



## BT's response to Ofcom's consultation document

### *Automatic Compensation*

*Protecting consumers from quality of service problems*

5 June 2017

**NON-CONFIDENTIAL VERSION**

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# 1 Executive Summary

1. Consumers increasingly rely heavily on communications services to support their daily lives. Whilst satisfaction with the quality of fixed and mobile services is generally high, we recognise that when things do go wrong, and service fails, this can result in inconvenience and frustration. The first priority should be to invest in minimising these occasions.
2. In principle BT agrees with Ofcom that in appropriate circumstances and subject to certain clearly defined assessment criteria, compensation should proactively be made available, with no difficult claims process, so that consumer harm is minimised and providers have a further incentive to improve quality of service.
3. Ofcom has assessed consumers' and SMEs' current experience in relation to quality of service and redress in the fixed voice, broadband and mobile markets. It has considered what, if any, intervention would be appropriate and proportionate.
4. BT agrees with Ofcom's conclusion that there is no justification for requiring automatic compensation to be paid for mobile loss of service. In Section 7 we discuss in detail the reasons why an automatic compensation scheme, whether voluntary or formal, is not appropriate for mobile services. However, we agree that for fixed line and broadband services, some further protection – in the form of improved compensation for consumers, and transparency requirements for SMEs<sup>1</sup> – is appropriate.
5. BT also agrees with Ofcom that the three proposed "triggers" for compensation with regard to consumer fixed landline and broadband services – delayed repairs where there is total loss of service, delayed provisions of service, and missed appointments – are the appropriate service issues to include in scope, as these are the issues likely to be important to consumers (although the degree of importance clearly varies between one consumer and another) and these things can generally be objectively defined and reliably measured.<sup>2</sup>
6. However, for reasons explored in detail later in this response, the voluntary industry Code of Practice proposed by BT, Sky and Virgin Media to address fixed line and broadband service issues would be a much more proportionate and less onerous means of achieving Ofcom's stated policy objectives than a prescriptive new General Condition.
7. The Code of Practice would contain a set of minimum standards with which participating CPs would comply. This would allow each individual CP the flexibility to offer its customers more generous amounts than the minimum and/or alternative forms of compensation, in order to differentiate itself from its competitors. Consumers would benefit from this competition and choice, including their preferred payment method.
8. The revisions to the draft Code of Practice, described in Section 5 of this response, close the gaps in the original draft which Ofcom identified in its consultation, so that the Code now addresses Ofcom's concerns.
9. Ofcom's approach to estimating the cost of consumer harm currently experienced, from which it derives the level of compensation payments it proposes to mandate, is not robust. Ofcom itself admits that its conclusions are uncertain. In practice, consumers' experiences and expectations vary widely, and the flexibility and choice offered by the Code of Practice would

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<sup>1</sup> However please note the issues raised in Section 6 of this response regarding SME definition

<sup>2</sup> However please note the issues raised in Section 2.1 of this response regarding total loss of service

be an appropriate way to reflect these variances, whilst still giving consumers added protection and incentivising providers to improve service.

10. Going straight to formal regulation in the form of a new General Condition would be premature and disproportionate at this stage. In line with the principle that Ofcom should operate with a bias against regulatory intervention, its obligation to consider self-regulation and with Ofcom's duty to regulate in a proportionate manner, we urge Ofcom to adopt the less intrusive Code of Practice approach first, with the option of moving to formal regulation later should the Code prove ineffective in meeting Ofcom's policy objectives.
11. We recognise that for the Code of Practice approach to work well and to help drive competition, consumers must be aware of providers' compensation policies and be able to weigh up compensation alongside other considerations such as price and quality of service when choosing their provider. We would be pleased to work with Ofcom and industry to consider how best to improve consumer awareness in this respect.

## 2 BT's comments on Ofcom's proposed compensation triggers

### 2.1 Delayed repair of loss of service

#### 2.1.1 Differences in consumer experience

12. BT agrees that in general the loss of a landline or broadband service can affect various day-to-day activities in a household, and that delays to restoration of service can in some cases have a harmful effect.
13. However we note that in Ofcom's research<sup>3</sup>, only 58% of households claimed the loss of their landline or broadband service had an impact on their household. For 42%, the loss of service had little or no impact.
14. Whilst we acknowledge that in some cases, consumer harm from loss of service can be significant, in other cases it is much less so. We have commented in more detail on the uncertainties surrounding Ofcom's assessment of consumer harm in Section 4 of this response. Given the wide range of consumer experience and expectations in this respect, Ofcom should not try to calculate "average harm" but should instead adopt the more flexible industry Code of Practice approach, which would enable consumers to choose their provider on the basis of how important a particular level of service, and in turn the level of compensation for delayed restoration of service, is to them.
15. We also note that in Ofcom's research, over a third of respondents who had experienced a loss of service had been able to find an alternative workaround<sup>4</sup>, such as a mobile phone or a dongle, and of these, only one in five had incurred direct financial costs as a result. We discuss in paragraphs 73-74 below how the ability to mitigate loss or harm should be taken into account when estimating consumer harm and considering the extent to which automatic compensation should be subject to a cap. With no consideration of these mitigation measures in Ofcom's analysis, it is likely that Ofcom has significantly overstated the level of consumer harm overall.
16. Nevertheless, we acknowledge that only a minority of consumers experiencing a loss of service currently receive compensation for that loss and, as stated in BT's response to Ofcom's Call for Inputs, we are supportive of the principle of automatic compensation in the event of delayed restoration of fixed landline or broadband services.

#### 2.1.2 Difficulties in defining "total loss of service"

17. We agree that compensation should be payable automatically when a consumer is unable to make or receive a call on their landline or only one-way speech is possible; or when they are unable to access the public internet on their broadband line. In the majority of cases, such situations can be objectively defined and reliably measured, i.e. it is clear that the service that should be delivered is unavailable.
18. As Ofcom notes, this is subject to the customer raising the loss of service incident with their provider and assisting in determining whether the loss of service is due to a fault on the network or due to an issue on the customer's side of the network termination point.
19. There will inevitably be occasions where consumers are unable or unwilling to provide such assistance. There will also be occasions where a consumer believes there to be a total loss

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<sup>3</sup> Jigsaw, *Automatic Compensation*, March 2017, slide 44, question F15

<sup>4</sup> Jigsaw, *Automatic Compensation*, March 2017, slide 39, question F7a

of service – for example, because the line is so noisy that they are unable to conduct a conversation, or where there are very frequent breaks in service – but which appear to the provider as an intermittent fault or which cannot be detected at the time when the customer reports it.

20. We believe there needs to be a clearer definition of total loss of broadband service than “unable to access the public internet”. For example, the broadband service may be running but packet loss may be so severe that in practice a consumer cannot get internet access. The definition must cover a comprehensive range of scenarios, and needs to be something that can be explained clearly to consumers as well as readily tested.
21. We suggest that further discussion is needed between Ofcom, industry (including wholesalers) and – in the case of those using its network – Openreach, so that a clear definition of “total loss of service”, and the way it is identified and logged, can be agreed
22. Ofcom proposes to exclude any scenarios where the loss of service is due to a fault or issue on the customer's side of the network termination point. If a customer's broadband hub or router develops a fault which causes the broadband service to fail, the equipment is likely to be repaired or replaced free of charge, but if this cannot be achieved by the end of the second working day, Ofcom has confirmed (in Nick Bereford's email of 16 May to Martin Davidson at Sky) that compensation would not automatically become payable, and that this scenario is not within scope of Ofcom's proposals, but should be dealt with under normal contractual provisions. However the router is likely to be considered by customers to be part-and-parcel of the broadband service, so it should be noted that there is likely to be some confusion on this point and clarity of information for customers will be very important.

### **2.1.3 Timing of payment**

23. The occasional uncertainties of remote diagnosis also mean that the amount of compensation to which a consumer may or may not be entitled following a delay to restoration of service cannot be confirmed and calculated until the fault has been fixed, and the engineering “clear code” has been issued by Openreach (in the case of providers using the Openreach network). In this sense, compensation for delayed restoration of service following a fault is different to compensation for a delayed provision or a missed appointment, where the service failure is a simple matter of fact. In the case of fault repair, there will be a huge dependency on the accuracy and reliability of clear codes. Ofcom needs to allow sufficient time for the Openreach process and systems development that will potentially be necessary.
24. There is an inconsistency in Ofcom's consultation with respect to timing of payment. Figure 6 on page 40 of the main consultation states “An initial payment of £10 should be made if the relevant service remains unrestored at this point [i.e. by midnight on the second working day after the provider becomes aware of the fault] and then a further £10 should be paid for each further full calendar day that the service remains unrestored.” However the draft General Condition (paragraph CX.12 at Annex 14) states “Each payment of compensation must be paid within thirty (30) calendar days after the date on which the loss of service is resolved...”
25. The requirement as stated in the draft General Condition is achievable; the requirement as stated in Figure 6 is not, given the need for the fault to be resolved and a clear code given before eligibility for compensation can be determined.

### **2.1.4 The point from which payment is automatic**

26. We agree with Ofcom that consumers will first need to register a loss of service with their provider, and for this to be the point from which the time to restore service is calculated, because providers cannot always identify accurately which individual lines have lost service, even when they are aware of a general network outage.

27. The consumer must have received an acknowledgement of the fault report from their provider, and a reference; it would not be enough for the consumer just to complain via social media, for example.
28. Ofcom proposes an exception, which is that if providers become aware, for example through network monitoring or a planned outage, that certain lines have lost service, time to repair should be measured from when the provider first became aware of the fault, rather than from when the consumer notifies their provider. We do not agree with this proposal, as it would be both very difficult to implement, and potentially disproportionate.
29. There could be cases where one customer notifies us of a fault and we become aware, once investigated, that others are also affected. It is not clear whether Ofcom's "exception" would apply in this case, so that time to repair is measured from this point even if we don't receive further customer notifications until later. This would create uncertainties – in the event of a dispute, it would be difficult for providers to prove whether they knew, or should have known, or not, and at what point they gained that knowledge.
30. Whether an outage is planned or unplanned, and reported by other customers or not, the principle must be maintained that compensation is only payable once the customer has reported a loss of service. It might be that a customer has not notified their provider of a fault because they are away from home, and therefore unaffected by a loss of service. It is unreasonable and disproportionate that because the provider is, nevertheless, "aware" of the service loss, the customer should automatically receive "backdated" compensation even though they have suffered no harm during the period before they notified their provider.
31. It should also be noted that no retrospective claims for compensation will be possible, after a fault has been fixed. Fault reports can only be logged and a line tested at the time the fault is "live" and, as explained above, the customer's notification must act as the point from which time to restore is calculated.

#### **2.1.5 Two services, two different CPs**

32. We agree with Ofcom that consumers should receive a single compensation payment, irrespective of whether either or both their landline and broadband services are lost at the same time and, if only one service is lost, irrespective of which service it is. This will be simpler and easier to communicate to consumers, and more proportionate in terms of cost implications for providers.
33. As noted by Ofcom (footnote 124), there will be instances where the fixed landline and broadband services are provided by two different CPs. According to Ofcom<sup>5</sup>, approximately 0.9m consumers buy their landline service and their broadband from different providers. Ofcom states that in such cases, "separate payments from each provider will be required".
34. We do not agree that this would be the case. Generally if the broadband service is not working, the broadband provider will ask the customer whether they have dial tone and can still make and receive calls. If the answer is no, the broadband provider is likely to refer the customer back to the landline provider to fix the fault (and seek redress where appropriate). This means that where the fault is on the landline, the landline provider will be liable for compensation, whereas if there is dial tone and it is only the broadband service that is faulty, the broadband provider will be liable for compensation. Therefore the position for these consumers would be the same as for those with a single provider, and only a single compensation payment would be received. This would be a fairer and more reasonable outcome than the consumer receiving double compensation payments compared to a consumer with a single provider, when the same harm has been suffered.

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<sup>5</sup> Ofcom, *Review of the market for standalone landline telephone services*, Annex 8 – February 2017



### **2.1.6 Repair times**

35. We agree with Ofcom's proposal that compensation should be payable if service is not fully restored by midnight on the second full working day after the provider has been made aware of the loss of service. This strikes a sensible balance between meeting consumers' expectations of what is reasonable (two to three calendar days), incentivising providers to improve on current repair times (current industry average time to repair is four calendar days), and not imposing excessive costs on industry. However please note our comments regarding a payment cap in Section 3.4 below.
36. If a consumer does not agree to the first available engineer appointment to enable the fault to be fixed, the days between that date and the date the consumer does agree to should not attract compensation.

## **2.2 Unscheduled delays in provisioning**

37. We agree with Ofcom that consumers should be able to expect their fixed landline or broadband service to be provided on the date agreed with their provider. However we also agree that the harm caused to consumers by a delayed provision will vary significantly from one consumer to the next, depending on the circumstances. In particular, the level of harm will vary according to whether or not the consumer still has service during the period of delay, and whether, if not, they are able to use an alternative service such as mobile voice or broadband instead. It is therefore difficult to establish what the "average" level of consumer harm is. We discuss this further in Section 4.
38. We agree that compensation should only be payable where the provider has failed to provide fixed line or broadband service by a date which the provider has previously committed to and which has been notified to the consumer in writing.
39. We agree that if a consumer chooses to move an installation date back, such as in a home move scenario, compensation would not be payable. Similarly it would not be payable if the delay was due to the consumer missing an engineer's appointment, or failing to arrange access to their property. And if an engineer's visit is required and the consumer does not agree to the first available provision appointment, any resulting delay to the provision should not attract compensation.
40. Please note our comments in Section 3.4 regarding a payment cap.

## **2.3 Missed Appointments**

41. We agree that consumers should reasonably expect agreed appointment dates to be kept by their provider, and that missed appointments can cause frustration and wasted time.
42. We also agree that a requirement to pay compensation when appointments are missed will incentivise providers to reduce the number of missed appointments and encourage providers to notify consumers of any unavoidable changes to appointment dates/times as early as possible.
43. We agree that 24 hours is an appropriate notice period to require if an appointment needs to be changed, and for compensation to be payable if less than 24 hours' notice is given. This should be subject to the exception proposed by Ofcom where, if the consumer gives their explicit consent to the engineer arriving later on the same day, compensation would not be required. Similarly, compensation would not be payable if the consumer is not at home when the engineer arrives, or fails to arrange access to the property.
44. As with the other service incidents discussed above, the harm caused to consumers will vary widely from one consumer to another, depending on individual circumstances, and

consumers' expectations will also vary. Ofcom's estimate of the average value of harm experienced is not particularly robust. Therefore, as discussed further in Section 4, it would be preferable for consumers to take into account the value that they personally place on compensation levels, and to be able to weigh up providers' differing policies when choosing a provider. This should be achieved through adoption of the voluntary industry Code of Practice, allowing providers to differentiate themselves whilst still achieving Ofcom's policy objectives of protecting consumers from harm and incentivising improved service performance.

## 3 Making automatic compensation simple and practical

### 3.1 Transparency

45. As Ofcom notes, there is already a requirement under the current General Condition 10.2(e) for providers to publish specific details of any compensation and/or refund policy offered. We agree with Ofcom that it is essential for consumers to be fully aware of their rights, and to be able to check these easily at any point.
46. As we have described elsewhere in this response, we believe that providers should be able to differentiate their services, including through the nature and type of compensation provided, and that consumers should be able to benefit from competition and choose their provider on the basis of their overall view of the provider's offering. Consumers should be able to weigh up compensation alongside other considerations such as price and quality of service.
47. The voluntary industry Code of Practice, with its set of minimum standards, would allow this competition and choice to develop, while promoting improvements in service generally; but in order for this to happen, there must be a sufficient degree of transparency. As Ofcom notes, many consumers are not currently aware of the availability of compensation and how to go about seeking it.
48. It would be in the interests of providers who are signatories to the Code of Practice to promote their policies more prominently, in order to compete more effectively on compensation and win customers. We intend to include commitments in the Code regarding prominence on providers' websites so that consumers can see and compare these policies more easily and compensation policy will become a differentiating factor at point of sale.
49. However we are keen to discuss with Ofcom other ways to improve consumers' visibility of providers' compensation policies, perhaps via Ofcom's approved Price Comparison Websites.
50. We envisage that Ofcom could include the Code of Practice, and a list of signatories, on its website (perhaps alongside its report on providers' quality of service), with guidance to consumers, to encourage them to take these things into account when weighing up their choice of provider.
51. We are also interested in exploring options for increasing transparency through other means, such as providing information through consumer organisations like Which? and CAB.
52. We agree with Ofcom's proposal that when a consumer contacts their provider to report a fault, the provider should inform the consumer that they may be entitled to compensation if the fault has not been fixed by a particular point in time, and the time frame and process by which any compensation would be payable.
53. We agree with Ofcom's proposal that, when agreeing a provision date with a consumer, providers should inform the consumer that if this date is not met, the consumer may have a right to compensation, and explain the timeframe and process by which any compensation would be payable.
54. We agree with Ofcom's proposal that when a consumer accepts an appointment offered by their provider, the provider should inform the consumer that they may be entitled to compensation if this appointment is missed (or if less than 24 hours' notice is given before rescheduling it), and explain the timeframe and process by which any compensation would be payable. It should also be made clear to the consumer that if they choose to rearrange the appointment directly with Openreach (as described in paragraph 42 above), compensation would not be payable.

## 3.2 Method of payment

55. Ofcom proposes that compensation should always be paid to consumers in the form of a bill credit, unless either: (i) the consumer will not, for some reason, receive any further bill from their provider; or (ii) the consumer expressly consents to the use of a different payment method. In Ofcom's view, a bill credit would be the most convenient and practical means of payment both for the provider and the consumer.
56. However, research by BT Consumer (completed by Basis in November 2015) shows that consumers believe compensation should be proportional to the time and nature of the issue and that a "one size fits all" approach was not favourable. Instead, participants demonstrated a preference for being able to choose from a range of remedies to suit their own preference. Overall, participants preferred to be compensated through free products and services that they valued. It was apparent in the focus groups that there was a strong feeling that bill credits were not meaningful or tangible, and therefore in comparison consumers preferred a cash (or equivalent) option that would have more immediacy.
57. [X]
58. In light of this, and the range of different consumer preferences, Ofcom should not mandate that a bill credit should be the default option. The voluntary industry Code of Practice would allow providers to differentiate and to pay compensation through alternative forms of monetary payment, such as pre-paid cards, as long as the value of the payment is equivalent to, or more than, the amount the consumer would be entitled to as a bill credit, and as long as the consumer can still choose a bill credit if they prefer.
59. Ofcom states that it does not wish to foreclose the option of non-monetary compensation should this be preferred by consumers, some of whom may have a preference for receiving discounts, upgrades or time-limited free offers. We agree with Ofcom that providers should be allowed to satisfy their obligation to pay compensation by providing such non-monetary benefits, so long as the consumer has given his or her consent to receiving this alternative non-monetary benefit, having been told the amount of monetary compensation due to them. This allows consumers a choice as to what is of most value to them. The revised draft Code of Practice allows similar flexibility and consumer choice.

## 3.3 Timing of payment

60. Ofcom proposes that providers should pay compensation to consumers within 30 calendar days after a scheduled appointment has been missed and, where loss of service has occurred or a provisioning date missed, within 30 calendar days of the fault being resolved or the service being provided..
61. We agree that this is a reasonable timescale and balances the need for timely redress for consumers with the need to ensure that no undue costs are imposed on providers. The same timescale is proposed in the voluntary industry Code of Practice, in instances where compensation takes the form of a bill credit. Where a customer has opted for quarterly billing, the credit would still be applied to their account within 30 days, but this would not be visible to the customer until the next bill is due.
62. As noted above, if the voluntary industry Code of Practice were to be adopted, it is likely that a number of providers would choose to differentiate and offer other forms of compensation, in which case the consumer would be likely to benefit earlier than 30 days after resolution.
63. We have previously raised with Ofcom that there might be occasions where a consumer decides not to take up service following a delayed provision, or decides to leave their provider before a fault has been fixed. Further discussion is needed as to whether and how compensation would be payable on such occasions, given that payment does not become

due until 30 days after the fault has been fixed or service provided. The consumer no longer suffers harm as a result of the service failure once they have cancelled their order or switched their provider, so it would not be reasonable for liability for compensation to continue beyond this point, potentially indefinitely.

### 3.4 Payment cap

64. Ofcom has considered the points for and against allowing a cap on the obligation to provide automatic compensation, and on balance has provisionally concluded that this would not be appropriate, because it would leave some consumers suffering long term service problems without redress after the cap is applied, and remove the incentive for providers to provide or restore service quickly.
65. However, Ofcom also makes the point that a payment cap *would* be appropriate if a balance could be struck between, on the one hand, ensuring that consumer harm is redressed and providers have incentives for timely repair and service provision, whilst, on the other hand, avoiding a potentially unlimited liability on providers.
66. Exposing providers to unlimited liability is out of line with the normal provisions of contract law and goes beyond normal levels of consumer protection, under which consumers would generally only be entitled to the value of the product or service that failed. It would therefore be a disproportionate step for Ofcom to take, given the alternative options available that would achieve a better balance between the interests of consumers and providers.
67. Delays to fault repairs and provisions that have continued for a long period of time are almost invariably due to matters outside of a retail provider's control, such as the need for wayleaves or major roadworks. In such cases the purpose of compensation payments in providing an incentive to the provider to complete the work more quickly becomes irrelevant.
68. Turning to the need to ensure consumer harm continues to be redressed, we would point to the fact that whilst, with the application of a cap, the consumer would cease to be entitled to *automatic* compensation of a set amount, they would still be entitled to claim ongoing redress under the normal provisions of consumer protection legislation (the Consumer Rights Act 2015) and under providers' standard complaints handling processes (including through reference to ADR if necessary).
69. In practice, consumers in this situation would likely be individually case-managed by their provider and given appropriate levels of redress or goodwill payments in accordance with the individual circumstances. This is a more balanced and personalised approach that still ensures consumer harm is mitigated and/or redressed.
70. The purpose of automatic compensation should be to provide redress and/or to drive resolution of smaller, less complicated issues, rather than longer term problems requiring a more complex or difficult solution.
71. We propose that a cap should be set at 60 calendar days, after which consumers would no longer be entitled to *automatic* compensation, but would be offered a right to exit their contract without penalty. (It is acknowledged that, for consumers in areas served only by Openreach-based providers, switching to another provider is unlikely to solve the underlying service issue.)
72. Consumers should be given 30 calendar days' notice of the ending of automatic compensation and of their right to exit, to give them the opportunity to look for an alternative service.
73. The revised industry Code of Practice described in Section 5, to be discussed with Ofcom, now includes details of this cap, which is proposed as a minimum, giving providers the flexibility to offer a longer period of time before a cap is applied.

74. In many cases, consumers will also be able to mitigate any harm by using mobile voice and/or data services. We note, for example, that in Ofcom's research, over a third of respondents who had experienced a loss of service had been able to find an alternative workaround<sup>6</sup>, such as a mobile phone or a dongle, and of these, only one in five had incurred direct financial costs as a result. Ofcom should take this evidence into account when considering the appropriate balance between redressing consumer harm and imposing excessive and disproportionate costs on providers through enforcing unlimited liability to pay automatic compensation.
75. In practice, a number of providers (including BT) are likely to offer free services to mitigate consumer harm. BT Consumer offers free mobiles to vulnerable customers, and call diversion is available for all customers experiencing a loss of service. BT Wifi enables free access to all BT Broadband customers. BT Consumer also allows customers to claim for actual financial loss (AFL) during time without service, so that additional costs incurred, such as incremental calls or mobile data, can be claimed back (with suitable evidence).
76. In summary, allowing CPs to set a cap on automatic compensation would not contravene Ofcom's policy objectives, in that, as explained above, a cap would not prevent consumers from receiving adequate redress, and it would not have any material effect on providers' incentive to improve service delivery.
77. As noted above, Ofcom must strike a balance between protecting consumers and not imposing unduly onerous constraints on providers. Given that Ofcom proposes not to allow providers to declare force majeure (see section 3.6 below), allowing a reasonable cap would partially restore that balance, whereas prohibiting any form of cap would be disproportionate.

### **3.5 Exceptions to automatic compensation**

78. We agree with Ofcom that compensation should not be paid to a consumer if the loss of service, delayed provision or missed appointment is caused by the consumer's acts or omissions, such as damage to home wiring by the consumer or a missed appointment because the consumer is not at home.
79. We agree that, where a consumer refuses an appointment to provide or repair a service, compensation should not be payable for the days between the date offered by the provider and the date accepted by the consumer.
80. We agree with the additional exceptions proposed by Ofcom, i.e.:
  - a) Compensation should not be payable if the provider reasonably believes that a consumer's report of a loss of service is frivolous or vexatious
  - b) Compensation should not be payable if the incident (such as loss of service) is triggered as a result of a civil emergency, such as a terrorist attack, an epidemic, or land contamination. We suggest that further discussion is needed between Ofcom and industry about the definition of "civil emergency", and whether this should go wider than just where the government has made emergency regulations under the Civil Contingencies Act 2004. For example, we understand that no such regulations were made during last year's floods in Cumbria, but consumers were forced to leave their homes. In BT's view this would constitute the kind of extreme circumstances where it would not be appropriate to expect providers to be liable for automatic compensation for quality of service problems. A possible definition of "civil emergency" could encompass situations where the consumer's premises (to which the relevant services are delivered)

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<sup>6</sup> Jigsaw, *Automatic Compensation*, March 2017, slide 39, question F7a

can no longer be occupied. A prolonged loss of the electricity supply might also be included.

- c) Compensation should not be payable if, to avoid paying it, the provider could reasonably expect that it would be breaking the law (such as providing service over private land where it does not have a wayleave)
- d) The consumer has committed an offence under sections 125 or 126 of the Communications Act. We suggest this should also include section 127 – improper use of a Public Electronic Communications Network..

- 81. We also suggest that the third exception should be extended to include where the provider has good reason to believe the consumer has breached the provider's terms and conditions, has committed fraud or has committed a criminal offence.
- 82. The revised draft industry Code of Practice described in Section 5 will contain the same exceptions as those proposed by Ofcom, taking into account the additional points made above.

### **3.6 Force majeure**

- 83. We agree that where quality of service problems arise as a result of a "force majeure"-type event, such as severe weather, natural disasters or criminal damage, consumers may still experience harm and have a right to expect service to be provided or restored within a reasonable time period, just as they do for problems brought about by other causes, other than in extreme circumstances. (Please note our comments in paragraph 79 above regarding an exception for civil emergencies.) Therefore we agree with Ofcom's provisional assessment that in general an exception for force majeure-type events should not be included in retail providers' automatic compensation schemes for fixed residential consumers.
- 84. Whilst it is true that network resilience and security are important aspects of network quality, retail providers are largely reliant on their wholesale network providers in relation to the extent of their investment in these things and the speed at which they are therefore able to restore service or complete installation following a force majeure-type incident.
- 85. However it is standard practice to include force majeure provisions in commercial contracts, and it is reasonable that Openreach should not be liable to retail providers for matters beyond its reasonable control (MBORC). Moreover, the speed at which Openreach recovers from such incidents is in itself subject to a test of reasonableness and Openreach must demonstrate that it is doing everything it can to minimise the harm as quickly as possible – otherwise the MBORC declaration, or the continuation of it, can be challenged, and SLGs can become payable.
- 86. Therefore in terms of Ofcom's second policy objective, the MBORC rules applying to Openreach already incentivise improvements in network and service quality and resilience.
- 87. We note that Ofcom is not proposing to remove the ability for Openreach to declare MBORC. This is the right decision for consumers as a whole, because otherwise it is likely that Openreach would increase its charges to retail providers (where these charges are not charge-controlled), to take account of the extra costs involved. This could have an unfair impact on those retail providers (and their customers) that buy non-charge-controlled products from Openreach.
- 88. The fairest outcome is for retail providers to bear the extra costs of paying compensation to consumers suffering loss of service or delayed provision in force-majeure-type circumstances, so that there is no difference in treatment between consumers depending on the cause of the problem. To the extent that this extra cost for force majeure incidents creates an increase in

pass-through to retail prices, it is fairer that this is borne by all customers of those retail providers, thus diluting and minimising the impact per customer.

89. The industry Code of Practice described in Section 5 includes a statement that providers signing up to the Code do not avoid payment of automatic compensation where the issue is caused by an event outside of the provider's control.

### **3.7 Complaints and disputes**

90. We agree that, where consumers are unhappy with their providers' decision that they are not entitled to compensation, this should be dealt with via normal complaint handling processes, including referral to ADR where resolution cannot be reached.
91. The industry Code of Practice includes a statement that complaints about compensation will be handled via normal complaint handling processes and ADR.
92. In BT's response to Ofcom's General Conditions consultation<sup>7</sup>, we welcomed Ofcom's proposals in relation to the new General Condition C5, and we agree that these new provisions should apply equally to complaints relating to compensation.

### **3.8 Retailers and wholesalers**

93. We agree that it is appropriate for requirements for automatic compensation to apply to retail providers, given that the retail provider is contractually responsible for delivering services to its customers and holds the necessary customer information to do so.
94. We agree that in principle, the cost of addressing consumer harm resulting from service failures should lie with the entity responsible for the failure. However this might not always be straightforward, particularly where there are a number of parties in the supply chain, including resellers as well as wholesalers.
95. It is important that the set of rules that Ofcom introduces maintains parity and fairness for consumers regardless of the length of the supply chain and whether or not the retail provider contracting with the consumer has complete control over the end-to-end supply chain.
96. The distinction between the responsibilities of wholesale and retail providers needs to be determined on a case-by-case basis, and consumers should never get "caught in the middle" where there is any doubt about where responsibility lies. Therefore it is right that retail providers should be responsible for compensating their customers for harm suffered, and the retail providers' ability to claim back from wholesalers is kept separate and subject to commercial negotiation.
97. In relation to the principle, stated by Ofcom, that the party responsible for a problem should bear the cost, we agree that any changes to Openreach SLAs or SLGs necessary to achieve this principle should be the subject of industry negotiations, facilitated by the OTA2, in the normal way.
98. As established in previous regulatory decisions, the calculation of fair and reasonable SLGs should be based on a pre-estimate of an average provider's loss. This is likely to require a review of current SLGs, with a bottom-up build of the direct costs incurred by retail providers, including not only compensation costs but also delayed revenue, additional customer service costs and lost customers. The extent to which current SLGs already take account of retail

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<sup>7</sup> [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0016/101473/BT.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0016/101473/BT.pdf)



providers' compensation costs, some of which will be substituted by the new automatic compensation scheme, will also need to be considered.

### **3.9 Timescales for implementation**

99. Ofcom proposes an implementation period of 12 months between the date of its final statement and the introduction of automatic compensation. Other than noting that “providers will need time to implement the changes....and that a 12 month period should allow providers sufficient time to do this”, Ofcom does not give any rationale for this timescale.
100. [X]
101. For PlusNet and EE Home, we estimate that at least 18 months to 2 years is likely to be needed, in view of the complexity of systems changes likely to be required and the need to take account of systems development release cycles.
102. For Business and Public Sector we estimate at least 12 months is likely to be needed to implement the transparency obligations.

### **3.10 Monitoring automatic compensation**

103. We agree with Ofcom that it will be important to monitor the impact that automatic compensation has on the industry and on consumers. The template table proposed by Ofcom in Figure 15 appears reasonable. In our description of updates to the proposed industry Code of Practice at Annex 2, we note that we are willing to include provision of relevant information to Ofcom to assist with monitoring of the impact the initiative has had.

## 4 Ofcom's assessment of consumer harm

### 4.1 Summary of Ofcom's proposals

104. Ofcom considers that intervention is required because current levels of compensation provided for loss of service, delayed provision and missed appointments are not commensurate with the level of consumer harm caused, and this, in turn, provides limited incentives to suppliers to improve service performance.
105. Ofcom believes that the market may be failing to reflect this harm because of asymmetry of information on quality of service between providers and consumers, and also because consumers may have a 'present bias', which means that they do not properly take account of quality of service in making purchasing and switching decisions, focusing instead on more immediate issues such as price.
106. On this basis Ofcom proposes to mandate automatic compensation at a level which it believes reflects the level of consumer harm caused. Ofcom considers three sources of survey-based evidence: willingness to pay ("WTP") for service repairs and provision, reasonable compensation for loss of service and missed appointments, and a component-based estimation of consumer harm. Ofcom places less weight on the WTP survey evidence as it believes this is likely to understate harm, because the survey included individuals that had not experienced a loss of service.

### 4.2 Limited evidence for proposed level of intervention

107. To justify an intervention Ofcom must first demonstrate that there is a market failure which is resulting in consumer harm. They must then seek to remedy this through the least intrusive means, operate with a bias against regulatory intervention and consider whether self-regulation (i.e. the Code of Practice) would be effective.
108. Ofcom considers that the current levels of compensation do not reflect the level of harm caused by loss of service, delayed provision and missed appointments, and this is symptomatic of market failure.
109. However Ofcom's own evidence points to the fact that consumers do not value quick service provision and repairs to the extent that Ofcom claims.
110. This is reflected in how providers compete, with Ofcom showing that prices and, to a lesser extent, speed feature more prominently in advertising material. It is also supported by the WTP survey conducted by Ofcom, which found that consumers were willing to pay similar amounts to what they currently receive when they claim compensation.<sup>8</sup>
111. Ofcom explains the Jigsaw survey results by asserting that customers are likely to be unduly influenced by a 'present bias', whereby consumers focus on the immediate benefits of a choice and pay insufficient attention to longer term costs. In Ofcom's view this results in consumers not giving sufficient weight to service in making their purchasing decision.
112. Firstly, this is merely an assertion from Ofcom and it does not provide substantive evidence that consumers in the Jigsaw WTP survey were susceptible to this bias. The fact that when consumers make purchasing decisions they appear to place relatively more importance on factors such as price or speeds does not mean that they take insufficient account of the potential for loss of service.

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<sup>8</sup> Ofcom, the Consultation, Figure A4.3, A4.4 and A4.7.

113. Secondly, Ofcom points to other survey evidence which leads it to believe that present bias may be distorting consumer purchasing decisions, but there is also evidence which does not support this view and which is arguably more robust. Ofcom states that two fifths of those experiencing a loss of service claim it had a negative impact on their day-to-day activities, and 30% claimed it caused anxiety or stress. But in contrast, the report also found that on average consumers felt they could manage without landline telephony service for around 45 days, and without data services for around six days. The former result was based on a very small sample size of less than 250 respondents, whereas the latter evidence was based on a survey of close to 2000 respondents, and so is likely to be more representative of UK consumers and more robust overall.
114. Furthermore the latter result might be explained by the fact that in the event of a loss of service most consumers now have access to voice and data services through mobile connections, a factor which Ofcom appears to ignore when interpreting the WTP results.
115. The evidence is at best mixed, and insufficient to conclude that the survey on consumers' purchasing choices is materially influenced by present bias. The evidence Ofcom points to might be an indicator of bias in consumers' stated drivers of purchasing decisions, but there is equally evidence to suggest that consumers do take proper account of potential loss of service but simply value it less than other factors.
116. If there is a concern that bias of this type can distort, or affect the interpretation of, survey findings, Ofcom should design appropriate behavioural experiments in order to investigate, and control for, these issues explicitly rather than simply asserting their existence and using this to downplay results which are less helpful in supporting the need for a specific, intrusive level of intervention.

### **4.3 Conflict with existing forms of intervention**

117. Ofcom attempts to justify the need for intervention on the basis that incentives to improve quality of service may be weakened by a lack of switching and also due to asymmetry of information on quality of service between providers and consumers. However Ofcom is already intervening to address these issues through other means.
118. Ofcom is publishing more information on quality of service and expects, over time, for the report to create incentives for providers to differentiate<sup>9</sup>. Ofcom has also reformed the process for switching services provided over the Openreach network and is consulting on reforms to triple play switching<sup>10</sup>. Both measures are expected to assist in stimulating greater competition in relation to service performance and better outcomes for consumers.
119. Ofcom's prescriptive proposals in relation to auto compensation have not been justified as proportionate relative to this improving baseline and represent an unnecessarily intrusive approach. The proposals are also unlikely to work with the grain of the measures designed to stimulate competition, as there is a risk that consumers will pay less attention to service performance if they think that they are protected by Ofcom's automatic compensation scheme whichever supplier they choose.

### **4.4 Proportionality – alternative remedies**

120. Even if Ofcom were to substantiate that there are "weak signals" from consumers concerning quality of service (reducing financial incentives for providers to improve service performance),

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<sup>9</sup> Ofcom report: Comparing Service Quality, April 2017 - [https://www.ofcom.org.uk/phones-telecoms-and-internet/advice-for-consumers/quality-of-service/report?utm\\_source=update&utm\\_medium=email&utm\\_campaign=servicequality](https://www.ofcom.org.uk/phones-telecoms-and-internet/advice-for-consumers/quality-of-service/report?utm_source=update&utm_medium=email&utm_campaign=servicequality)

<sup>10</sup> Ofcom consultation: Making switching easier and more reliable for consumers, July 2016 - <https://www.ofcom.org.uk/consultations-and-statements/category-1/making-switching-easier>

and even if it were to demonstrate the precise nature of any behavioural biases, Ofcom could first seek to resolve this by empowering consumers to send stronger signals. For example it could promote greater ability to access, assess and act on information about service performance in order for consumers to be able to discipline poor performers more effectively.

121. Ofcom has not discussed in the consultation how competition might be promoted through behavioural remedies designed to promote greater engagement by consumers in relation to service levels.
122. BT does not dispute that certain behavioural biases may create barriers to understanding and comparing products; but the appropriate response to such issues is not to over-ride the choice mechanism but to consider different ways of engaging consumers in order to identify how these biases might best be overcome. For example, Ofcom should investigate whether quality of service can be presented in a way that would elicit more attention (particularly by price comparison services).
123. This, together with an industry Code of Practice, would be a more pro-competitive and proportionate approach than Ofcom's compensation proposals. The proposals amount to a blunt price control which controls market outcomes based on a regulatory judgment about what is best for consumers, rather than allowing improved signals from consumers to drive better market outcomes based on what they actually want. Ofcom has not considered lower minimum compensation levels which would distort competition to a lesser degree and would be more proportionate as a counterfactual.
124. Ofcom's argument for not relying on transparency measures is circular: improved transparency of what is available from CPs is not expected to improve consumers' ability to assess or act with regard to quality of service (because CPs' policies for compensation are opaque and non-specific). However if consumer engagement was improved, this would drive changes in current policies and practices and would drive suppliers to try and differentiate themselves. In other words, with stronger consumer signals, suppliers would compete more actively by improving their policies and the transparency of their offers.
125. As stated in Section 3.1 relating to transparency, the revised Code of Practice will include commitments to promote compensation policies more prominently on providers' websites, so that consumers can easily compare them.
126. A combination of minimum levels of protection through the industry Code of Practice, with room for competition above these levels (driven by greater transparency) would be a more proportionate remedy and more consistent with Ofcom's legal duties.

## **4.5 The asymmetric risk of setting compensation levels too high**

127. There is an asymmetric risk associated with setting levels of automatic compensation too high. If Ofcom errs by setting the level of compensation above the actual level of harm that might be observed in a competitive market, this could have potentially serious and irreversible consequences for the efficient use of services and ongoing investment.
128. In contrast if Ofcom sets the minimum compensation below the competitive level, or the industry Code of Practice approach is adopted and this fails to stimulate the market to raise levels of compensation, then there may be some consumer welfare loss but this could be addressed by ratcheting up the minimum level of compensation based on observed outcomes (rather than inevitably uncertain survey evidence), whilst minimising the risk of distorting competition and dampening incentives to invest.
129. The asymmetric risk associated with setting compensation levels too high is even more acute given fast-changing technology and consumer preferences, which are likely to cause the potential consumer harm to fluctuate (since the value consumers place on different services and the availability of substitutes will change over time). This strengthens the case for

adopting the more flexible Code of Practice approach and allowing competition and consumer preferences to determine the appropriate compensation level, rather than pre-judging this by imposing a level of compensation determined by regulation. The role of regulation would be more appropriately directed towards investigating how any behavioural barriers to a market-led solution could be removed.

## 4.6 Ofcom's estimates of consumer harm

### 4.6.1 Ofcom's survey evidence points in different directions and the weight given to certain results over others is not justified

130. Ofcom's WTP survey indicates that consumers are willing to pay around £4 to £5 for faster repairs, and £1 to £2 for faster provisions. This is less than half of Ofcom's proposed daily compensation for loss of service and late provision, at £10 and £6 respectively.
131. BT conducted some quantitative research recently<sup>11</sup> which asked consumers how much extra they would be prepared to pay for a fast repair guarantee ("We guarantee we'll get an engineer to your home the next day if you have a fault. If we're not able to do this then you can get a month's free broadband"). This was only valued at approximately £5 (total amount, rather than per day).
132. Ofcom places significantly less weight on the WTP survey estimates on the basis of an assumption that customers who have not suffered a loss of service are likely to understate their willingness to pay for service improvements. Ofcom has not demonstrated that there is any such bias in the survey, nor has it established whether it materially affects the results. Ofcom suggests that the higher estimates of harm from its direct and component-based estimation highlight the bias, but these measures themselves suffer from several issues which mean they are likely to overstate the true value attributed by customers to the relevant aspects of service.
133. Ofcom places significant weight on a separate stated preference survey which asks consumers that *have* experienced a loss of service what they would expect in compensation. However the survey methodology suffers from a number of problems which bring into question the validity of the results. More detail is given in Annex 1, but some key points are as follows:
  - a) *Priming* - consumers may be primed to start their mental journey from a particular perspective by the way in which questions are asked. Using the word "compensation", for example, may prime a consumer to think that they have experienced harm when in fact they may not due to mitigations that were available to them.
  - b) *Focalism* - by asking the question, there is a presumption that the issue being raised was a consideration for the individual when it may not have been (again due to mitigation opportunities). But people will generally provide a response because they can bring an answer to mind even though it bears no resemblance to what they actually thought when the incident occurred.
  - c) *Timing* – consumers are asked to recall events that happened up to 2 years ago (or up to 5 years ago for those who had moved house). These recollections could well be inaccurate, and yet there is a direct link to the harm calculated.

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<sup>11</sup>Basis – *G.Fast proposition conjoint analysis*, May-July 2016

- d) Bringing these points together, responses will be shaped by what is asked, how it is asked, what is easy to recall, and how consumers prefer to see themselves, and their decision making capabilities, all of which can result in estimates which are distorted

134. The wide variation in Ofcom's estimates (see table below) highlights two things:

- a) Estimating consumer harm is inherently difficult, and so there is a significant and inevitable margin for error. Any attempt to identify the precise level of compensation that is consistent with a well-functioning market must reflect this uncertainty and adopt a cautious and conservative approach. Put simply any intervention should leave the maximum scope for any issues to be resolved through competition rather than through inevitably imperfect regulation.
- b) There is a wide variation in valuations amongst consumers, with some consumers prepared to have a lower level of service but pay less, and others willing to pay more for higher levels of service. By Ofcom mandating compensation for loss of service for example at a level well in excess of even the mean WTP value (50% higher than the mean), never mind the lower end of the distribution, Ofcom reduces the scope for providers to differentiate their services and compete, which may lead to consumer harm by undermining important dynamic benefits from competition.

#### **4.6.2 Ofcom relies heavily on cross-sector benchmarks, but fails properly to take account of the inherent differences between the services and conditions within those sectors which limit their value as benchmarks.**

135. The water sector is not subject to competition for household customers and so Ofwat sets levels of automatic compensation at levels which it believes mimic the competitive level (second-best pricing). In contrast, there is competition in the provision of fixed line and broadband retail services and so instead of risking a distortion of competition by using second-best pricing, Ofcom should be looking to promote competition by removing any barriers to consumers making informed choices, including on the basis of service and compensation parameters.

136. Water, electricity and gas companies provide services to meet basic human needs (e.g. hygiene, heating etc.). In contrast, while fixed line and broadband are now widely considered to be extremely important services, they are not as much of a necessity. Ofcom claims to take account of this by adjusting these benchmarks by the relative price of the services provided, but this still fails to take any account of the potentially significant difference in consumer surplus for the services.

137. In 2015, BT had a study conducted<sup>12</sup> which showed that consumers do not put electricity and water on a par with broadband. In response to the question "If you had to be without one of the following for a day, which would you choose to be without?" only 1% chose electricity and 2% chose water, whereas 9% chose the internet. Similarly, in response to the question "Which of these do you think you couldn't live without?" 42% said electricity but only 19% said the internet (water was excluded).

138. In contrast to the benchmark services, for most consumers where there is a loss of fixed telecommunication services there are readily available substitutes (e.g. mobile calls and broadband) which significantly reduce or even remove harm from loss of service. Whilst Ofcom acknowledges that substitutes to fixed services may reduce the harm, they do not take proper account of this in their cross-sector benchmarking.

139. As Ofcom notes in the consultation, fixed voice and broadband services are entirely dependent on a consumer having an electricity supply and so any compensation for loss of

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<sup>12</sup> Basis - *BT Superior Broadband Segmentation Analysis*, May-June 2015

electricity supply should implicitly reflect the resulting harm from a loss of fixed voice and broadband services, as well as several other highly valuable and essential utilities such as heating and household appliances. We would therefore expect the harm and resulting compensation from a loss of electricity supply to be significantly greater than for a loss of fixed voice and broadband services.

#### **4.6.3 International benchmarks are unreasonably dismissed by Ofcom**

140. International telecommunication benchmarks are dismissed because they are based on mandating refunds of amounts paid rather than estimating harm. It is possible that this approach is preferred in these countries, however, because of the subjectivity involved in estimating consumer harm, and the risks of over-regulating if the values are over-estimated.

#### **4.6.4 Ofcom component valuation fails properly to take account of mitigation measures available to consumers**

141. In its component analysis Ofcom fails properly to take account of the mitigation measures available to consumers in the event of a loss of service. For instance, consumers can access alternative fixed voice and broadband services at their work-place, in public places such as libraries, at school or college, etc. In BT's case, this includes access to BT Wi-Fi at no extra charge.
142. Nearly 90% of fixed voice and broadband households have mobile connections (e.g. mobile handsets, dedicated mobile broadband) which allow them to continue to access voice and data services. In most cases consumers are able to do so for minimal or no additional cost.<sup>13</sup> For example, over 60% of EE's post-pay mobile subscribers have unlimited voice calls included in their mobile subscription package and only 4% to 7% of its total bundled subscriber base exceed their call allowance.<sup>14</sup> Furthermore, Ofcom's research shows that year on year mobile subscribers continue to get larger voice call and data allowances for less.<sup>15</sup>
143. A trend towards quad play services may provide further security for consumers from loss of service, with some providers already offering free or discounted mobile SIMs with call and data allowances as part of a fixed call and broadband package.<sup>16</sup> As a result we would almost certainly expect that for most consumers the potential harm from a loss of fixed call and broadband services would largely be offset at least in the short-term by the ability to access these services using a mobile connection, at a small or even no additional cost. Ofcom's component analysis fails to appropriately take this into account and is therefore likely to significantly overstate the harm to consumers overall.
144. Instead Ofcom takes the view, in its component based analysis, that consumers would face a significant cost in procuring an alternative means of accessing voice call and data services. Ofcom's estimate of the likely cost makes up over 75% of the total harm estimated from its component analysis, and leads to an estimate which is nearly four times that of its alternative component based estimate (which is instead based on the value of time spent to restore service). Despite the significant materiality of this estimate Ofcom provides no details of how it has been derived, which means that stakeholders are not able to comment on the merits of the approach or the quality of the data that has been used.

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<sup>13</sup> In the case of data services, consumers can continue accessing these services on the same devices that they use fixed broadband, by tethering on mobile devices.

<sup>14</sup> Based on information submitted by BT/EE in response to Ofcom's MCT S135 Notice of 16 February 2017.

<sup>15</sup> Ofcom, Pricing trends for communications services in the UK, March 2017.

<sup>16</sup> For example, Talk Talk's Essential SIM is free for with any broadband plan and offers 200 UK Minutes, Unlimited Texts, and 500MB of Data

145. On the face of it, Ofcom's mean estimate of £15.43 per day appears to be an overestimate of the additional cost of an alternative service. As noted above, most consumers already have access to voice and data services through mobile connections, which in most cases include unlimited voice calls and large data allowances, and so the incremental cost and therefore harm to the consumer at least in the short term is likely to be small or even nil. In any case, for those post-pay mobile customers without large data allowances the average cost to a household of purchasing additional data is likely to be closer to £8 a day.<sup>17</sup> Whilst the cost to pre-pay mobile subscribers is potentially closer to Ofcom's estimate these customers make up less than half of UK households and the costs have been falling, as Ofcom's own research shows.<sup>18</sup>
146. As mentioned above, BT Consumer in any case allows consumers to claim for actual financial loss incurred as a result of a service failure, including costs such as incremental call charges or mobile data charges.
147. Moreover, Ofcom's estimates of the direct financial cost vary dramatically with a range of £3.67 to £22.31 per day, within a 95% confidence interval. This suggests that Ofcom's estimates are highly sensitive to the assumptions adopted and draws into question their robustness. This strengthens the need for Ofcom to adopt the more flexible approach offered by the industry Code of Practice, particularly given the asymmetric risk associated with setting automatic compensation too high.

	<b>Loss of service (£/day)</b>	<b>Missed appointment (£/missed appointment)</b>
<b>Current compensation</b>	1	3
<b>(only those that received comp)</b>	(4)	(24)
<b>Willingness to pay</b>	3-5	n/a
<b>Component based</b>	5-28	24-39
<b>Direct estimation</b>	6-15	47-57
<b>Water</b>	11	20
<b>Electricity/gas</b>	22-56	30
<b>International</b>	3-19	n/a
<b>Ofcom estimate</b>	10	30

<sup>17</sup> Average usage of a fixed broadband subscriber is 4GB per day (see Ofcom's 2016 Infrastructure report). Average price of a 10GB add on is £20. This gives an average cost of data of £8 per day.

<sup>18</sup> Ofcom's 2016 Communications report shows that only around 35% of mobile subscriptions were pre-pay in 2015, and this will have dropped since. Ofcom's March 2017 "Pricing trends for communications services in the UK" report shows that Pre-pay 'add-on' packs have contributed to a decline in overall pre-pay prices.



## 5 Benefits of a voluntary industry Code of Practice

### 5.1 The Code as a more proportionate measure

148. As referenced in Ofcom's consultation, BT, Sky and Virgin Media have jointly proposed a voluntary industry Code of Practice as an alternative to Ofcom's proposed General Condition. We are strongly of the view that this would be a more effective and proportionate way to achieve Ofcom's stated policy objectives.
149. Going straight to formal regulation in the form of a new General Condition, with prescriptive rules on compensation values and terms based on uncertain evidence, would be premature and disproportionate at this stage.
150. It would lead to all consumers receiving the same level of compensation (with likely pass-through to increased retail prices), regardless of their individual preferences and priorities, and prevent providers from competing with each other in relation to their compensation policies.
151. The Code of Practice would contain a set of minimum standards with which participating providers would comply. This would allow each individual provider the flexibility to offer its customers more generous amounts and/or alternative forms of compensation, in order to differentiate itself from its competitors. Consumers would benefit from this competition and choice.
152. *Earlier consumer benefits:* In terms of technical systems development and implementation, there is little difference between Ofcom's proposed formal regulation and the Code of Practice. However, Ofcom is likely to be able to publish its final statement more quickly if it chose to go with the Code of Practice approach, because there would be less need to defend its assessment of consumer harm thoroughly and provide further justification for the compensation values it has arrived at. This means that providers could start development work sooner, leading to earlier consumer benefits, if the Code of Practice approach were to be adopted.
153. *Simplicity and transparency:* In drafting the detailed Code, we have sought to keep the principles and associated compensation arrangements straightforward and clear so that they are easily understood by consumers;
154. *A workable solution:* As industry representatives, we are in the best position to arrive at a solution which is practical to administer and straightforward to implement, whilst still achieving Ofcom's consumer-focused goals;
155. *Widespread take-up:* compliance with the Code would be promotable by signatories as a selling point. We anticipate this driving take-up by the rest of industry without the need for Ofcom enforcement action.

### 5.2 Proposed improvements to the Code

156. Since publication of Ofcom's consultation, industry discussions have continued regarding how to close the gaps Ofcom identified between its own proposal and the minimum standards in the draft Code of Practice.
157. Ofcom highlighted three "notable shortcomings" in the draft Code of Practice published in Annex 13 of its consultation. These were:
- a) *Proposed compensation levels* - whilst noting that the amounts stated in the draft Code were *minimum* levels, Ofcom did not feel confident that market conditions would foster

competition between providers with respect to compensation levels and therefore felt that the amounts proposed were too low to redress consumer harm.

In addition the draft Code only proposed to pay compensation to consumers for the number of *working days*, rather than calendar days, that they were without service.

- b) *Number of consumers covered* – at the time the consultation was published, Ofcom noted that only BT, Sky and Virgin Media had committed to the Code, which would mean that whilst c80% of broadband and landline consumers would receive redress, around one in five consumers would not be covered.

Ofcom noted our view that, where consumers place a high value on quality of service and compensation, they would switch to those providers offering schemes that attracted them; and that this, in turn, would create an incentive for other providers to sign up to the Code or to offer their own schemes. However Ofcom is concerned that such competitive pressures would not materialise, due to certain market features including lack of consumer awareness.

- c) *Timing of compensation for delayed repair* – under the original draft Code, consumers would only have the right to compensation for delayed repair after midnight on the third working day, as against after midnight on the second working day as per Ofcom's proposed General Condition.

158. In the light of these concerns, we now propose the following changes to the Code of Practice:

- a) *Proposed compensation levels* – we now propose the minimum levels in the Code should increase. Please see Annex 2 for details. We also propose that consumers should be paid per calendar day, rather than per working day, that they are without service.
- b) *Number of consumers covered* – we now have agreement from PlusNet and Zen Internet that they will commit to the Code of Practice, and EE are actively considering committing to the CoP of practice and in principle agree that a CoP approach is more appropriate than regulation. TalkTalk and Vodafone have been in continuing discussions with us, although they have not yet decided whether to commit to the Code. We anticipate that if the voluntary Code were to be implemented, awareness amongst consumers of the benefits of automatic compensation would quickly grow, and competition between providers would encourage more providers to adopt the Code over time.

In addition, we propose to address some of the market features that give rise to concern, such as information asymmetries, by committing to improving transparency of information on quality of service and compensation policies on our websites and by having further discussions with Ofcom, industry and other stakeholders such as consumer groups, regarding how best to draw consumers' attention to these issues so that they give them full consideration.

Ofcom has described information asymmetries that are likely to exist currently (at paragraphs 4.16 to 4.18 of the consultation), but do not appear to have taken account of how this is likely to change in the near future. For example, Ofcom's own initiatives such as the publication of its annual quality of service report, to be developed to enable easier comparisons to be made between providers' quality of service and policies, will help reduce or remove this asymmetry. And BT has recently launched its own initiative

to proactively publish quality of service information on its website,<sup>19</sup> so that customers can see how we are performing and which aspects we are working on to improve.

- c) *Timing of compensation for delayed repair* – we now propose to change the Code so that consumers would have the right to compensation for delayed repair after midnight on the second working day, in line with Ofcom's proposed General Condition.

159. Further details of our proposed enhancements to the draft Code of Practice are included at Annex 2.

### 5.3 [X]

160. [X]

161. [X]

162. [X]

163. [X]

164. [X]

165. [X]

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<sup>19</sup> <https://www.bt.com/help/home/customer-service-performance/>

## 6 Small and medium sized enterprises

166. Generally we agree that it is important for there to be sufficient transparency regarding providers' service quality and compensation policies to enable SMEs to make an informed decision when selecting a provider, and to seek redress for harm when they experience delayed repair, provisioning delays or missed appointments.
167. It is more appropriate to compensate micro businesses as residential customers where they purchase consumer products and this obligation should not be extended to SMEs and larger business customers, or customers who purchase business products.
168. These larger business customers are much more aware of their responsibilities to their businesses to take appropriate mitigation actions against loss of service from any of their suppliers. They are more likely to assess the potential risks from different impacts on their business and take actions to control those risks. They may choose alternative products or solutions to increase the resilience of any identified critical service and will better understand the cost-benefit equation. They may buy with variations of standard terms and conditions or even negotiate non-standard terms with BT on SLAs and compensation. We would assert that there is no evidence of harm to this group of customers that requires Ofcom intervention.
169. In terms of transparency we note the general obligation under General Condition 10.2 to provide information on compensation. We are surprised that Ofcom has extended its proposed new obligations on transparency to SME customers (up to 249 employees) rather than restricting these to micro business customers (10 or less employees). We do not agree with this extension. Ofcom's own research has shown that approximately 95% of the SME market relates to micro business customers. Therefore the obligation to provide such information for the whole SME market is disproportionate because it would imply an extension of its scope both in terms of services (the current obligation only applies to PATS) and in terms of customer definition. Ofcom will achieve transparency of SLAs and subsequent protection of micro business by limiting the obligation to micro business customers.
170. If the new transparency obligations were to be extended to cover customers with up to 249 employees, it is not clear whether this would capture the UK sites of multinational customers with headquarters overseas. It would be particularly disproportionate if that were the case, as this type of customer needs no extra protection. We believe that when Ofcom define the application of the 249 employees' criterion they will need to clarify the extent to which it applies to multinational customers headquartered overseas who have employees based in the UK.
171. Moreover the definition of SME proposed would not be consistent with the definition of SME used throughout the General Conditions and would consequently make its application particularly complex in practice.
172. We do not agree that it is appropriate to advise customers whether products and service can be negotiated. Most micro business customers buy standard products with standard terms and conditions and are served by telephone advisors or online processes at prices that reflect these standard arrangements. By definition standard products are supplied on the basis of being standard and not bespoke. Where business customers have specific needs, BT will wish to discuss those needs individually with the customer to understand them and any possible solutions. This is normal business practice and would lead to any negotiation about terms and conditions.
173. Finally we believe the definition of relevant products to which the proposed obligations should apply is not appropriate. In fact those definitions are different from those used in the General Conditions creating a huge confusion and uncertainty around the scope of the obligations.

Moreover they are not technologically neutral; they do refer to different types of technologies most of which are really out of date as well. For example, the definition of voice service not only doesn't refer to the well-known category of POTS services, which would be clear and technologically neutral, but refers to very legacy services/technologies and therefore the distinction would not even be between PSTN and IP but rather between services that allow transmission of facsimile and data up to a speed of 64 kbit/s and those that don't. We don't believe there are good reasons for adopting new and different definitions from those already in place under the General Conditions.

## 7 Compensation in the context of mobile services

### 7.1 Introduction

174. BT's lines of business which sell mobile services, including EE, wholeheartedly support the principle that consumers should receive a good quality of service from their provider and agree it is important that consumers have appropriate rights of redress when things go wrong.
175. We completely agree with Ofcom that intervention is not warranted in respect of mobile services, and we consider that an automatic compensation scheme, whether voluntary or formal, will never be appropriate for issues around quality of mobile services. Below we set out our reasons, under the following headings:
- a) Mobile quality of service issues;
  - b) Existing legal framework and EE's network terms and conditions;
  - c) Levels of compensation; and
  - d) Impact of compensation regime on competition.

### 7.2 Mobile quality of service issues

176. As Ofcom indicates in its consultation, quality of service issues for mobile services differ from fixed ones, and are mainly around mobile coverage and reliability of service. Mobile providers do not guarantee coverage everywhere in the country, but instead provide customers with detailed coverage information, based on a coverage checker, at point of sale. This allows customers to check before they buy whether they are likely to have coverage in the places that matter to them.
177. Our coverage checker is a prediction based on models, and in particular indoor coverage depends on a number of factors, the specifics of which cannot be included in a prediction model. If customers take out a contract, and their indoor coverage turns out to be much lower than predicted, customers can cancel their service without paying a penalty, whether they take out their contract online, through telesales, or in retail shops.
178. Quality of service-related issues can be caused by multiple factors, including the consumer's location, type and reliability of handset, content provider issues, and density of other usage nearby. Such issues are often intermittent, and therefore hard to identify and measure objectively. An automatic compensation scheme for these will therefore not be appropriate.
179. Mobile networks are made up of sites that cover a geographical area. Most sites provide overlapping coverage, which means that an outage of a single site may not impact service for individual customers, or only to a certain extent. In addition, identification of affected consumers is not easy. Depending on the site, customers may still be able to get service from another site. Customers living in the vicinity of a site with an outage may be impacted if they are in the area at the time. If they are not, for instance because they work in a different area or they are away, they may not be impacted at all, or only partially. Automatically compensating customers in the vicinity, based on postcode, risks being inaccurate. The imposition of a fixed compensation fee could therefore have the unintended effect of undercompensating some individuals and over compensating others.
180. Accordingly, it is not appropriate that compensation in respect of mobile services should automatically be payable. Further, we do not think that the proposal to offer consumers fixed levels of compensation (whether under a mandatory or voluntary code) will be proportionate

given the harm suffered by a consumer of mobile services may vary depending on the customer's age, usage patterns, handset and access to alternative / substitutable services,

181. Instead, BT (including EE) supports an approach to mobile consumer redress that is tailored to the harm actually suffered by the individual and with compensation calculated by reference to the complexity of the underlying problem affecting an individual customer's service and the particular circumstances of the customer.

### 7.3 Legal considerations

182. The Consumer Rights Act 2015 was introduced to strengthen consumers' rights. Accordingly, there is now a very clear obligation on traders to perform services with reasonable skill and care. If they don't, a consumer is entitled to a refund of up to 100% of the cost of the services supplied. The legal framework provides UK businesses and consumers with a minimum set of standards but does not and cannot define "reasonable". What is deemed to be "reasonable" will always be a matter of interpretation.

183. For the reasons set out below, an imposed definition of "reasonable" in the mobile sector will be particularly subjective and potentially harmful for consumers and the industry:

- Some faults affecting mobile service can be resolved within minutes rather than days. The imposition of a two day SLA, as Ofcom proposed for fixed services, may result in the de-prioritisation of mobile service faults that today would be dealt with immediately because it is currently considered unreasonable for there to be any delay undertaking remedial work.
- Mobile networks use a range of technologies. These may be located underground (requiring permission from third parties to excavate on public lands), on private property and/or in areas that are difficult to access. Whilst we will always seek to rectify network faults as soon as possible, we will not always be able to do so within two calendar days – under the terms of the agreement with the landowner, an engineer may need prior permission to access property or to undertake particular types of remedial work, or we may be faced with demands for ransom payments for access. Therefore, meeting a two-day timeframe in all cases, if even possible, will likely result in increased operating costs that may ultimately hinder future network investment and/or increase the cost of mobile services for consumers.

184. Ofcom's proposed exemptions in relation to fixed automatic compensation exclude (most) force majeure events on the basis that to do so would result in a material number of consumers without adequate redress for harm. However, given Ofcom's view of the differences between fixed and mobile, including in respect of the extent of the payment of compensation, any future mobile review should examine force majeure afresh. In particular, any such review should balance whether there were any reasonable steps that could have been taken by the mobile network to avoid or mitigate the event or its consequences. Further, given force majeure clauses are capable of challenge under the Consumer Rights Act 2015, the exclusion of their application in a mobile context would appear unwarranted, especially given, for example, EE's current contractual approach.

185. The requirements from the Consumer Rights Act are reflected in EE's network terms<sup>20</sup> and conditions which go further to make clear to customers the scenarios in which they will receive a refund from EE.

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<sup>20</sup> <http://ee.co.uk/help/accounts-billing-and-topping-up/terms-and-conditions/ee-terms-and-conditions/pay-monthly-terms/ee-pay-monthly-network-terms>

186. For ease an extract of the relevant terms have been provided below.

*“We would pro-rate your Monthly Charges or other recurring Charges by up to 100% during a reported period of Network disruption where:*

*4.5.1 the disruption reported impacts the parts of the Network and the Services You most frequently use; and*

*4.5.2 the disruption is considered to be severe based on Your previous usage history and Our reasonable assessment of the impact of that disruption on You, using appropriate diagnostics tools; and*

*4.5.3 an alternative mode of accessing the disrupted Services is unavailable to You.”*

187. This sets out very clearly when a refund will be available to a customer and is underpinned by policies for our advisors. However, EE will also provide additional credits and compensation where warranted. By necessity, this additional compensation has to be discretionary and personalised so as to take account of the individual's circumstances.

188. Calling in and requesting compensation is easy. Customers can call our customer service number, explain the issue to advisors who are well aware of our terms and conditions, and underlying policies in this area.

189. To help provide customers with information about network outages, we provide access to our so called Network Status Checker<sup>21</sup> that allows customers to check the status of our network in five different locations, and to get alerts for these as well. The checker also provides them with information around resolution times, to manage their expectations, and includes the option to report an issue, which will then be assessed by our engineers. It also facilitates calling in with an issue, and explaining where the issue was, by referring to the checker.

## **7.4 Levels of compensation**

190. In its consultation, Ofcom includes an estimate of the extent to which consumers lose service as a result of mobile network outages, based on complex analysis and crude assumptions. The range of customers experiencing outages for certain time periods is therefore wide.

191. EE offers its customers several solutions to mitigate network issues or poor indoor coverage. We introduced WiFi calling, where customers, with a WiFi calling enabled handset, can use a fixed WiFi connection to make calls. Should there be a mobile site outage, WiFi calling would still allow customers to use their phones, and make calls and would mitigate the effect on such an outage. 4G calling allows customers to make calls over our 4G network; again, where there are issues with the 2G or 3G network, customers can continue to make calls and use mobile broadband services. Investment in these solutions is important and they are clear competitive differentiators.

192. These solutions should be taken into account when assessing loss of service and it is not clear from Ofcom's analysis how these have been accounted for. It also reiterates the importance that compensation should not be automatic for mobile services, but that individual circumstances, including the type of handset, should be included in the analysis.

193. Ofcom also assessed the number of times compensation has been paid, and the average compensation per incident, which is £12. The harm of a loss of fixed service is estimated at

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<sup>21</sup> <https://myaccount.ee.co.uk/networkchecker/checkservice>



£10, and Ofcom uses the same amount for mobile. Ofcom then concludes that mobile operators pay more than the harm suffered because of loss of service.

194. As per our comments above, it is very hard to identify how many customers are impacted by an outage and whether Ofcom's assessment is correct. In terms of the level of compensation paid per incident, we are not surprised that the amount is higher than Ofcom's estimate of the harm suffered. Where customers call in and are unhappy with our service, the level of competition in the market is such that our focus cannot be solely on undoing the harm, but on trying to turn a negative experience into a positive one. This can be done in monetary terms, but also by providing other benefits, such as additional data allowances, or access to content services.

## **7.5 Impact of compensation regime on competition**

195. The UK mobile market is highly competitive. According to Ofcom's pricing research, prices continue to decrease, and international benchmarking shows that UK prices are low compared to other countries, in particular for mobile services.
196. Against this backdrop of competition, the mobile market is subject to increasing regulation, from Ofcom, government and the EU. This means the number of aspects mobile providers can compete on continues to decrease. Formal regulation around compensation would remove yet another angle. An example of competition on compensation is Orange, one of EE's brands, which used to offer its customers a network promise, whereby customers automatically got compensated for dropped calls (the call following a dropped call would be free). It would be unlikely such initiatives would be launched if formal regulation were to be put in place in the mobile market.
197. We are concerned that formal regulation around compensation could incentivise mobile customers to stay with their current provider and take some compensation payments on a regular basis, rather than express their dissatisfaction and switch to another mobile network. This is at odds with Ofcom's ongoing work on mobile switching and Ofcom's quality of service publications. On the one hand, Ofcom is trying to inform customers about aspects of telecoms services other than price, and put in place easy switching process, yet, at the same time they consider putting in place rules which may have the unintended consequence of, for example, increasing inertia in the market.

## **7.6 Conclusion**

198. Mobile services and networks are significantly different from fixed services and networks. The characteristics of mobile networks do not lend themselves to easily and automatically identifying impacted customers. Customers' usage, handsets, location and access to alternative services are relevant and complicating factors in determining if and to what extent a customer has been impacted, and therefore the level of compensation due.
199. The current legal framework provides consumers with redress when things go wrong. Additionally, for example, EE's terms and conditions, and the way that these are applied in practice, reflect and extend the relevant statutory and regulatory provisions. Ofcom's analysis shows that mobile providers pay more than the harm suffered by mobile consumers in the case of outages. This demonstrates that mobile providers, in a highly competitive market, are incentivised to ensure that if their customers have a negative experience, it is in their interests not just to compensate for the harm, but to go beyond that.
200. We therefore support Ofcom's conclusion that compensation for mobile services should not be automatic. An automatic scheme for mobile would not be proportionate, would further

reduce the ability of mobile providers to compete on different aspects and could ultimately result in a negative impact on competition.

## 8 Answers to Ofcom's questions

201. This section provides BT's responses to the questions raised in the Ofcom consultation.

### 8.1 Scope and framework for assessment

Question 1: Do you agree with our framework for assessment?

202. Ofcom's framework for assessment is to look at the current consumer experience in terms of quality of experience and redress; to consider whether there are features of the market that lead to less favourable outcomes or consumers; and then to consider what, if any, intervention would be an appropriate and proportionate means of achieving Ofcom's policy objectives.

203. We agree that this is a sensible framework against which to assess the case for intervention.

### 8.2 The case for automatic compensation in residential landline and broadband services

Question 2: Do you agree that in landline and broadband markets consumers are insufficiently protected from poor quality of service and that intervention is required?

204. Whilst it is likely to be true that many consumers experiencing quality of service issues do not seek or receive compensation, it is not necessarily true that those who claim compensation do not receive an amount commensurate with the degree of harm they have experienced.

205. The compensation to which BT's residential customers are entitled under BT's terms and conditions is based on a pro rata of the monthly package price. However in practice many customers will also receive an additional payment on a "goodwill" basis, which takes into account the specific circumstances of each individual case.

206. However we accept that this might not be the case where other providers are concerned, and therefore that there is justification for some form of intervention from Ofcom to ensure that residential consumers as a whole are sufficiently protected.

Question 3: Do you agree that it is appropriate for automatic compensation to be introduced for landline and broadband consumers?

207. With regard to the three options considered by Ofcom – maintaining the status quo, enhanced requirements for transparency, and the introduction of automatic compensation for landline and broadband consumers – we agree that the third option is most likely to achieve Ofcom's policy objectives.

208. We agree that an automatic compensation scheme would remove ambiguity over consumers' entitlement to compensation; it would make it simple for consumers to receive redress at adequate levels; and it would incentivise providers to improve service quality.

209. However we urge Ofcom not to move immediately to formal regulation when the voluntary industry Code of Practice is likely to achieve the same objectives in a more proportionate manner and with more consumer benefit.

### 8.3 Delayed repair of loss of service

Question 4: Do you agree with our proposal to provide automatic compensation when a loss of service takes more than two full working days to be restored?

210. In general we agree with Ofcom's proposal in relation to loss of service. However please see our comments in Section 2.1 above.

## 8.4 Unscheduled delays in provisioning

Question 5: Do you agree with our proposal to provide automatic compensation when there are delays in provisioning a landline or fixed broadband service?

211. In general we agree with Ofcom's proposal in relation to delays to provision of landline or fixed broadband service. However please see our comments in Section 2.2 above.

## 8.5 Missed appointments

Question 6: Do you agree with our proposal to provide automatic compensation when missed appointments take place with less than 24 hours of prior notice?

212. In general we agree with Ofcom's proposal in relation to missed appointments. However please see our comments in Section 2.3 above.

## 8.6 Making automatic compensation simple for consumers and practical to implement

Question 7: Do you agree with our proposals on transparency?

213. We agree that consumers should be provided with information about their potential entitlement to compensation at the time they report a fault, place an order for service or book an appointment.

214. We believe that in order for consumers to benefit from the competition and choice provided by the voluntary industry Code of Practice, there should be further commitments made by providers to promote their compensation policies prominently on their websites, and the Code of Practice will contain such commitments.

215. Please see our further comments in Section 3.1 above.

Question 8: Do you agree with our proposals on the method and timing of payment?

216. On method of payment, given the range of different consumer preferences, Ofcom should not mandate that a bill credit should necessarily be the default option. The voluntary industry Code of Practice would allow providers to differentiate and to pay compensation through alternative forms of monetary payment, such as pre-paid cards, as long as the value of the payment is equivalent to, or more than, the amount the consumer would be entitled to as a bill credit, and as long as the consumer can still choose a bill credit if they prefer.

217. On timing of payment, we agree that 30 calendar days is a reasonable timescale and balances the need for timely redress for consumers with the need to ensure that no undue costs are imposed on providers. The same timescale is proposed in the voluntary industry Code of Practice, in instances where compensation takes the form of a bill credit.

218. If the voluntary industry Code of Practice were to be adopted, it is likely that a number of providers would choose to differentiate and offer other forms of compensation, in which case the consumer would be likely to benefit earlier than 30 days after resolution.

219. Please see our further comments in Sections 3.2 and 3.3 above.

Question 9: Do you agree with our proposal not to have a payment cap (and our assessment of the reasons for and against it)? - If you consider there should be a payment cap, what should it be and why?

220. We do not agree with Ofcom that there should be no payment cap. We propose that a cap should be set at 60 days, after which consumers would no longer be entitled to automatic compensation, but would be offered a right to exit their contract without penalty.

221. By this point, other forms of redress, tailored to the consumer's individual circumstances are more likely to be appropriate. And of course, general consumer protection rights would continue to apply, along with consumers' specific rights to refer a complaint to arbitration.

222. Please see our comments in Section 3.4 above. In summary, allowing CPs to set a cap would not contravene Ofcom's policy objectives, in that a cap would not prevent consumers from receiving adequate redress, and it would not have any material effect on providers' incentive to improve service delivery.

223. A cap of this kind would achieve the right balance between protecting consumers and not exposing providers to unacceptable levels of commercial exposure.

Question 10: Do you agree with our proposed exceptions?

224. We agree with Ofcom's proposed exceptions, and have proposed some further exceptions in Section 3.5 above.

225. . As noted in Section 3.5, we suggest that further discussion is needed between Ofcom and industry about the definition of "civil emergency", as this should go wider than just where the government has made emergency regulations under the Civil Contingencies Act 2004. For example, we understand that no such regulations were made during last year's floods in Cumbria, but consumers were forced to leave their homes. In BT's view this would constitute the kind of extreme circumstances where it would not be appropriate to expect providers to be liable for automatic compensation for quality of service problems, because it is clear the customer could not use their fixed line or broadband for other reasons. .

Question 11: Do you agree we should not allow for a blanket exception for force majeure-type events?

226. We agree that there should be no blanket exemption for force majeure-type events at a retail level, as consumers will still experience harm and have a right to expect service to be provided or restored within a reasonable time period, just as they do for problems brought about by other causes. However please note our comments regarding civil emergencies in Section 3.5 and paragraph 216.

227. Please see our comments in Section 3.6 above.

Question 12: Do you agree with our proposal on complaints and disputes?

228. We agree that, where consumers are unhappy with their providers' decision that they are not entitled to compensation, this should be dealt with via normal complaint handling processes, including referral to ADR where resolution cannot be reached.

229. Please see our comments in Section 3.7 above.

## 8.7 Impacts of a regulatory approach for residential landline and broadband services

Question 13: Do you agree with the impacts we describe? Please wherever possible give your reasoning and provide evidence for your views.

230. We have not carried out any detailed analysis of Ofcom's impact assessment at this stage.
231. We have no reason to doubt Ofcom's calculations of the increase in average level of compensation per qualifying incident, the increase in the number of annual compensation payments for fixed residential services, or the increase in annual aggregate compensation paid, since these are based on data collected through S135 information requests to providers. We would note, however, that these are based on historical service incidents, the volume of which are likely to continue to reduce over time.
232. We have not analysed Cartesian's assessment of potential industry implementation costs, nor Ofcom's calculations of the relative magnitude of the benefits of fewer quality of service incidents as compared to those implementation costs. But we note that, given the number of assumptions, estimates and judgements that have to be made, the results will necessarily be uncertain.
233. We disagree with Ofcom that the General Condition proposals would have a positive impact on competition. A set of rigid rules, with set levels of payment, would lead to a reduction in competition and differentiation, compared to the industry Code of Practice proposal which (along with appropriate transparency measures) would encourage providers to compete on the basis of their quality of service and their compensation policies.
234. We agree that there is likely to be some pass-through to retail prices as a result of the increased costs incurred by providers, but, again, there are lots of uncertainties here and we have not carried out a detailed analysis.

## 8.8 Provisional conclusions on residential landline and broadband services

Question 14: Do you agree with our provisional conclusions on residential landline and broadband services?

235. We have discussed in detail in Sections 4 and 5 above why we consider that the industry Code of Practice would be a more effective and proportionate way to achieve Ofcom's stated policy objectives than the formal and prescriptive regulation proposed by Ofcom.
236. We have also explained in Section 5 how we propose to adapt the current draft Code of Practice to close the gaps identified by Ofcom in Section 10 of the consultation.

Question 15: Do you agree with our proposal of 12 months to implement automatic compensation?

237. We believe that, due to systems development and release schedules, an implementation period of 18 months to 2 years is more realistic. Please see paragraphs 98 and 99 above.

Question 16: Do you agree with our proposal to monitor the impact of automatic compensation?

238. Yes, we agree that Ofcom's proposed method for monitoring of the impact of automatic compensation is reasonable.

## 8.9 Small and medium sized enterprises

Question 17: Do you agree with our proposals for greater transparency regarding service quality and compensation for products targeted at SMEs?

239. Generally we agree that it is important to ensure transparency of service levels and compensation policies for SMEs.
240. It is more appropriate to compensate micro businesses as residential customers where they purchase consumer products and that this obligation should not be extended to SME and larger business customers. We would assert that there is no evidence of harm to this group of customers that requires Ofcom intervention.
241. In terms of transparency we note the general obligation under General Condition 10.2 to provide information on compensation. We are surprised that Ofcom has extended the new obligations on transparency to SME customers (up to 249 employees) rather than restricting these to micro business customers (10 or less employees) and aligning with the definition used in Ofcom's General Conditions to avoid confusion and complexity. We do not agree with this extension.
242. Please see our further comments in Section 6 above.

## 8.10 Delayed repair of mobile loss of service

Question 18: Do you agree with our provisional conclusions not to introduce automatic compensation for delayed repair of mobile loss of service?

243. Mobile services and networks are very different from fixed services and networks. The characteristics of mobile networks do not lend themselves to easily and automatically identifying impacted customers. Customers' usage, handsets, location and access to alternative services are relevant in determining if and to what extent a customer has been impacted.
244. The current legal framework provides consumers with redress when things go wrong. Ofcom's analysis shows that mobile providers pay more than the harm suffered by mobile consumers in the case of outages. This demonstrates that mobile providers, in a highly competitive market, are incentivised to ensure that if their customers have a negative experience, it is in their interests not just to compensate for the harm, but to go beyond that.
245. We therefore support Ofcom's conclusion that compensation for mobile services should not be automatic. An automatic scheme for mobile would not be proportionate, would further reduce the ability of mobile providers to compete on different aspects and could ultimately result in a negative impact on competition.

## 8.11 Legal powers and consultation on legal instrument

Question 19: Do you have any comments on the draft condition set out in Annex 14 to this document?

246. Notwithstanding our position that the voluntary industry Code of Practice is a better way forward, we have the following comments on Ofcom's draft General Condition:

### **CX.10 – CX.12 – Compensation for delayed repair following loss of service**

We have noted at paragraphs 20 and 21 above that there needs to be a clearer definition of "total loss of service" agreed between industry and Ofcom. This would need to be reflected in the General Condition.

We have explained at Section 2.1.5 above what should happen when the customer buys their landline and broadband services from two different providers. The General Condition would need to be unambiguous on this point and state that such customers would not be entitled to a double payment.

#### **CX.10 – Timing of Loss of Service Trigger Day**

We have explained at Section 2.1.4 above that in all cases, the loss of service trigger day must be based on the date on which the customer notified us of the problem. The GC must reflect this.

#### **CX.13 – Exceptions to obligation to pay Compensation**

We have noted at paragraph 79 the need to review the definition of “civil emergency” to ensure that it covers the appropriate circumstances in which the obligation to pay automatic compensation should be excluded. The General Condition would need to reflect this definition.



## Annex 1 – Challenges to Ofcom's survey evidence

1. **Challenge:** Inadequate quota controls set – no quotas set on broadband / line provider or on fibre / copper splits

**Implication:** the survey is potentially not representative of the broadband / line market meaning that, for example, the estimated number of days needed to resolve an issue in the past isn't representative of the entire market (it might be skewed by one provider more than is the reality) meaning the derived harm isn't accurately calculated.

**What we'd do differently:** Set quotas on core aspects of the broadband / line market, and not just on demographics

2. **Challenge:** Framing of questions – some of the questions in the study are asked in a leading way. For example, D1 asks the following:

“Thinking again about your [service], how much does your household rely on this service? Firstly, your [service], would you say that...(read out options)...and for how many days do you think your household would be able to cope without [service]?”

**Implication:** this could have led to more negative responses to the first half of the question by asking it at the same time as getting people to think about the number of days that they could be without it (it immediately makes the question seem much more negative). Words such as 'cope' are loaded with negativity.

**What we'd do differently:** Evaluate the question text throughout used to ensure it is neutral and doesn't introduce any bias into the question

3. **Challenge:** The accuracy of responses when asking about something that happened up to 2 (or 5) years ago. For instance, respondents who have suffered a loss of service in the past two years are asked how long they were without service; asking them to recall the difference between 1 or 2 days, or 2 or 3 days etc. of something that happened up to 2 years ago is very challenging. Equally those who moved house up to 5 years ago are asked to recall if the length of time it took for their service to be activated was in line with what they were told – this then has a direct impact on how harm from delayed provisioning is calculated (66% - derived from slide 169 in the Automatic Compensation Jigsaw slide deck, and used in calculation on page A22 in Annex 4)

**Implication:** the 'event' / past experience data could be inaccurate due to being incorrectly remembered (and the survey doesn't capture anywhere when the actual 'event' / loss of service took place). These have a direct link to the harm calculated (meaning that the harm calculated is potentially incorrect / invalid)

**What we'd do differently:** Capture when the loss of service / delayed provisioning took place and only allow respondents to tell us about an event that we think they have more chance of accurately remembering (something in the last 3 months feels like a more reliable cut-off point).

4. **Challenge:** There are significant outliers left in the data (e.g. F7- claimed direct financial costs of over £300 caused by a loss of service, H1k – claimed level of compensation required = over £500).

**Implication:** these outliers have a direct impact on cost calculations as they skew the average (making it higher than it would be in reality)

**What we'd do differently:** Apply appropriate cut-off points (e.g. £100 feels more reasonable here)

We note that Ofcom themselves reference this issue in Annex 4 – paragraph A4.3.

5. **Challenge:** The way willingness to pay is calculated is leading / inaccurate (e.g. WTP1 – 4 / WTP5 – 10 etc.)

**Implication:** there are several elements to this, but they all ladder up to mean that the willingness to pay calculation is inaccurate:

- a. The prices are asked in directional order (either all up, or all down) meaning the respondents answer to each price point is framed by the previous lower / higher one
- b. The respondents are only given a binary option – yes / no, rather than a scaled response (forcing those who might not feel strongly about this to make a judgement call one way or the other which could be unrealistic)
- c. The question text frames the answer codes by introducing an 'acceptable' time of e.g. 2 days (thus biasing the responses gathered as the respondent already 'knows' what it deemed acceptable)

**What we'd do differently:** we'd use a Gabor Granger style technique where the price points are introduced to respondents in a semi-randomised way (randomised but not allowing for illogical movements – so the script wouldn't ask a respondent if they'd pay more for something if they already say no at the lowest amount). We'd use a scaled response (rather than binary) allowing respondents more flexibility in their answers. And we'd remove the framing reference of number of days it would normally take from the question text.

6. **Challenge:** Framed interpretation of the data

**Implication:** There are different ways in which the data could be interpreted that would lead to a different stance to Ofcom's – e.g. the vast majority of those who didn't receive compensation didn't ask for it (88% - slide 48), and amongst those, although the top answer is 'didn't expect to get it' (31%), 1 in 5 simply thought that it wasn't the provider's fault (18%). This is left out of the story / calculations

**What we'd do differently:** Ensure unbiased interpretation is represented in the Ofcom report

## Annex 2 – Proposed changes to voluntary industry Code of Practice

### Automatic Compensation – Voluntary Industry Code of Practice

Factor	Ofcom's proposal	Current draft VICOP	Proposed improvement to VICOP
<b>Number of consumers covered</b>	All consumers of landline and broadband services for residential services	BT/Sky/VM	BT/Sky/VM plus Zen Internet, EE, Plusnet in principle
<b>Compensation for delayed repair of loss of service</b>	<b>£10 per calendar day</b> if the customer experiences a total loss of landline and/or broadband service and their service is not fully restored by midnight on the <b>second working day</b> after the provider becomes aware of the loss	<b>£3 per working day</b> for loss of service beyond <b>three working days</b> after a customer reports a total loss of service and a fault recorded on that line	<b>£7 per <u>calendar</u> day</b> for loss of service beyond <b>two</b> working days
<b>Compensation for delayed provisioning</b>	<b>£6 per calendar day</b> where there is a delay in the commencement of a landline and/or broadband service beyond the date that the provider has committed to in a written form	<b>£3 per day for each working day</b> beyond the date of intended activation	<b>£4 per <u>calendar</u> day.</b> <i>Assumed that only payable automatically if customer subsequently activates.</i>
<b>Compensation for missed appointments</b>	<b>£30</b> to be paid by the provider where an appointment is missed (and notice of at least 24 hours has not been given or the consumer expressed consent to changed appointment time)	<b>£20</b> for a missed appointment slot (if 24 hours' notice of change is not provided)	<b>£20</b> for a missed appointment slot (and notice of at least 24 hours has not been given <b>or the <u>consumer expressed consent to changed appointment time</u></b> )
<b>How compensation will be paid</b>	<ul style="list-style-type: none"> <li>• Compensation to be paid automatically when appointment is missed and there is a</li> </ul>	<ul style="list-style-type: none"> <li>• Compensation to be paid automatically when appointment is missed and there is a</li> </ul>	<i>See consultation response</i>

	<p>delay in provisioning</p> <ul style="list-style-type: none"> <li>• Compensation to be paid automatically for delayed repair after customer contacts provider to notify it of the loss of service and a fault is recorded</li> </ul>	<p>delay in provisioning.</p> <ul style="list-style-type: none"> <li>• Compensation to be paid automatically for delayed repair after customer contacts provider to notify it and a fault is recorded</li> </ul>	
<p><b>Cap on payments</b></p>	<p>No cap proposed</p>	<p>Providers have ability to impose a cap, although this must be above a minimum level. Precise minimum level is not specified. This cap does not limit customers' other rights of redress (to exit their contract or claim additional compensation).</p>	<p><b>As a minimum, CPs to offer:</b></p> <p><b>Automatic compensation for loss of service and delayed provision limited to 30 days beyond a notice given to the customer that automatic compensation payments will cease.</b></p> <p><b>CPs' notice must not be served before the date 30 days after the 'trigger day' for compensation payments.</b></p> <p><b>Notice must :</b></p> <ul style="list-style-type: none"> <li><b>(i) set out the date on which compensation will cease;</b></li> <li><b>(ii) set out that no early termination/default charges will be charged in the event of cancellation if a customer cancels during the 30 day period from receipt of the notice (even if service is restored during this period);</b></li> <li><b>(iii) set out that the customer can still raise the issue through the complaints process and seek additional compensation via that</b></li> </ul>

			<p>route, including reference to ADR.</p> <p>This remains without prejudice to any other right a customer has to cancel.</p>
<b>Form of payment</b>	Bill credit (unless otherwise agreed by the customer)	Bill credit (unless otherwise agreed by the customer).	<b>No change as the same</b>
<b>Timing of payment</b>	<ul style="list-style-type: none"> <li>• Within 30 days of missed appointment</li> <li>• Within 30 days of loss of service or delayed provision is resolved</li> </ul>	In a timely manner and no later than the next bill after the issue is resolved	<p><b>Change to align with proposed GCs</b></p> <ul style="list-style-type: none"> <li>• Within 30 days of missed appointment</li> <li>• Within 30 days of loss of service or delayed provision is resolved</li> </ul> <p><b>Note:</b></p> <ul style="list-style-type: none"> <li>• <b><i>Whilst credits will appear on customer account within period, it may not be reflected until next bill (which could be much later e.g. if billed quarterly).</i></b></li> <li>• <b><i>Further discussion needed on impact on timing/payment of compensation if a customer chooses to leave before an issue is resolved.</i></b></li> </ul>
<b>Exclusions</b>	<ul style="list-style-type: none"> <li>• Compensation excludes customer-caused incidents</li> <li>• Force Majeure and MBORC type events not excluded</li> </ul>	<ul style="list-style-type: none"> <li>• Compensation excludes customer-caused incidents</li> <li>• Force Majeure and MBORC type events not excluded</li> </ul>	<p><b>Change to align with proposed GCs to include exclusions in proposed GC's CX.13 (b) to (d)<sup>22</sup></b></p> <p><b><i>Assumed that an issue caused from within the customer's home is excluded.</i></b></p>

<sup>22</sup> Industry welcome further discussion with Ofcom on the definitions used within the current exceptions.

			<b>Compensation not payable for loss of service issues to the extent caused by customer not accepting first available repair date.</b>
<b>Implementation</b>	Implementation period of 12 months after statement (see below)	As soon as reasonably practicable	See consultation response.
<b>Provision of information about compensation to Relevant Customers</b>	<ul style="list-style-type: none"> <li>• Notification of compensation entitlement on booking for missed appointments</li> <li>• Notification on compensation entitlement on notification of activation date</li> <li>• Notification of compensation entitlement on report of loss of service</li> </ul>	Promoted on CP's website	<p>To ensure VICOP's principles as they apply to a CP are appropriately and transparently communicated to customers, CPs would like to work with Ofcom (and, if appropriate, consumer groups) to look to increase transparency of the VICOP by:</p> <ul style="list-style-type: none"> <li>(i) considering similar transparency principles as outlined in Ofcom's proposed regulation for SMEs; and</li> <li>(ii) establishing a 'kitemark' identifying those CPs who have chosen to participate in the VICOP.</li> </ul>
<b>Enforceability</b>	Legally enforceable	Not enforceable	<b>CPs are willing to include provision of relevant information to Ofcom to assist with monitoring.</b>