

KCOM's response to Ofcom's Consultation on Automatic Compensation

Introduction

1. KCOM Group PLC ('KCOM') welcomes the opportunity to respond to Ofcom's Automatic Consultation (the 'Consultation').¹
2. KCOM considers it important that consumers are appropriately protected from the negative impacts that service quality problems can cause and where consumers experience failures in service quality that they are able to obtain redress and that communications providers face appropriate incentives to improve matters.
3. The Consultation is important to KCOM as any regulatory decision to introduce automatic compensation will affect our business both directly and indirectly.² This is because we are a supplier of network services to landline and broadband customers both in the Hull and East Yorkshire (HEY) area but more widely across the UK.³ Specifically:
 - In the HEY area we use our network to provide both wholesale and retail communications services to both residential and business consumers. These include fixed line communications services which we deliver using our current generation network and our next generation fibre network (FTTx); and
 - In the rest of the UK we provide our consumer and SME customers directly using BT inputs; and to our wholesale customers using BT inputs.
4. We have provided a summary of the key points to our response to the Consultation below and specific answers to the 19 questions Ofcom posed in the main body of our response. We hope that Ofcom finds our contribution helpful.

Summary

Context

5. As Ofcom's survey data indicated, over 80% of fixed line, broadband and mobile consumers are satisfied with their services. Moreover, Ofcom's qualitative consumer research suggests that typically, residential consumers and small businesses consider communications services today to be reliable; they generally work as expected or advertised, and service quality problems are infrequent.

¹ Ofcom (2017), *Automatic Compensation: Protecting consumers from quality of service problems*, Consultation, 24 March 2017, available at: https://www.ofcom.org.uk/data/assets/pdf_file/0030/98706/automatic-compensation-consultation.pdf

² KCOM is responding directly to the Consultation, further to the joint response to the Call for Inputs as an associate of the UK Competitive Telecommunications Association (UKCTA).

³ We provide landline and broadband services to residential and business customers in: (i) the Original License Area (OLA), which accords with the Hull area as well as the expansion area covered by our network in the East Riding of Yorkshire; (ii) in the UK, to a limited number of consumer and SME customers directly using BT inputs; and in the UK, to our wholesale customers using.



6. However, Ofcom's Consultation presents evidence that indicates that a significant minority of consumers do experience quality of service problems (e.g. when there is a loss of service, delays to provisioning, and missed appointments) with their communications services and when they occur these issues can have acute negative impacts on them.⁴ This 'harm' is the key driver behind Ofcom's call for the sector to deliver significantly better quality of service for consumers, and with that in mind Ofcom has identified a number of measures they would take to help deliver it. This included the requirement for communications providers to pay automatic compensation for consumers as a result of failures in service quality caused by them. Others included:
- *Publishing comparison tables on a range of quality measures* (the 'QoS Report') so consumers can understand how communications providers perform, thereby using reputational motivations to incentivise improvements in quality of service;
 - *Setting more demanding minimum quality requirements* and incentivising Openreach to drive service quality for fixed networks;
 - *Exploring options for extending and improving mobile coverage*; and
 - *Working with industry as necessary where there is poor coordination*, which is affecting service quality.
7. In particular, in considering the use of automatic compensation Ofcom has the policy objectives of:
- ensuring consumers receive adequate compensation when providers don't deliver the service quality standards in line with their reasonable expectations and obtain redress in as automatic form as possible; and
 - incentivising providers improve the service quality that they deliver.
8. Ofcom is proposing the use of automatic compensation as a method of incentivising communications providers to internalise the social cost of poor service quality by pricing those impacts into their planning and management activities to reflect the impact. In other words, rather than using compensation structures to provide pro rata redress to customers for the loss of value resulting from a failure of supply (i.e. to refund customers for those services that were not delivered), Ofcom is proposing to use compensation to meet any gap between the value that customers place on the service and the price that they paid for the service (i.e. to assign a rate of compensation for the detriment resulting from the failure of supply).

⁴ As Ofcom implies, the form and extent of the consumer harm arising from quality of services problems is a function of the availability of alternative communications services (e.g. mobile connectivity) available to the end customer.



9. In the event that Ofcom decides to mandates the automatic compensation payments, it is important that its implementation addresses the associated issues with schemes of this type, and that the scheme's introduction does not lead to unintended consequences. For example:
- It is difficult to set the efficient level of 'social' compensation. Therefore if a rate of compensation is set too high this will produce unintended results by:
 - generating excessive levels of expenditure by the relevant network provider(s) in seeking to meet quality of service targets. In this case, investment is diverted from productive activities and that results in sub-optimal levels of service quality as the network provider attempt to minimise compensation payments for the qualifying set of quality of service parameters. (This includes actions taken to address factors within their control and in contesting external factors.); and
 - diverting the network provider's focus from other quality of service parameters thereby resulting in the network provider(s) paying less attention to other aspects of service that do not qualify for automatic compensation payments. This in turn may result in Ofcom seeking to widen the qualifying parameters at increasing levels of regulatory management.
 - In requiring automatic compensation payments to be paid to consumers for quality of service failures this may result in the parallel application of charges for attendance failures / short notice cancellations by consumers. In these circumstances it is the actions of consumers that result in costs being incurred by the network provider that they have no way of avoiding.⁵
 - It is important that automatic compensation payments are made for quality of service failures that are within the control of the network provider. In other instances, the application of automatic compensation does not appear appropriate. For example, there may network failures that customer affecting but which do not result in regulatory investigation (under General Condition 3.1). In these cases it may well take an extended period of time to deal with a loss of service (and there may well be good consumer protection reasons for doing so) that would otherwise trigger automatic compensation. It is therefore important for Ofcom to be clear where this dividing line is for qualifying payments.

⁵ As Ofcom's evidence identifies, 18% of consumers did not ask for compensation as they did not consider the loss of service was the provider's fault. (See Figure 4, p.31 of Ofcom's Consultation.) That is not to say that the consumer considered it their fault but that may be one explanation.



- In practice, there will be instances where disputes arise over the applicability of automatic compensation payments then there will need to be
- It is important that the costs of administering and auditing an automatic compensation scheme do not outweigh its benefits.
- Given the origins of the issues that have been identified by Ofcom are wholesale rather than a retail. Importantly, the model envisaged by Ofcom requires compensation payments to be cascaded through the supply chain quickly in order to ensure that balancing payments do not present smaller providers with financial issues and additional complexities where payments are contested.⁶

Summary of KCOM's position

10. The challenge that Ofcom faces is to ensure that it uses appropriate instruments, and in the correct balance, to address the problems that it has identified and the policy objective it has defined. For example, there is a case for Ofcom focussing attention on the incentive structures in Openreach's charge controls and in addressing information failures through its publication of its QoS Report, and through varying the publishing requirements detailed in the General Conditions.⁷ These combined measures could produce a market outcome whereby providers seek to compete on quality parameters and to offer these as alternative SLAs in contracts.⁸ These can then be used to meet the alternative service expectations of consumers who place different valuations on the relevant service attributes and pick alternative redress commitments to reflect that.
11. In addition to the evidence that it presents in annex 4 to the Consultation, it would be helpful for Ofcom to review and present any evaluation evidence of the use of automated pro rata compensation schemes for quality of service failures in the EU. In particular, where these schemes are complemented by providers offering alternative redress commitments.⁹
12. In the event that Ofcom decides that an alternative package of remedies would not address the market features at issues and instead Ofcom considers that automatic compensation is the appropriate and proportionate regulatory remedy to

⁶ This may be involved when providers seek to recover payments made to the end-customer, in particular when the basis for payment is contested (e.g. the customer claims to have been in and an engineer claims that they visited the premise but were unable to contact the customer).

⁷ In 2014, the ORR conducted research⁷ into compensation. It found that the biggest single contributor to easing customer access to compensation is by far clearer information (60%) that is made more readily available (50%). See, ORR (2014), *Passenger compensation and refund rights for delays and cancellation*, Office of Rail Regulation, February 2014, available at: http://orr.gov.uk/_data/assets/pdf_f...ion-and-refunds-report-2014-02-21.pdf. In addition, certain behavioural solutions might also be appropriate to address the presentation of that information. See, E. Costa, King, K, Costa, E, Dutta, R. and Algate, F. (2016), *Applying behavioural insights to regulated markets*, Citizens Advice, available at: <http://www.behaviouralinsights.co.uk/wp-content/uploads/2016/05/Applying-behavioural-insights-to-regulated-markets-final.pdf>

⁸ This would require the provision alternative wholesale service level product for residential landline and broadband services.

⁹ Ofcom notes automatic compensation has been adopted by communications regulators in some other EU Member States. However most of those regimes are based on pro rata compensation in the form of service refunds.



address the forms of consumer harm that it has identified then we consider that:

- the scope of the proposed measure should be extended to include providers that use Fixed Wireless Access to deliver voice and broadband services at fixed locations;
- the scope of proposed measure should, as Ofcom is proposing, exclude quality of service issues arising on the customer side of the network demarcation boundary (network termination point);
- the three quality of service parameters that Ofcom is proposing to regulate in fixed networks are the most important to consumers and these service quality issues tend to lend themselves to objective definition/measurement and appropriate candidates automatic compensation.¹⁰ Specifically: delayed repair following loss of service¹¹; delayed provisioning¹²; and missed appointments¹³. To the extent that customers face inconvenience and as a result of quality of service problems then mobile providers should by extension the same rationale for automatic compensation should apply as to the incentive structure to improve quality of service;
- we agree with Ofcom's focus on the application of proposals concerning fixed line SMEs automatic compensation consumer contracts, with the impacts assessment framed with reference to residential customers.
- the level of payments is consistent with the evidence that Ofcom has presented;
- automatic compensation should take the form of a financial payment. Our clear preference is for this to be paid in the form a credit on the customer's bill. In our view this will be more efficient than the issuing direct payments and will keep the administrative costs to a minimum. However, where a direct payment is required then it is appropriate to make it;¹⁴
- in principle, there is a case for broadening the circumstances when automatic compensation should not be paid;
- there is a case for capping the total amount payable for a failure of service; and

¹⁰ Ofcom is correct not to consider other issues relating to fixed networks that have previously been identified. For example, we concur that automatic compensation is not the appropriate instrument to address slow broadband speeds in fixed networks, which require long term network investment to solve.

¹¹ A loss of service not fully restored after two full working days have elapsed and attracting a payment of £10 for each calendar day, after two working days, that the relevant service is not repaired

¹² A delay in the commencement of service beyond the date the provider has committed to and attracting a payment of £6 for each calendar day of the delay beyond the promised start date

¹³ An appointment is missed, or cancelled with less than 24 hours' notice and attracting a £30 payment for each missed appointment.

¹⁴ Clearly, any decision by a given provider to offer a goodwill gesture over and above the prescribed payments regime is at the individual discretion of the company in question, as should be the form of such a gesture.



- where complaints and disputes arise the use of the Alternative Dispute Resolution (ADR) mechanism is appropriate.

Ofcom Consultation questions

Question 1: Do you agree with our framework for assessment

- 1.1 Yes, we agree with the framework.

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?

- 2.1 As Ofcom notes, the majority (80%) of fixed line, broadband and mobile consumers are satisfied with their services. This is not indicative of a market in which consumers are insufficiently protected from poor quality of service. Moreover, we strive hard to ensure that consumers and businesses receive a high quality service and address issues quickly when they present themselves.
- 2.2 However, Ofcom has provided evidence that the market as it is currently function is not providing effective redress for consumers of landline and broadband services and has produced estimates indicating that there is a significant minority of customers across the UK suffering quality of service issues with their landline and broadband service. (Although at any one point in time those customers affected may represent a small proportion of the total number of consumers.)
- 2.3 As we noted, having identified the issue it may be possible for the market to provide an effective response to the issues identified by Ofcom.
- 2.4 However, in the event that Ofcom does not consider that this is likely to address the consumer issues that it has identified then we recognise Ofcom's decision to require the introduction of automatic compensation and that its form and structure is based on economic measures of consumer harm.

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

- 3.1 In the event that it is demonstrably the most appropriate and proportionate response to the issues identified by Ofcom then in principle we would agree to its introduction.
- 3.2 However, we do consider that it is important to understand the evaluation evidence for the use of a pro rata compensation schemes given it is so widely used across EU Member States, and the extent to which that might be a more targeted solution.



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?

- 4.1 In general, yes.
- 4.2 However, please also see our response to questions 11 and 19 as there may be exceptional circumstances that can cause delays in provisioning and as such the automatic payment of compensation is not applicable.

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

- 5.1 In general, yes.
- 5.2 However, please also see our response to questions 11 and 19 as there may be exceptional circumstances that can cause delays in provisioning and as such the automatic payment of compensation is not applicable.

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?

- 6.1 In general, yes.
- 6.2 However, please also see our response to questions 11 and 19 as there may be exceptional circumstances that can cause delays in provisioning and as such the automatic payment of compensation is not applicable.

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

- 7.1 Yes.

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

- 8.1 We consider that the method is appropriate. However, on the timing, it would be helpful for Ofcom to recognise that it is possible that an incident may occur/triggered outside the current billing cycle and so in moving it into the following period this could 30 day period specified in the Consultation. In order to keep the administration costs to a minimum, we would therefore suggest that Ofcom recognise that payment is made either within 30 days or at the next relevant billing point.



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?

- 9.1 We consider that there should be a payment cap. It does not seem appropriate that the payments should exceed the available Openreach Service Level Guarantees (SLGs) and Service Level Agreements (SLAs). Unless providers are able to back-off the risk that they are exposed to for network level issues then they will have to effectively self-insure against a risk and to pass that through in retail prices.
- 9.2 The solution for this is for Openreach to offer SLG/SLAs that reflect the longest period that an issue took to resolve, or at the very least that Openreach provided clarity for the industry on the upper bound to period of service resolution and the number of times that this has exceeded the relevant service level assurance, which will inform providers of the probability with which it might occur.

Question 10: Do you agree with our proposed exceptions?

- 10.1 Yes.

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

- 11.1 We consider that Ofcom has too narrowly defined the circumstances which should be excluded from the application of automatic compensation payments.
- 11.2 Force majeure type events do not apply in circumstances outside the company's control in other utility settings. For example:
- In the water industry, while different exceptions apply to different standards, when situations arising beyond the company's control Ofwat exclude the application of automatic compensation. These include situations such as unforeseen events, industrial action or severe or exceptional weather conditions.¹⁵; and
 - In the electricity and gas markets, exceptions include:
 - severe weather conditions (as well as weather events that qualify under Part 2 of the Civil Contingency Act 2004); and

¹⁵ Ofwat (2008), *The guaranteed standards scheme (GSS)*, available at: https://www.ofwat.gov.uk/wp-content/uploads/2015/10/gud_pro_gss08.pdf



- other circumstances of an exceptional nature beyond the control of the supplier.¹⁶

11.3 We consider it appropriate only to include those events which cannot have been reasonably foreseeable and it is not clear why there would be different rules applying in communications markets in cases where force majeure type events occur. (It is important that within the communications sector that these events should be treated in a consistent way.¹⁷)

11.4 This is not to say that customers should not be eligible for redress in the event customers are left with a loss of service for an unwarranted period of time. Rather it is to recognise that in circumstances beyond a network provider's reasonable control there may be legitimate delays to service restoration and as such two working days may not be a reasonable period of time to stand services back up.

11.5 In our view this situation is different to that when there is a demonstrable breach of a provider's regulatory obligations (General Condition 3.1 and/or s.105 of the Communications Act 2003). In these circumstances there is a mechanism to assess compensation on a case-by-case basis as part of the relevant contravention decision.

11.6 Please also see our response to question 19.

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

12.1 Yes.

12.2 It is worth considering how any common dispute from multiple consumers might be efficiently handled through ADR. For example, this situation might arise in the event of a decision to dis-apply automatic compensation under a qualifying exception.¹⁸

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

13.1 Yes, we agree with the impacts that Ofcom describe. We also note the issues that Ofcom has identified in quantifying these.

¹⁶ *The Electricity and Gas (Standards of Performance) (Suppliers) Regulations 2015*, SI No. 1544, Regulation 9, available at: <http://www.legislation.gov.uk/ukxi/2015/1544/regulation/9/made>

¹⁷ For example, while we do not consider that it necessarily follows that industrial action results from poor industrial relations this is a firm-level matter that would normally be accompanied by a strike notice and could therefore likely be managed by the relevant provider in question. However, as Openreach provides for Matters Beyond Openreach's Reasonable Control (MBORC) in contract this releases Openreach from liability under the relevant product terms and conditions in circumstances where specified criteria apply to its failure to perform the contract. Examples of MBORC situations are: network attacks (i.e. criminal damage to network apparatus); BT plant damaged by non-BT contractors, a primary connection point (PCP) or pole being knocked over or damaged in a traffic accident; damage caused by exceptionally severe weather, e.g. floods or storm damage; a gas leak preventing access to underground cables/joints.

¹⁸ In those instances where a dispute develops between a downstream retail provider and an upstream network provider about the basis for payment then in principle this could be brought as a complaint/dispute to Ofcom.



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

- 14.1 In principle, yes. This is because this is the customer and contractual interface. However, it is important to recognise that in doing so there will need to be investments made to enable the cascading of payments through the supply chain as these quality of service issues are likely to originate at the network level.

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

- 15.1 While it is potentially possible to meet a 12 month implementation period, we think that Ofcom should consider extending the implementation period to 18 months.

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

- 16.1 Yes.
- 16.2 On the assumption that Ofcom proceeds with the introduction of automatic compensation, it is appropriate for Ofcom to request information for the purpose of policy evaluation. However, it is not clear why the reporting obligation should form part of the proposed general condition.

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

- 17.1 Yes.
- 17.2 We would ask Ofcom to note that providers, including ourselves, do not record whether business customers purchasing relevant business voice and broadband services qualify as SMEs. For this reason, the only practical solution available is to apply the transparency arrangements to all business contracts.
- 17.3 In addition, as Ofcom recognises, certain SMEs may purchase residential voice and broadband services. While the market may develop more detailed SLA/SLG arrangements for these customers it would be helpful for Ofcom to confirm that these specific transparency obligations only relate to the sale of relevant business voice and broadband services.

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

- 18.1 Ofcom has sought evidence from consumers and SMEs on the impacts of quality of service failures as the basis for market intervention. It logically follows that if



that evidence points towards consumer harm arising from particular forms of service issues that there is a clear case for reviewing whether the benefits of intervening to correct the identified issue(s) outweigh the costs.

- 18.2 As part of its assessment, Ofcom (as in the case of a fixed line intervention) should assess whether automatic compensation is the most appropriate mechanism to address the identified consumer harm and if it is, then Ofcom should apply the same three criteria test to the introduction for mobile consumers as it is proposing for automatic compensation on fixed line providers. In our view it is not the absolute level of compensation that is paid per se but whether that compensation is directed at the harm arising, which in turn incentivises performance improvements in the quality of service dimensions that are most valued by consumers.

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

Scope

- 19.1 We consider that the definition of the Relevant Broadband Service and/or the Relevant Voice Service, to which automatic compensation is payable, should be extended to include Fixed Wireless Access (FWA) networks. These networks are distinct from mobile networks and are widely used to deliver voice and broadband services to fixed locations.¹⁹

Exception to obligations to pay Compensation

- 19.2 It is important to recognise that certain quality of service issues (loss of service) are likely caused by factors outside the provider's reasonable control that take time to address. For example:
- The UK has seen significant uptick in the number of severe weather events over the reference period and these can cause major network outages with knock-on implications for service delivery. While these include qualifying emergencies under Part 2 under the Civil Contingency Act 2004 this may not always be the case. Indeed, it is possible that the function of next generation access networks (FTTP) are unable to provide either telephony, or voice services in the event that there is an extended period of time where there is a localised power outage, which impacts the delivery of both voice and broadband services. Clearly, situations such as these are customer-affecting and may take an extended period of time to rectify.²⁰

¹⁹ These networks are widely used across the UK to deliver standard broadband and a number have been classified as Next Generation Access (NGA) networks capable of delivering superfast broadband speeds for the purpose of State aid support by Broadband Delivery UK. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/84200/State_aid_guidance_-_Role_of_Fixed_Wireless.doc

²⁰ Under the provisions of general condition 3.1(c) providers of Publicly Available Telephone Services (PATS) are expected to maintain call access to emergency organisations for a period of one hour in the event of loss of electricity supply.



- Similarly, providers can be subject to network security issues (e.g. cyber-attacks) that are customer-affecting and may take extended periods of time to rectify.

19.3 Where exceptional, force majeure type events, such as those outlined above are outside the reasonable control of the provider then these should not be within scope of automatic compensation. In our view Ofcom should widen the definition of exceptional circumstances to recognise this and so either (i) exclude these from the proposed automatic compensation regime; or (ii) provide a longer period before the requirement to pay automatic compensation applies.

19.4 We understand that an act or omission applying under paragraph CX.13b) would include, amongst other things, the failure of the Relevant Customer to pay an outstanding bill, which subsequently results in the relevant service being terminated.

Provision of information to Ofcom

19.5 Requiring the provision of information within one month following the end of each period specified by Ofcom in paragraph CX.18 could present issues from the a billing cycle perspective. It may take a period longer than 30 days to confirm payments in the month immediately prior to the end date of the specified reporting cycle.

