

NON-CONFIDENTIAL VERSION

Automatic Compensation

Protecting consumers from quality of service problems

TalkTalk's response to Ofcom's consultation document

5 June 2017

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Executive summary

- We believe Ofcom has identified the correct service standards (late provisioning; late repair of loss of service (landline and broadband); and missed appointments) to meet the regulatory objective of ensuring that consumers receive adequate compensation based on their reasonable expectations, and that they receive this as automatically as possible.
- The system must be proportionate, sensible and adequately targeted. The events that trigger automatic compensation in each case must be clear and well-understood by all consumers and consistently applied by all retail and wholesale providers.
- An automatic compensation scheme must be structured in such a way that all providers in the value-chain have the right incentives to improve the service and network quality that they are responsible for delivering and therefore can control.
- Openreach should be included from the very beginning, with clear automatic, pass-through contractual and process mechanisms where it is responsible for issues leading to compensation and for reimbursing retail providers. Ofcom must require Openreach (as a wholesale provider with significant market power) to offer wholesale automatic compensation that fully corresponds to the obligations imposed on the retail provider. The retail provider (or wholesale providers in the value chain) should not bear any cost of Openreach's failure to deliver the required service quality, including service level guarantee ("SLG") compensation amounts and processes.
- Openreach only repairs instances of total loss of service under their service level agreement with other providers (i.e. Openreach warrants that the line meets the SIN349 standard). The retail provider should therefore be able to apply the same loss of service standard in the retail market for providing automatic compensation.
- The introduction of a smooth and effective automatic compensation scheme requires significant system development for larger retail providers. Ofcom's proposals would also require significant changes to Openreach's wholesale SLG regime and processes which are currently not fit-for-purpose. We would therefore argue that an implementation period of 24 months from Ofcom's final statement would be required.
- We remain open to the possibility of establishing an industry voluntary code of practice in lieu of formal regulation. Such a code, however, would have to meet all our concerns around definitions and processes set out in this submission. Openreach would also have to sign a voluntary code and specifically commit to make its systems and processes fit-

for-purpose within a specified timescale. In addition, there would have to be a new, dedicated appeals mechanism where either Ofcom or the OTA (or a dedicated dispute resolution body) can quickly and effectively resolve disputes between infrastructure and retail providers although Openreach (and others) should still be required to make compensation payments to retail providers pending such appeals.

1. Introduction

In markets that work effectively, providers respond to consumer demands by offering a wide range of services, including service levels, that consumers can choose from according to what they need and value. Although Ofcom acknowledges that UK retail telecoms markets generally work well¹, it also believes there is evidence that the markets are not delivering adequate compensation to customers.

By way of overview, Ofcom proposes the following automatic compensation scheme:

| Compensation event | When is compensation available | Level of compensation |
|--|---|--|
| Delayed repair following loss of service | A loss of service that is not fully restored after two full working days have elapsed | £10 for each calendar day, after two working days, that the relevant service is not repaired |
| Delayed provisions | A delay in the commencement of service beyond the date the provider has committed to | £6 for each calendar day of delay beyond the promised start date |
| Missed appointments | An appointment is missed, or cancelled with less than 24 hours' notice | £30 per missed appointment |

We believe Ofcom has correctly identified the correct metrics to meet the regulatory objective of ensuring that consumers receive adequate compensation when their provider does not deliver service quality standards in line with consumers' reasonable expectations. With regard to the proposed levels of compensation, it is important that they are underpinned by solid evidence of consumer harm. We recommend that further up-to-date research is carried out in support of Ofcom's final statement.

Ofcom describes its two policy objectives as follows:²

- to ensure that consumers are able to receive adequate compensation when their provider does not deliver service quality standards in line with consumers' reasonable expectations, and that they receive this as automatically as possible; and
- to ensure that providers have greater incentives to improve the service quality they deliver.

¹ Ofcom consultation document, paragraph 1.4.

² Ofcom consultation document, paragraph 3.27.

These policy objectives are sensible and it is important that the automatic compensation scheme is carefully designed to meet both of them. The second policy objective is particularly important in terms of the wider architecture of the scheme and how it affects the economic incentives on providers in the value chain. In order for this objective to be fully met, each provider must face appropriate penalties for the failure to meet the required service standards for which they are ultimately responsible. We welcome Ofcom's provisional policy position that *"in principle a wholesaler – in this case, Openreach – should meet the cost of retail level compensation in circumstances where it is at fault."*³ Similarly, Ofcom states in the separate Openreach Quality of Service consultation that it expects *"that, in due course, Openreach's SLGs will also need to cover the costs to telecoms providers of paying automatic compensation due to Openreach network failures."*⁴ Furthermore, Ofcom states in its WLA Market Review consultation that *"[i]n order for SLGs to continue to cover the average costs to telecoms providers of breaches to the obligations in the SLAs, we consider that in due course SLGs will need to be changed in order to cover the costs to telecoms providers of paying automatic compensation due to Openreach network failures."*⁵

It is plainly not sufficient to impose the automatic compensation regime at a retail level and essentially leave it up to the retail provider to negotiate appropriate wholesale service levels e.g. with Openreach. Ofcom must ensure that Openreach pays its downstream retail providers the appropriate service level guarantees with regard to service failures in the Openreach network.

2. Openreach must be included in the automatic compensation scheme

Openreach must be covered by the rules of the automatic compensation scheme. Openreach's service level agreements and processes are currently not fit-for-purpose to support an automatic compensation scheme of the nature proposed by Ofcom. The main changes required are set out below and need to be operational ahead of the scheme entering into force in order to ensure that retail providers are adequately and promptly compensated where responsibility for failure lies with Openreach:

- The overriding and critical principle is that the requirements on retail providers are mirrored exactly in Openreach's service level agreements and processes.

³ Ofcom consultation document, paragraph 8.60.

⁴ Quality of Service for WLR, MPF and GEA, Ofcom Consultation on proposed quality of services remedies, 31 March 2017, paragraph 3.17. https://www.ofcom.org.uk/_data/assets/pdf_file/0033/99645/QoS-WLR-MPF-GEA.pdf

⁵ Wholesale Local Access Market Review, Ofcom consultation on the proposed market, market power determinations and remedies, Annexes, Paragraph 11.168. https://www.ofcom.org.uk/_data/assets/pdf_file/0035/99638/Annexes1-19.pdf

- The SLG values must be sufficiently large to cover the retail payment to TalkTalk's customers and an uplift to cover TalkTalk's reasonable overhead costs of managing the process of receiving and mediating the payment from Openreach. [redacted]⁶
- The Openreach contract currently provides that Openreach will pay compensation by the number of "working days" of late delivery and fault repair. In contrast the proposed retail obligation to pay automatic compensation would be according to the number of (normal) days late. The two needs to be consistent. We would argue that the most sensible option is for the automatic compensation regime to be based on working days (failing which the Openreach contract would need to be changed to normal days to ensure consistency).
- The process for Openreach making SLG payments to TalkTalk must be fit-for-purpose. For instance, Ofcom proposes that the retail provider must make the automatic payment to the customer within 30 days from the relevant event. This means that Openreach must make the SLG payment much earlier than 30 days to ensure that TalkTalk does not unfairly bear any cash flow costs. We would argue that Openreach would need to make the SLG payment within 20 days to ensure that TalkTalk would be able to process the payment to the customer in time.
- Openreach's processes do not currently allow a retail provider to verify in a timely fashion whether a fault was caused by Openreach or by the customer. When the Openreach engineer sends through the KCI3 message (which signals that the fault has been cleared), Openreach's system does not give the retail provider sufficient information to conclude what caused the fault. This process would need to improve significantly to enable the retail provider to identify the root cause of the fault and ultimately pay timely automatic compensation to the customer (when the fault was caused by Openreach). To achieve this, the information available from Openreach would have to be more timely, clearer and possible for the retail provider to reconcile with their own system information.
- Openreach must pay SLG compensation to TalkTalk even in the case of force majeure (or MBORC⁷). It is unreasonable to require the retail provider to pay compensation in the case of force majeure unilaterally declared by Openreach. TalkTalk does not in practice have any influence over Openreach's decision to do so and should therefore not bear this not insignificant cost (which TalkTalk estimates at about [redacted]).⁸

⁶ [redacted]

⁷ Matters Beyond Our Reasonable Control. Please see further comments below.

⁸ [redacted]

- We welcome Ofcom's proposal to remove the caps on SLG compensation currently set out in the Openreach contracts.⁹ This change needs to be fully covered by the negotiations with Openreach.
- Openreach would need to make SLG payments also in the case of any planned outages in line with the proposed retail obligations on automatic compensation.
- Although we welcome Ofcom's recognition that Openreach's reporting of missed appointment is not always accurate, it is not fair to suggest that the fact that retail providers would have 30 days to pay compensation means that this is likely to cause difficulties or impose disproportionate costs on retail providers.¹⁰ In TalkTalk's experience, the accuracy and timeliness of Openreach's billing of missed appointment is far from satisfactory and is not fit-for-purpose. Retail providers are still faced with significant delays in billing (in some cases up to 3-6 months after the appointment date) which therefore requires significant revenue assurance resource to review and confirm accuracy.

We are, on balance, happy for the OTA to oversee the negotiations between Openreach (and BT Wholesale in those wholesale broadband markets where it retains significant market power) and CPs but we would stress that all of the above points need to be changed in the Openreach's contracts to ensure equivalence with the retail obligations on automatic compensation. In that sense we would expect the negotiations to either be very straightforward (hopefully) or the matter to be referred to Ofcom very quickly for resolution. The negotiations would have to be concluded within 6 months to allow for any Ofcom investigation. In the end the contractual and process changes would have to be operational before the automatic compensation regime takes effect at the end of the implementation period.

3. Definition of loss of service

The events that trigger automatic compensation in relation to late provisioning, late repair and missed appointments must be clear and well-understood by all consumers and consistently applied by all retail and wholesale providers. Otherwise, consumers are likely to be confused about when automatic compensation is due and when it is not in accordance with the definitions proposed by Ofcom.

⁹ Quality of Service for WLR, MPF and GEA, Ofcom Consultation on proposed quality of services remedies, 31 March 2017, paragraph 5.97. https://www.ofcom.org.uk/_data/assets/pdf_file/0033/99645/QoS-WLR-MPF-GEA.pdf

¹⁰ Ofcom consultation document, paragraph 7.20.

The proposals around fault repair rely on the concept of “loss of service” which in relation to broadband, is defined as “*where the customer is unable to access the public internet.*” As Ofcom is aware, Openreach maintains copper lines to a technical specification called SIN349¹¹ which reflects the capabilities of its exchange based line test systems. Diagnosis and repair of problems affecting broadband services which fall outside this specification (broadly, conditions which cannot be detected with Openreach’s exchange based line test systems) are treated as out-of-tariff activities and are chargeable activities unless the investigation uncovers a fault that falls within the SIN349 definition.

The retail provider must be able to apply the same loss of service standard in the retail market as Openreach offers in the wholesale market. By way of illustration, if Openreach declares a copper line to meet the SIN349 standard, the retail provider must be able to consider that the line is capable of offering access to the public internet (in so far as Openreach’s part of the network is concerned) for the purposes of the customer’s right to automatic compensation.¹²

4. Force majeure

We agree with Ofcom that “*[c]onsumer harm occurs when quality of service problems arise, irrespective of whether there is a force majeure event.*”¹³ It is simplistic to suggest however that “*providers can often take mitigating measures to protect their networks and operations against the impact of force majeure events.*”¹⁴ In a normal commercial environment, a retail provider who relies on a wholesale provider would indeed be able to take mitigating measures by changing wholesale provider (or seeking to negotiate more favourable terms with their current provider).

In the case of Openreach, however, a retail provider is faced with a significant restriction in that Openreach is the sole provider which has little or no commercial incentive to improve their service. TalkTalk is not able to take any mitigating measures when Openreach declares force majeure (or MBORC¹⁵) and thereby suspends their payment of SLGs under current wholesale contracts. TalkTalk is forced to forego [redacted] from Openreach because the latter (unilaterally) declares force majeure.

¹¹ Suppliers Information Note 349 Issue 2.5 August 2015, <http://www.sinet.bt.com/sinet/SINs/pdf/349v2p5.pdf>.

¹² TalkTalk and other providers are currently advocating the need for Openreach to introduce a higher broadband standard in their network within the line rental tariff. In the future it may be appropriate to use such standard for the purposes of automatic compensation but until then retail providers have no other choice but to use the current SIN 349 standard.

¹³ Ofcom consultation document, paragraph 8.36.

¹⁴ Ofcom consultation document, paragraph 8.38.

¹⁵ Matters Beyond Our Reasonable Control.

This cost must be borne directly by Openreach as they are in control of their network and can take mitigating measures to protect themselves against the impact of force majeure events. It would clearly be unfair to expect TalkTalk to bear this cost under an automatic compensation regime that required compensation to be paid to customers even during Openreach force majeure events. Ofcom would thereby also fail to deliver its second policy objective of ensuring that providers have greater incentives to improve the service quality they deliver.¹⁶

5. Comments on specific provisions

We note Ofcom's request for comments on some of the key definitions in the proposed legal text.¹⁷ There are specific provisions that require further attention in our view as outlined in the following.

5.1 The starting point for measuring time taken to restore

The draft provision CX10 states that “[w]here a Relevant Customer has reported to its Regulated Provider a Loss of Service in relation to a Relevant Voice Service and/or a Relevant Broadband Service [..].” When a customer contacts their provider to report a fault, it would be entirely reasonable for the provider to have to verify whether there is indeed the customer is experiencing a “loss of service” within the meaning of this provision. This could be a very quick process (e.g. a line test while the customer is on the phone) but may in some cases require some further investigation which may take some time. We assume that this is the intention behind the draft wording of this provision but would be grateful if Ofcom could confirm its thinking in this regard.

5.2 Planned and unplanned outages

We note Ofcom's reasoning that it would be appropriate to require compensation to be paid also where the loss is the result of a planned outage. We do not believe one can say that “*the same level of harm exists irrespective of why the loss occurred.*”¹⁸ The consumer harm arises because a customer notices that their phone or broadband is not working and therefore notifies their provider. If the customer does not notice an outage (whether planned or unplanned) then they have not been impacted and no consumer harm has therefore arisen. An outage can impact different customers in different ways. For instance,

¹⁶ Ofcom consultation document, paragraph 3.27.

¹⁷ Ofcom consultation document, paragraph 13.8.

¹⁸ Ofcom consultation document, paragraph 5.51.

if a customer is on holiday or otherwise not at home, an outage does not cause that customer any harm and no automatic compensation should therefore be payable. It would therefore be reasonable to require the customer to report a fault even during a planned outage in order to be entitled to automatic compensation.

5.3 Network termination point

The proposed clause CX.13 provides that the provider would not have to pay automatic compensation if *“the event giving rise to the obligation to pay Compensation was caused by the act or omission of the Relevant Customer, including (but not limited to) circumstances in which the Regulated Provider (or its supplier) is unable to obtain access to the Relevant Customer’s premises;”*¹⁹ We understand that this provision is intended to mean that automatic compensation should be payable by retail providers only for faults in the actual network (i.e. on their side of the network termination point (“NTP”)) but not on the customer’s side.

This is a sensible approach. It is operationally very difficult to identify the root cause of a fault on the customer’s side of the NTP. In our experience, the most common types of issues that may occur in the customer’s home include:

- Internal wiring in customer’s home, including not using filters correctly;
- Router orientation, e.g. router located behind a sofa or facing the street;
- Third party routers i.e. customers are not using TalkTalk provided routers;
- Old or inefficient personal equipment, such as PC/Phone specifications; and
- In home contention, i.e. too many users online at the same time with slower line speeds.

Although the automatic compensation scheme would not apply in these scenarios, the retail provider’s existing compensation rules would naturally apply in case it was shown that the fault was down to the provider and not the customer. In any event, we would welcome Ofcom’s confirmation that this is the intention of the proposed automatic compensation scheme and the wording of the relevant general conditions.

5.4 Rearrangement of appointments

The proposed provision on compensation for missed appointments (CX.5) says that the appointment can be arranged with less than 24 hours’ notice if the customer has “expressly requested” this. We note that Ofcom elsewhere makes the point that such permission by

¹⁹ Ofcom consultation document, Annex 14, page A70.

the customer would have to be “recorded”.²⁰ It is unclear what Ofcom’s expectations are in this regard but we would argue that having to “record” the customer’s permission in such circumstances would be unduly onerous and costly for the provider. Often a rearrangement of the appointment (which may simply be due to the fact that the engineer is a few minutes late on the day) may be done over the phone between the engineer and the customer. Provided the engineer process, training and monitoring for making a verbal agreement with the customer is robust we do not believe that such permission should have to be “recorded”. In addition the provider would obviously have to treat any complaint by the customer in this regard in accordance with normal complaint handling procedures.

5.5 Customer committed delivery date

As set out in the draft provision CX.7, the requirement to pay automatic compensation for late delivery requires that the provider has “*agreed to Provide a Relevant Voice Service and/or a Relevant Broadband Service to a Relevant Customer*”; and that the provider has provided the customer “in a Durable Medium the date on which the service is (or services are) to be activated.”

The use of the words “agreed” and “is to be activated” suggest that the provider will have had to enter into a legally binding agreement with the customer that the service would be activated on a specific date. Such agreement would therefore reasonably have to be set out in the terms and conditions for the service. We believe this is a sensible approach but it would be helpful if Ofcom were able to clarify that this is indeed the intention behind this draft provision.

5.6 Provision of information to Ofcom

The proposed obligation on the retail provider to provide annual reports to Ofcom is sensible and proportionate. No further specific obligations are required. These reports will enable Ofcom to monitor how providers comply with the obligations to pay automatic compensation to their customers. Ofcom also has strong powers to investigate any compliance concerns and is able to impose significant monetary penalties on providers who are found not to comply.

It is also important to remember that a well-designed automatic compensation regulatory regime will encourage retail providers to implement clear and transparent processes that enable consumers to understand how and when compensation is available. Consumers who are unhappy are able to use retail providers’ complaint handling processes and ultimately

²⁰ Ofcom consultation document, paragraph 7.19.

take their matter to alternative dispute resolution. This is ultimately not in any provider's interest, however, as dealing with complaints is expensive and harmful to the provider's brand and reputation.

5.7 Small and medium-sized business customers

The proposed transparency requirements in relation to small and medium-sized customers are a sensible and proportionate way to address the specific and comparatively lesser harm found in this market. We have no specific comments on this section.

6. Implementation timescales and costs

The implementation of an automatic compensation scheme along the lines set out by Ofcom would require significant system and process development within TalkTalk.

[redacted]

In view of the above, we do not believe the proposed timescale of 12 months for implementing the new requirements is feasible or indeed realistic. We would expect that a period of 24 months would be required in order to deliver an automatic compensation scheme that works as smoothly and efficiently as consumers would reasonably require it to do.

7. The option of an industry voluntary code

We are aware of the separate industry discussions around establishing an industry voluntary code of practice in lieu of formal regulation. As Ofcom is aware we have also been able to attend some of the meetings with Ofcom to discuss this proposal.

TalkTalk has always in principle been receptive to a voluntary code provided it meets all our reasonable concerns around definitions and processes. As outlined above, we are concerned that retail providers should be adequately compensated for any delivery failures that can be attributed to Openreach (whose processes are currently not fit-for-purpose). We do not believe however that Openreach would have sufficiently strong incentives to make the necessary improvements in the event that the automatic compensation scheme was set out in a voluntary code rather than formal regulation. For this reason, the successful deployment of a voluntary code would also require Openreach as a signatory and that it specifically commits to make its systems and processes fit-for-purpose within a specified timescale.

In addition, there would have to be a new, dedicated appeals mechanism where either Ofcom or the OTA (or a dedicated dispute resolution body) can quickly and effectively resolve disputes between infrastructure and retail providers although Openreach should still be required to make compensation payments to retail providers pending such appeals.

If the above criteria were met TalkTalk would indeed be prepared to join a voluntary code in lieu of formal regulation.

8. Concluding remarks

We believe that Ofcom has identified the right services standards for an automatic compensation scheme when a provider's quality of service does not meet the consumer's reasonable expectations. It is pivotal that the scheme creates the right incentives on all providers in the value chain to improve the network or service standard for which they are responsible.

Openreach holds a unique position as the access provider deemed by Ofcom to hold significant market power in the wholesale local access market. The key challenge is that its service level agreements and processes are currently not fit-for-purpose and that significant and timely improvements to these will be required to support an effective automatic compensation scheme.

We remain keen to explore the option of a voluntary code in lieu of formal regulation. Our support however is conditional on specific commitments from Openreach to improve its service level agreements and processes to a satisfactory standard prior to the entry into force of any automatic compensation scheme.

Annex - [redacted]