

Automatic Compensation

Response to Ofcom consultation on protecting consumers from quality of service problems

Non Confidential Version

Comments on this response should be sent to:

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Foreword

On 24 March 2017, Ofcom published its consultation on automatic compensation, proposing measures at the retail level to protect consumers from quality of service problems.

This submission is provided by Openreach, a line of business within British Telecommunications plc ("BT"), in response to Ofcom's proposals, giving specific consideration to their impact on Openreach's product portfolio (supporting fixed voice and broadband services), namely WLR analogue, LLU and Sub-Loop Unbundling (MPF and SMPF) and NGA (GEA-FTTC, GEA-FTTP) and SOGEA when launched.

BT will provide a separate submission in response to Ofcom's proposals with regard to their impact on its retail divisions.

1. Executive Summary

1. Openreach welcomes Ofcom's review of quality of service at the retail level and its consideration of end customer compensation. We also welcome Ofcom's proposal to introduce automatic compensation and to address transparency concerns. From an end customer's point of view, the supply chain can appear confusing with CPs / resellers providing the service, Openreach carrying out the installation and maintenance work on their behalf and other resellers or wholesalers providing intermediate products, thus increasing the length of the supply chain. Moreover, when something goes wrong, it may not be obvious to the end customers who is responsible for resolving the issue, who should pay compensation or indeed whether compensation is due.
2. We agree with Ofcom that there is a lack of understanding by end customers regarding the supply chain and who should be responsible for the payment of Service Level Guarantees (SLGs). This is evidenced by the number of complaints and requests for compensation - for example regarding missed appointments - that Openreach receives directly from end customers who did not receive compensation from their own providers and in some cases were advised to contact Openreach.
3. Openreach moved from paying SLGs reactively to proactive payments to CPs in 2008. From a CP's point of view, this simplified the process by removing the need for CPs to claim and ensured that compensation is paid when it is due. In 2016/17, Openreach paid [£<] in compensation of which [£<] relate to the three SLGs Ofcom is considering at the retail level¹. Openreach does not know how much, if any, of these payments flow through to end customers.
4. Our response to this consultation has been informed by our experience of operating a proactive SLG payment scheme. It sets out our concerns with Ofcom's proposals for the scheme and its operation, where they directly impact or have the potential to impact Openreach. Our key concerns are:
 - Exclusion of compensation cap at the retail level which deviates materially from the principles established in our current Service Level Agreements (SLAs) and SLGs. It is normal commercial practice to include a cap on compensation payments in any SLA contained within a commercial contract so that any liability is not open ended or unlimited.
 - Exclusion of MBORC exception at the retail level, which also deviates materially from the principles established in our current SLAs and SLGs. Ofcom has not concluded that this exception should also be excluded at the Openreach level and before considering doing so, should take into account that we have worked closely with industry and the OTA over the past years to ensure that a robust and efficient process applies at the Openreach level. This process could be undermined and the impact of removing this important legal principle would be detrimental. It is a common and widely accepted legal principle that parties can negotiate the inclusion and scope of a Force Majeure clause in their contracts. As the drafting is generally interpreted narrowly (i.e. strictly against a list of included events and mechanisms) we believe that there is sufficient and reasonable control of these types of event through the standard practices we have in place to monitor and control MBORC events where an event prevents or delays the performance of a

¹ SLG payments applied to WLR3 (analogue, ISDN2 and ISDN30), LLU (MPF and SMPF) and NGA (GEA-FTTC and GEA-FTTP).

contractual obligation. Furthermore, Openreach is working to limit the impact of MBORC. Over the last two years we have made a very strong effort in improving our recovery response, especially in the last 12 months.

- Proposal that in principle, the party responsible for the failure should bear the cost of the retail level compensation². The principles previously established by Ofcom, particularly the principle that SLGs should be based on a pre-estimate of the average CP's loss should continue to be the guiding principles for the negotiation of SLAs and SLGs. Furthermore, all three impacted product contracts (i.e. WLR, LLU and GEA) contain provisions which allow the CPs to claim for additional financial loss associated with specific breaches beyond the level of the SLG compensation payment contained within the SLAs and SLGs.
 - As our existing SLGs are based upon pre-estimate of loss principles, we believe that those SLGs already contain provision for CP losses at the retail level. Furthermore, Openreach offers a comprehensive range of SLGs in the impacted product contracts which, either taken individually or considered as a whole, exceed those being proposed by Ofcom at the retail level.
5. We further explain in our response how our proactive SLG scheme operates and the extent of our already generous SLG payments. Our SLG payments for late provisions (£8 per day or part day for all products except WLR where the SLG is £7.22 (WLR Basic) per day or part day when Openreach is late delivering the service) and missed appointments (£56 per missed appointment) already offer retail CPs scope to pay more to their end customers (where they do not already pay the levels of compensation proposed by Ofcom) without Openreach having to increase its SLG payments.
 6. Openreach also pays SLGs in a range of scenarios not covered by Ofcom's automatic compensation proposals, for example "dead on arrival" payments made by Openreach when a newly provided line does not work properly.
 7. Our SLG payments are therefore more than sufficient and we should not need to increase them following the introduction of automatic compensation at the retail level. Were this to change, however, we would expect any additional costs to flow through to the charge control (for those products that are or are proposed to be charge controlled) and be taken into account in the final settlement.
 8. These and other concerns are discussed in more detail in our response to Ofcom's specific questions. As noted above, we have limited our response to what we consider to be the relevant questions for Openreach.
 9. Enhancing the customer experience and reducing the opportunities for failure are the responsibilities of all parties in the value chain. Openreach has and will continue to play its part in this process.

² See <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation> paragraph 8.56

2. Openreach proactive compensation scheme

10. Proactive SLG payments to CPs have been in operation in Openreach since 2008, following a review by Ofcom of the SLG regime in operation at the time. They apply to the Openreach products in scope of Ofcom's review³ and cover provision and repair activities as well as Openreach missed appointments.

Scheme Overview

11. The operation of the Openreach scheme relies on the proactive measurement of achievements against SLAs and subsequent calculation and payment of SLG payments that are facilitated via a flow of event data through the Openreach systems. Key items of data are captured throughout the relevant (provision, repair or appointment) journeys and passed through our systems to the SLA Measurement system (SLAM). At this point the SLA measurement is made and where appropriate, the SLG calculated in response to this measurement.
12. Once the jobs that are eligible for SLG payments have been identified and payments calculated, SLG payments (depending on the SLA) are validated. Validated SLG payments data is then sent to individual CPs and to billing for onward processing and payment.
13. Checks against SLAs and SLG calculations currently take place for each closed provide order or repair fault in the month in which the event closes in Openreach systems. Subsequent validation and forwarding to billing for onward processing and payment take place the following month. The SLG payments appear in the form of a credit in the next CP bill. In summary, SLG payments for events closing in month 1 are validated and processed in month 2 and paid in month 3. Note that for missed appointments the event data is passed to the SLAM system when the associated order or fault closes, not when the missed appointment happens.
14. In some cases, the overall process can take longer, depending on how the SLA works. On repair missed appointments for example, an SLG will be paid if a fault report is cancelled and a further fault is raised within 28 days of the initial fault being cancelled. In such cases, the trigger for payment of the SLG is the completion of the second fault.
15. As mentioned above, validated SLG payments data is sent to CPs in the form of a monthly itemised statement. The statement provides details of the individual events, SLA failures, SLG exclusions and SLG payments as appropriate and a total payment for the CP, for the SLA, for the month in question.

Contractual Exceptions

16. There are a number of contractual exceptions that apply to the payment of SLGs by Openreach notably:
 - MBORC, where matters beyond our reasonable control prevent Openreach from completing a repair (or more rarely a provision order) within the SLA or by the commitment date. These are often related to weather events but could also apply to events such as third party damage to Openreach's network.

³ WLR analogue, Local Loop Unbundling and Sub Loop Unbundling (both MPF and SMPF) and NGA (GEA-FTTC, GEA-FTTP) and SOGEA when launched

- End customer no access or end customer delays (e.g. end customer not ready for the service).
- For repair, faults completed late where the fault was not on the Openreach network (e.g. fault on the end customer's equipment).
- Other exclusions (e.g. third party consents) that are discussed in more detail in response to question 10.

SLG Payments Summary

17. Table 1 below summarises the SLGs that Openreach pays CPs for the relevant products and for late repairs and provisions and missed appointments, and shows how they compare with Ofcom's proposed compensation at the retail level.

Table 1 – Openreach SLGs overview

Openreach products	Proposed compensation (retail level)	Openreach compensation
Missed Appointments	£30 per missed appointment (missed, or cancelled with less than 24 hours' notice)	£56 per event and includes where the fault is cancelled and re-reported within 28 days or where the provision order is cancelled
WLR Provision	£6 for each calendar day of delay beyond the promised start date	£7.22 (WLR Basic) per day or part day Openreach is late providing the service
MPF Provision	£6 for each calendar day of delay beyond the promised start date	£8 per working day or part working day Openreach is late providing the service
SMPF Provision	£6 for each calendar day of delay beyond the promised start date	£8 per working day or part working day Openreach is late providing the service
GEA-FTTC Provision	£6 for each calendar day of delay beyond the promised start date	£8 per day or part day Openreach is late providing the service
GEA-FTTP Provision	£6 for each calendar day of delay beyond the promised start date	£8 per day or part day Openreach is late providing the service
WLR Repair	£10 for each calendar day, after two working days, that the relevant service is not repaired (following loss of service)	£7.22 (WLR Basic) per day or part day Openreach is late in clearing a fault (subject to the applicable Service Maintenance Level)
MPF Repair	£10 for each calendar day, after two working days, that the relevant service is not repaired (following loss of service)	£7.10 (SML1) per day or part day £7.30 (SML2) per day or part day Openreach is late in clearing a fault
SMPF Repair	£10 for each calendar day, after two working days, that the relevant service is not repaired (following loss of service)	£0.21 per day or part day Openreach is late in clearing a fault (subject to the applicable Service Maintenance Level)
GEA-FTTC Repair	£10 for each calendar day, after two working days, that the relevant service is not repaired (following loss of service)	40/2 – £6.90 per day or part day 40/10 - £7.40 per day or part day 55/10 - £8.40 per day or part day 80/20 - £9.95 per day or part day

Openreach products	Proposed compensation (retail level)	Openreach compensation
		Openreach is late in clearing a fault (subject to the applicable Service Maintenance Level)
GEA-FTTP Repair	£10 for each calendar day, after two working days, that the relevant service is not repaired (following loss of service)	40/2 – £6.90 per day or part day 40/10 - £7.40 per day or part day 40/15 - £9.95 per day or part day 55/10 - £8.40 per day or part day 80/20 - £9.95 per day or part day All other variant above £12 per day or part day Openreach is late in clearing a fault (subject to the applicable Service Maintenance Level)
GEA-FTTC Appointment Availability	No Ofcom proposal for automatic compensation	New SLA/SLG for GEA-FTTC Engineer Install £2 or £4 depending on performance and forecast Launched with effect from 1 January 2015
WLR and LLU	No Ofcom proposal for automatic compensation	SLG against a maximum timescale for providing a CCD or 'meaningful message' update to the CP SLG quantum agreed as £8, process agreed at CPPG (Copper Products Process Group) and implemented with effect from 1 April 2015
Missed Appointments	£30 per missed appointment (missed or cancelled with less than 24 hours' notice)	Increase in Missed Appointment SLG Increased payment to CPs from £40 to £56 implemented with effect from 2 March 2015 for each Missed Appointment
WLR, LLU and GEA Repair	No Ofcom proposal for automatic compensation	Increase SLG for Care Levels 3 and 4 1 month SML rental per day or part day delay (£3.10 for SML3 and £4 for SML4) in addition to the late repair SLG Implemented with effect from 2 March 2015
WLR and LLU Provision and Repair	No Ofcom proposal for automatic compensation	Enhanced Service Credit mechanism for ELF and DoAs and improving how ELF/DoAs are dealt with Launched with effect from 16 February 2015
GEA Provision	No Ofcom proposal for automatic compensation	GEA SoR - SoR for an SLA/SLG on GEA regarding Dead on Arrival (DoA) Launched with effect from 1 April 2015 based on £12 quantum per DoA event
Missed Appointments	£30 per missed appointment (missed or cancelled with less than 24 hours' notice)	Payment of Missed Appointment SLG of £56 for cancelled WLR, LLU (MPF and SMPF) and GEA (FTTC and FTTP) provision orders Launched with effect from 1 August 2016
WLR Provision	£6 for each calendar day of delay beyond the promised start date	Payment of SLGs for WLR sub-order types for late delivery Launched with effect from 1 August 2016

Openreach products	Proposed compensation (retail level)	Openreach compensation
GEA-FTTC Provision	No Ofcom proposal for automatic compensation	Payment of £12 SLG for GEA-FTTC Dead on Arrivals showing ADSL service as working Launched with effect from 1 August 2016
GEA-FTTC Provision	£6 for each calendar day of delay beyond the promised start date	Implement a change to GEA such that late delivery payments will be calculated on the basis of calendar days Implemented with effect from 1 August 2016
GEA-FTTC Appointment Availability	No Ofcom proposal for automatic compensation	Appointment availability SLA to include Generic Ethernet Access (GEA) - Fibre To The Cabinet (FTTC) Primary Connection Point (PCP) Only £2 or £4 depending on performance and forecast Launched with effect from 1 October 2016
Missed Appointments	£30 per missed appointment (missed or cancelled with less than 24 hours' notice)	Payment of Missed Appointment SLG of £56 for cancelled WLR, LLU (MPF and SMPF) and GEA (FTTC and FTTP) fault orders provided that the fault is re-reported within 28 days Launched with effect from 1 October 2016
WLR, LLU and GEA Repair	No Ofcom proposal for automatic compensation	Introduction of a 'Repeats' SLG to cover same network fault, network fault following fault not found (FNF) or right when tested (RWT) and 'in home' repeat; in each case where repeat occurs within 28 days of each other £10 for each repeat fault Launched with effect from 1 January 2017
LLU Provision	No Ofcom proposal for automatic compensation	Dead On Arrival (DOA) - £16 per day
WLR, MPF and GEA Appointment Availability	No Ofcom proposal for automatic compensation	£2 or £4 depending on performance and forecast margin of error for forecasting CPs
WLR and GEA	No Ofcom proposal for automatic compensation	Disconnection in error (reactive claim) £7.22 (WLR Basic) £6.90 to £9.95 for GEA depending on the product variant.
WLR, LLU and GEA EMP Availability	No Ofcom proposal for automatic compensation	Service credits calculated by scaling the applicable run rate (i.e. fulfilment order run rate, assurance order run rate or Dialogue Service run rate), fixed monetary credit of £20 and the duration of loss of service in hours (the multiplier)

18. Payments are currently capped at 60 calendar or working days depending on the products.

19. Since the completion of the Fixed Access Market Review (FAMR) in 2014, Openreach has

successfully negotiated with industry, through the OTA-led process, new and enhanced SLAs and SLGs (as detailed in Annex A). We now provide a comprehensive suite of SLAs and associated SLGs.

- We pay compensation more often, notably we pay for part days when Openreach is late delivering a service or fixing a fault and one day earlier for repair for lines on Service Maintenance Level 2.
- We pay compensation for more scenarios, for example repeat faults, than those proposed by Ofcom and we also combine SLG payments where applicable (e.g. if a late repair applies to a repeat fault, we pay the repeat fault SLG and the late repair SLG).
- For repair, we also pay compensation whenever we are late fixing a fault that is on the Openreach network (i.e. where the service is not delivered against the relevant standard as detailed in the product contracts).

3. Ofcom's proposed automatic compensation scheme

20. Having concluded that there is a need for intervention to ensure end customers are adequately compensated for the harm they suffer when quality of service problems occur, Ofcom subsequently considered how the scheme should operate to ensure end customers are compensated quickly and easily.
21. Ofcom considered placing obligations on wholesale providers (including Openreach) to pay compensation to the retailers in cases where the wholesaler is at fault (for compensation to be subsequently passed on to the end customers) and also considered imposing requirements on wholesalers to pay out compensation directly to end customers⁴. Ofcom concluded that none of these options would best address the service problems it identified at the retail level.
22. We agree with Ofcom's conclusions. Obligations for Openreach to pay SLGs to its CP customers for specific service aspects on a proactive basis already exist (see below for details) and there is a framework in place for negotiating new or changes to existing SLAs and SLGs. There is therefore no need for additional regulation at the Openreach level. We also agree that it would not be appropriate for Openreach to pay compensation directly to end customers, as we do not have any contractual or billing relationships with end customers. Furthermore, this would add a layer of complexities to our contractual relationship with our CP customers.
23. As mentioned above, Openreach already has an obligation to pay compensation to its CP customers on a proactive basis under the 2008 SLG direction⁵ which was introduced to address two broad concerns at the time:
- CP issues with the process for claiming compensation
 - Compensation levels deemed insufficient to either compensate the CPs or incentivise Openreach to provide better service
24. Ofcom is in the process of reviewing the Narrowband and Wholesale Local Access (WLA) markets and is proposing to maintain the 2008 SLG direction on WLR in the Wholesale Fixed Analogue Exchange Lines (WFAEL) market⁶ but to remove it in the WLA market⁷ (LLU) where it proposes to embed the requirement for proactive payment in SMP conditions. In both markets, Ofcom notes that Openreach is free to negotiate the terms of these SLAs and SLGs with industry⁸ and to incorporate additional terms.
25. Ofcom is now proposing that "*in principle the party responsible for the quality of service problem*

⁴ See <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation> paragraphs 8.49 and 8.52

⁵ See https://www.ofcom.org.uk/_data/assets/pdf_file/0020/33617/statement.pdf for details

⁶ See https://www.ofcom.org.uk/_data/assets/pdf_file/0016/95011/Narrowband-Market-Review.pdf paragraph 9.50

⁷ See https://www.ofcom.org.uk/_data/assets/pdf_file/0033/99636/Vol1-Market-review.pdf paragraphs 5.110 and 5.114

⁸ See WLA market review consultation paragraph 5.106 and Narrowband market review paragraph 7.132

*should bear the cost of the retail level compensation*⁹ and that it would take this principle into account were Openreach and industry unable to reach an agreement on changes to Openreach SLAs and SLGs CPs are likely to request following the introduction of automatic compensation at the retail level and were the matter to be referred to Ofcom for resolution. Ofcom is also suggesting that the SLGs Openreach currently pay may not be sufficient to cover CPs' increased costs¹⁰.

26. The principles previously established by Ofcom, particularly the principle that SLGs should be based on a pre-estimate of the average CP's loss should continue to be the guiding principles for the negotiation of SLAs and SLGs. This has been the principle adopted during the negotiation of the DOA (Dead on Arrival) SLG for NGA in which Openreach now proactively pays for NGA DOA a one off payment of £12 per event. This has not and does not necessarily reflect payments at the retail level particularly when there is a long supply chain involving many intermediaries. It should also be noted that presently Openreach is in discussion with CPs and the OTA2 with regard to SLG payments for Ethernet Access Direct (EAD), where points of principle are being discussed.
27. All three impacted product contracts (i.e. WLR, LLU and GEA) contain provisions which allow the CPs to claim for additional financial loss associated with specific breaches beyond the level of the SLG compensation payment contained within the SLAs and SLGs. Therefore we believe that CPs already have a mechanism for additional claims should that be appropriate.
28. The SLG compensation payments detailed within the SLAs for all three impacted product contracts (i.e. WLR, LLU and GEA) reflect what Openreach considers to be a reasonable pre-estimate of loss that a CP may suffer for failure by Openreach in provision or repair. We therefore do not consider that any variation to these payments would currently be justified.
29. Furthermore, Openreach already pays more for delayed provision and for missed appointments and for delayed repair pays SLGs more often than CPs will be required to do at the retail level:
 - Openreach missed appointment SLG (£56) is well in excess (almost twice) of Ofcom's proposed SLG of £30
 - Openreach late provision SLG (£7.22 or £8 depending on the product) is also above Ofcom's proposed SLG of £6. We also may pay where we have failed to deliver a working LLU, or GEA service, known as 'DOA' – for example at the rate of £16 per day for MPF.
 - Openreach late repair SLG for most products (over £7) is slightly less than Ofcom's proposed SLG of £10 however this should not be looked at in isolation but as part of a package of SLGs where:
 - We pay more often (i.e. we pay for part day delays) than CPs will be required to pay at the retail level
 - We pay SLGs one day earlier (end of next working day, Monday to Saturday)

⁹ See <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation> paragraph 8.56

¹⁰ See <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation> paragraph 8.55

than under Ofcom's proposed scheme for 67% of the relevant installed base¹¹

- We pay SLGs for more scenarios, for example repeat faults and we also combine SLG payments where appropriate.

30. Given that Openreach offers a comprehensive suite of SLAs and SLGs, any negotiation of SLAs and SLGs would need to be done in that context and not in isolation.
31. A number of Openreach SLGs are currently linked to a product's monthly rental charges (e.g. repair SLGs). Openreach considers that SLGs should also remain commensurate to the price the CPs pay for the product or service¹². Ofcom should be mindful that should Openreach agree to pay SLG payments that diverge significantly from the charges the CPs pay for the product or services (e.g. SMPF), prices may need to be increased to cover the additional costs (where the charges are not charge controlled) which in turn could result in increased prices at the retail level. Where the price is charge controlled, we would expect the additional costs to flow through to the charge control and be taken into account in the final settlement.
32. We note that for loss of service (repair), Ofcom is proposing a compensation rate of £10 per calendar day which is a standalone higher quantum than what Openreach currently pays to CPs. Where it is not standalone – for example in the case of a repeat fault, Openreach pays an additional payment which may not be passed through to the end customer. In any event, the Ofcom proposed SLG payment is based on a very wide range of estimate of harm (£5 to £19)¹³ and does not appear to take into account any mitigation that Openreach and CPs offer or that might already be available to end customers (e.g. use of mobile phone). For example, on WLR lines, CPs can ask for calls to be diverted to minimise the impact on end customers and the facility to divert calls is offered free of charge for faults on the Openreach network.
33. Ofcom considers that end customers that do not have existing service suffer harm similar to loss of service when the provision of a new service is delayed¹⁴. In addition, some end customers can lose service temporarily as a result of a delayed upgrade or migration of an existing service. As a result, Ofcom has used the level of harm it has estimated for loss of service (£10) as the basis to estimate the harm incurred for delayed provision (by multiplying the proportion of delayed provisions that lead to a loss of service by £10¹⁵). On that basis, we would expect the level of harm from delayed provisions to be adjusted if Ofcom decides to change the level of harm from loss of service.

¹¹ As at 28 April 2017, 67% of WLR analogue, LLU (MPF and SMPF) and NGA (GEA-FTTC and GEA-FTTP) lines at aggregate level were on SML2 and 33% on SML1. This excludes lines on higher SMLs that are aimed at the business market.

¹² The linkage between price and SLGs is supported by case law in, for example, *Una Oil vs Leighton Offshore 2014*, where the high court held that the validity of the liquidated damages needed to be assessed by reference to the value of the contract.

¹³ See <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation> annex 4, figure A4.5

¹⁴ See <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation> annex 4, paragraph A4.69

¹⁵ See <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation> annex 4, figure A4.9

4. Response to Ofcom's specific questions

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?

34. Openreach already pays compensation to CPs per (calendar) day or part (calendar) day Openreach is late fixing a fault. Depending on the Service Maintenance Level (SML) that applies to the line, payment can be due as early as 6 hours after the fault is reported (SML4) or as late as midnight on the second working day after the fault is reported (SML1). Residential end customers will typically be on SML1 (SLA of end of next working day plus one, Monday to Friday) or SML2 (SLA of end of next working day, Monday to Saturday).
35. We agree that in turn end customers should be compensated and that compensation should be paid automatically (without end customers having to make a claim for it) when they experience a total loss of service that is not fixed within agreed timescales.
36. We note that Ofcom's proposed lead times for compensation align with Openreach basic SML1 whereby a fault is cleared by the end of the next working day plus one, Monday to Friday. This SML applies to WLR analogue (fixed voice) and MPF (fixed voice and broadband) lines and currently accounts for [3<] of these lines¹⁶. For [3<] of these WLR analogue and MPF lines combined and for fixed broadband services provided over copper (SMPF) and fibre (GEA-FTTC) as well as for GEA-FTTP, SML2 applies whereby a fault is cleared by the end of next working day, Monday to Saturday. In such cases, where Openreach fails to fix the fault by the SLA commitment date, Openreach pays compensation one day earlier than CPs would need to.
37. We also note that Ofcom is proposing that in certain scenarios, the time to repair at the retail level, should be measured from the point in time when the provider first becomes aware of the issue or incident¹⁷. We are concerned that if this were to apply to Openreach, this would not be practical at all or proportionate and would complicate unnecessarily the calculations of SLGs. This also assumes that all end customers that report faults linked to these issues and incidents lost access to their services at the same time or became aware of that loss at the same time which is not necessarily the case. Some end customers may not have been using the service or been at the impacted premises at the time the issue or incident first occurred. It should also be noted that faults reported within the same day as such an issue or incident takes place would all be eligible for compensation after midnight on the second working day after the day that issue or incident occurred. End customers impacted by this scenarios would be those who waited a day or more before reporting a fault or were not aware that there was a problem until much later, however, Ofcom is suggesting that they suffer the same level of harm and are therefore entitled to the same level of compensation as if they had been aware of the fault straight away. Furthermore, we do not believe it would be practical for Ofcom to monitor compliance against this particular aspect of the proposed General Condition.
38. We would also appreciate if Ofcom could clarify that in these scenarios, like other loss of service / repair scenarios, end customers would be expected to report a fault before becoming eligible for

¹⁶ As at 28 April 2017

¹⁷ See <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation> paragraphs 5.49 and 5.50.

compensation in case of delays to the repair.

39. From an Openreach point of view, SLG calculations are automated. Repair SLAs apply to faults that have been reported to Openreach and the commitment date and time is based on the SML that applies to the line and the date and time when the fault is first reported to Openreach, not when Openreach becomes aware of an issue or incident on the network.
40. There is a difference between being aware that an incident has taken place and using this information to advise end customers and manage their expectations and using this information to calculate the point in time when associated faults become liable for SLG payments. Any information that Openreach provides to CPs regarding network issues or incidents is provided for information purposes and to help the CPs manage the faults that are reported to them and provide feedback to their end customers.

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

41. Openreach already pays compensation to CPs per (calendar / working depending on the product) day or part (calendar / working depending on the product) day Openreach is late delivering service.
42. We agree that in turn end customers should be compensated and that compensation should be paid automatically (without end customers having to make a claim) when they experience a delay in the delivery of their service.

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?

44. Openreach already pays compensation to CPs (£56) when an Openreach engineer misses an appointment. This is paid in most cases, including when a provision order is subsequently cancelled. For repair, missed appointment compensation is paid when a fault is subsequently cancelled as long as another fault is reported within 28 days.
45. We agree that in turn end customers should be compensated and that compensation should be paid automatically (without end customers having to make a claim for it) when an Openreach appointment is missed.
46. In its assessment of harm, Ofcom considers the impact on end customers of the CP rearranging or cancelling appointments¹⁸ and concludes that 24 hours is an appropriate timeframe. Ofcom, however, does not specifically consider how cancelled appointments¹⁹ should be treated. The draft legal instrument is also silent on the matter apart from giving consideration to appointments cancelled by the end customers. We would therefore ask Ofcom to clarify the position with regard to cancelled appointments and amend the draft legal instrument where appropriate.

¹⁸ See <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation> paragraph 7.26

¹⁹ On provision activities, Openreach occasionally cancels appointments when they are not needed to complete the work.

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

47. Ofcom has set the timeframe for compensation to be paid at the retail level within 30 calendar days from a missed appointment taking place or a delayed provision or repair being completed.
48. Given Ofcom's preference for a bill credit as method of payment, we think that Ofcom should ensure that the proposed timeframe can be accommodated by the CPs within their existing billing cycles so as to limit the system development that might be needed to implement the scheme.
49. As explained in section 2 above, the Openreach process for proactive compensation runs over three months whereby SLG payments for events closing in month 1 are validated and processed in month 2 and paid in month 3. It is therefore important from an Openreach point of view, that Openreach can continue to operate its proactive scheme in the same way as we do today and pay SLGs as credit notes in the relevant bills²⁰. Changing any of this would require process and system changes which could be significant and could impact the speed at which the scheme could be implemented.

²⁰ CPs are billed monthly for the products in scope of Ofcom review.

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?

50. Openreach is concerned that Ofcom is considering excluding compensation caps at the retail level, which deviates materially from the principles established in our current SLAs and SLGs. Furthermore, Openreach does not agree with the removal of the SLG compensation cap present in the LLU, GEA and WLR3 contracts as proposed by Ofcom in its consultation on quality of service remedies²¹.
51. It is normal commercial practice to include a cap on compensation payments in any SLA contained within a commercial contract so that any liability is not open ended or unlimited. As noted by Ofcom²², caps apply in certain circumstances in the electricity and gas sectors.
52. Notwithstanding the above, all three contracts contain provisions which allow the CPs to claim for additional financial loss associated with specific breaches beyond the level of the cap contained within the SLAs. Therefore we believe that CPs already have a mechanism to make claims where they are above the relevant SLG cap.
53. Ofcom considered removing the cap on compensation in 2008, in its review of BT's SLGs, but on balance decided not to do so because it recognised that the absence of caps can create uncertainty. Ofcom specifically stated that it *"acknowledges that caps limiting exposure to compensation – even set at a level where they are unlikely to bite – aid certainty and provide a level of transparency to both parties subject to the contract"*²³. Ofcom was also mindful at the time of not introducing unreasonable burdens on Openreach²⁴.
54. In 2016/17, Openreach paid [£<] in compensation for the relevant products of which [£<] relate to the three SLGs Ofcom is considering at the retail level²⁵. The removal of the payment cap would result in additional SLG costs of [£<] per year (2016/17 figures²⁶) for Openreach. Were these additional costs to be incurred, prices might need to be increased to cover them (where the charges are not charge controlled) which in turn could result in increased prices at the retail level. We would also expect these additional costs to flow through to the charge control (for those products that are or are proposed to be charge controlled) and be taken into account in the final settlement.

²¹ See https://www.ofcom.org.uk/data/assets/pdf_file/0033/99645/QoS-WLR-MPF-GEA.pdf paragraphs 3.13 to 3.16 and 5.96.

²² See <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation> paragraph 8.21

²³ See https://www.ofcom.org.uk/data/assets/pdf_file/0020/33617/statement.pdf paragraph 3.37

²⁴ See https://www.ofcom.org.uk/data/assets/pdf_file/0020/33617/statement.pdf paragraphs 4.21 and 5.22

²⁵ SLG payments applied to WLR3 (analogue, ISDN2 and ISDN30), LLU (MPF and SMPF) and NGA (GEA-FTTC and GEA-FTTP).

²⁶ Include ISDN2 and ISDN30

Question 10: Do you agree with our proposed exceptions?

55. Ofcom identified a small number of exceptions to automatic compensation with which we agree.

One of these exceptions also apply at the Openreach level and is reflected in our contracts:

- The missed appointment, delayed provision or repair is caused by the customer's actions or omissions (e.g. end customer no access or delays)

56. There are a number of other contractual exceptions that apply to the payment of SLGs by Openreach notably:

- MBORC, where matters beyond our reasonable control prevent Openreach from completing a repair or provision activity within the SLA or by the commitment date. These are often related to weather events but could also apply to events such as third party damage to Openreach's network. This is discussed further in response to question 11.
- Missed appointments, delayed provisions or repairs that are caused by the CPs' actions or omissions which include among others where the CPs are in breach of contract or where Openreach has suspended service.
- For repair, faults completed late where the fault is not on the Openreach network
- Third party consents (e.g. wayleaves and traffic management)

A full list of exceptions is available at Annex B.

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

57. Openreach is concerned that Ofcom is considering excluding exceptions for force majeure-type event (MBORC) at the retail level. Ofcom has not concluded that the exceptions should also be excluded at the Openreach level and before considering doing so, should take into account that we have worked closely with industry and the OTA over the past years to ensure that a robust and efficient process applies at the Openreach level. This process could be undermined and the impact of removing this important legal principle would be detrimental.
58. It is a common and widely accepted legal principle that parties can negotiate the inclusion and scope of a Force Majeure clause in their contracts. As noted by Ofcom²⁷, some exceptions for force majeure type events also exist in the compensation schemes that apply in the utility sector. Ofcom also explained that "*Parliament is currently considering making more explicit Ofcom's powers in this area in the Digital Economy Bill, where it signalled its supports for automatic compensation in the communications sector to bring it in line with the compensation schemes in the utility sectors*²⁸". Not allowing exceptions for force majeure type events in the communications sector would result in the misalignment of the compensation schemes in the utility and communications sectors.
59. Furthermore, as the drafting is generally interpreted narrowly (i.e. strictly against a list of included events and mechanisms) we believe that there is sufficient and reasonable control of these types of event through the standard practices we have in place to monitor and control MBORC events where an event prevents or delays the performance of a contractual obligation. Openreach has put in place a legal framework around MBORC that limits the harm once a force majeure type event has happened and the condition is invoked:
- the cause of the event must be beyond Openreach's reasonable control and
 - the ability to rectify the situation within standard repair timescales must also be beyond Openreach's' control.
60. These clauses have been widely discussed with CPs both as part of our contract review process and as part of a specific working group with the OTA which were concluded successfully in 2016. Openreach should not be liable for events that are beyond its reasonable control whether that be at the regional level or the local level and so consequently SLG compensation exposure for these events is viewed as unreasonable by Openreach. Please refer to Annex C for a list of potential MBORC cases.
61. Were Ofcom to conclude that Openreach should pay compensation to its CPs in situations that are beyond its reasonable control, Openreach would incur additional costs of just over [£<] per year (2016/17 figures²⁹). As a result, prices might need to be increased to cover these additional costs (where the charges are not charge controlled) which in turn could result in increased prices at the retail level. We would also expect these additional costs to flow through to the charge control (for those products that are or are proposed to be charge controlled) and be taken into account in the

²⁷ See <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation> paragraph 8.33

²⁸ See <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation> paragraphs 2.24 and 10.33

²⁹ Includes ISDN2 and ISDN30

final settlement.

62. Openreach is working to limit the impact of MBORC. Over the last two years we have made a very strong effort in improving our recovery response, especially in the last 12 months. This has been achieved through higher resource levels, increased cross-skilling of engineers, increased contingency that we can move across to repair, and more swift actions such as resource moves. As a result MBORC declarations tend to be shorter and the impact on both CPs and end customers much more limited.
63. Openreach is also working with CPs to improve communications and transparency of information around any MBORC event/declaration.

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

64. Ofcom should take a prudent approach to setting the timeframe for the implementation of its proposal for automatic compensation.
65. Whether automatic compensation is implemented via regulatory intervention (General Condition) or a voluntary code of practice, Ofcom should be mindful that CPs might need to make system changes to implement automatic compensation and might, in turn, require additional information from Openreach. This could also lead to Openreach having to make system changes of its own which CPs would then need to consume.
66. Openreach is keen to engage with CPs to understand what the requirement is and how it can be delivered most effectively. Work to that effect started on 2 May 2017 with an industry workshop. Typical system developments take 12 to 18 months to implement and as a case in point, Consumer Switching took 18 months to implement.

Annex A: New and Enhanced SLAs and SLGs

The following table provides a list of the new and enhanced SLAs and SLGs Openreach has successfully negotiated with industry, through the OTA-led process, since the completion of the Fixed Access Market Review (FAMR) in 2014.

Request Summary	Outcome
Improved SLA/SLG for responding to a Cablelink failure	Launched with effect from 27 November 2014
New SLA/SLG for GEA-FTTC Engineer Install	Launched with effect from 1 January 2015
SLG against a maximum timescale for providing a CCD or 'meaningful message' update to the CP	SLG quantum agreed as £8, process agreed at CPPG and implemented with effect from 1 April 2015
Increase in Missed Appointment SLG	Increased payment to CPs from £40 to £56 per implemented with effect from 2 March 2015 for each Missed Appointment
Increase SLG for Care Levels 3 and 4	Implemented with effect from 2 March 2015
Enhanced Service Credit mechanism for ELF and DoAs and improving how ELF/DoAs are dealt with	Launched with effect from 16 February 2015
GEA SoR - SoR for an SLA/SLG on GEA regarding Dead on Arrival (DoA)	Launched with effect from 1 April 2015 based on £12 quantum per DoA event
Availability of Openreach provided AC and DC power serving co-mingling facility and for subsequent remedial work	Launched with effect from 11 May 2015
SLA for a maximum provisioning timescale for a non-appointed order to align with appointed orders	Launched with effect from 19 September 2015 (R2950)
Removal of Missed Appointment SLG for PCP only (GEA-FTTC)	SLG was removed on the 1 January 2015 as per industry agreement
Payment of Missed Appointment SLG of £56 for cancelled WLR, LLU (MPF and SMPF) and GEA (FTTC and FTTP) provision orders	Launched with effect from 1 August 2016
Payment of SLGs for WLR sub-order types for late delivery	Launched with effect from 1 August 2016
Payment of £12 SLG for FTTC Dead on Arrivals showing ADSL service as working	Launched with effect from 1 August 2016
Removal of SMPF 12 week repair SLG	Launched with effect from 1 August 2016
Cessation of LLU MPF SLG payments as soon as service is up and working (including when KCI3 is delayed)	Launched with effect from 1 August 2016
Implement a change to GEA such that late delivery payments will be calculated on the basis of calendar days	Implemented with effect from 1 August 2016

Request Summary	Outcome
Appointment availability SLA to include Generic Ethernet Access (GEA) - Fibre To The Cabinet (FTTC) Primary Connection Point (PCP) Only	Launched with effect from 1 October 2016
Payment of Missed Appointment SLG of £56 for cancelled WLR, LLU (MPF and SMPF) and GEA (FTTC and FTTP) fault orders provided that the fault is re-reported within 28 days	Launched with effect from 1 October 2016
Introduction of a 'Repeats' SLG to cover same network fault, network fault following fault not found (FNF) or right when tested (RWT) and 'in home' repeat; in each case where repeat occurs within 28 days of each other	Launched with effect from 1 January 2017

Annex B: Contract SLA and SLG exceptions

The following table provides a list of exceptions to the payment of SLGs documented in our product contracts.

GEA	WLR3	LLU
The failure by BT is due to the performance of the public internet	The failure by BT is due to the performance of the public internet	
The failure by BT is due to the Communications Provider's own network or equipment or any other network or equipment outside the BT Network	The failure by BT is due to the Communications Provider's own network or equipment or any other network or equipment outside the BT Network	The service level commitments set out in this Part do not cover faults other than those within the BT System or occurring on premises owned or controlled by BT. For the avoidance of doubt, any faults due to a failure of non-BT equipment connected to the BT System are excluded from the service level commitments in this Part as are faults due to the Communications Provider System or any Third Party Communications Provider system
The Communications Provider is in breach of any part of this Contract or BT suspends the Service or any part of it in accordance with the contract		
		Due to an action, error or omission by the Communications Provider, Third Party Communications Provider, and/or the End User that directly causes BT to be unable to comply with such obligations: The Service Maintenance Level period shall be extended for the calculation of the service level commitment until such action is rectified

GEA	WLR3	LLU
<p>Through no fault of its own or because of circumstances beyond its reasonable control, BT is unable to carry out any necessary work at, or gain access to the Site or the Communications Provider fails to agree an appointment date or work is aborted by the Communications Provider, End User or a third party that BT reasonably assumes to be in authority</p>	<p>Through no fault of BT, BT is unable to carry out any necessary work at, or gain access to an End User's Site or the Communications Provider fails to agree an appointment date or work is aborted by the Communications Provider or End User or a 3rd party that BT reasonably assumes to be in authority</p>	<p>BT being unable to access to the End User premises at the agreed appointment time in relation to the fault through no fault of its own: The Service Maintenance Level period shall be adjusted so that for the calculation of the Service Maintenance Level commitment, the original appointment time is changed to the next agreed appointment time where BT is able to have access to the End User premises;</p> <p>BT has requested access to premises from the Communications Provider or a Customer for such period as such access has not been given</p>
<p>The Communications Provider and BT agree a different timescale for performance of the Service</p>	<p>The Communications Provider and BT agree a different timescale for performance of the service</p>	<p>Where a date, being a date used in the calculation of fixed compensation anywhere within this Part, is changed by mutual agreement, the relevant date for the calculation of such fixed compensation shall become the Working Day following the revised date</p>
<p>Reasonable assistance is required or information is reasonably requested by BT from the Communications Provider or a third party and such assistance or information is not provided</p>	<p>The failure by BT is because reasonable assistance is required or information is reasonably requested or required by BT from the Communications Provider, End User or a third party and such assistance or information is not provided</p>	<p>BT has requested reasonable assistance or information from the Communications Provider required to enable BT to comply with its obligations under this Agreement and such reasonable assistance or information has not been given</p> <p>BT is unable to proceed because the Communications Provider is unavailable to respond to enquiries from BT.in relation to the fault: The Service Maintenance Level period shall be extended for the calculation of the Service Maintenance Level commitment for the period until BT receives the necessary response(s) from the Communications Provider</p>

GEA	WLR3	LLU
		to its enquiries;
Through no fault of its own, BT is unable to obtain any necessary permissions or consents required in connection with the performance of a particular service level	Through no fault of its own, BT is unable or is waiting to obtain any necessary permissions or consents required in connection with the performance of a particular service level	Through no fault of its own, BT is unable to obtain any necessary approvals or consents required in connection with the performance of a Service, or any part of it
The failure is due to a Force Majeure event	The failure is due to a reason covered by clause 14 (Force Majeure) of the Conditions	Covered within clause 16 (Force Majeure) of the Conditions
The failure is due to a planned or emergency Service interruption		
The failure is due to a Scheduled Outage or an outage of the System notified in accordance with this Contract	The failure is due to a Scheduled Outage or an outage of the Systems notified in accordance with the Contract	
The failure is due to an inaccurate Order being submitted by the Communications Provider		
If the fault is not reported in accordance with the fault reporting provisions in Schedule 2B (GEA-FTTC) or 2C (GEA-FTTP)		
	When BT issues a request to a Communications Provider for further information in relation to a particular order, for the number of whole or part hours taken for the Communications Provider to respond to BT, the corresponding number of working hours will be added to the timescales which relate to that order in this Schedule	

GEA	WLR3	LLU
	The failure is due to the application of the geographic number porting process in accordance with that process	
	The failure is due to BT receiving a cancel own or cancel other instruction in relation to the affected order	
	During work to implement an order for a line, BT discovers that work is required which could not have been reasonably foreseen	
	The failure is because an Ancillary Product is required	
	Reasons (including but not limited to) high volumes of Failures of Service	
		<p>If the Communications Provider does not accept the first available appointment time offered by BT</p> <p>The Service Maintenance Level period shall be extended for the calculation of the Service Maintenance Level commitment so that it commences at the time of the alternative agreed appointment time.</p>

Annex C: List of potential MBORC cases

The following table provides a list of situations that are potential MBORC cases.

Potential MBORC cases	
Network attacks i.e. criminal damage to network apparatus	
Damage from very severe weather e.g. floods or storm	
Plant damage by non-BT contractors	
PCP or pole damaged in traffic accident	
Gas preventing access to underground cables/joints	
Foot and Mouth or other Government restrictions	
Failure of ferry services preventing engineer's access	
Fire in telephone exchange	Terrorism
Major Incident – Rail, Air	Fuel Crisis
Hurricane	Ice Storm
Heavy snowfall	Lightning