

# Confirmation Decision under section 96C of the Communications Act 2003

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Confirmation Decision served on BT by the Office of Communications (Ofcom) for contravention of SMP Condition 10.1.

Case reference: CW/01273/06/23

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# 1. Overview

BT has been subject to Quality of Service ('QoS') standards for Wholesale Local Access markets ('wholesale local access') since 2014 and Leased Lines access markets ('leased lines access') since 2016, most recently under SMP Condition 10.1 as set out in Volume 7 of the Wholesale Fixed Telecoms Market Review ('WFTMR').<sup>1</sup> The obligation to meet these standards was imposed by Ofcom in order to ensure that service levels remain at a minimum standard for consumers and businesses. Ofcom takes compliance with QoS obligations seriously, as consumer harm can result when service levels fall below the standards that are expected.<sup>2</sup>

Ofcom assesses performance against these obligations on an annual basis. On 27 June 2023, Ofcom opened an investigation into Openreach's performance for the 2022/2023 regulatory period. This document sets out Ofcom's decision that in 2022/2023 BT contravened the relevant regulatory obligations by failing to meet three of the QoS obligations.

The document also sets out how, having considered all of the relevant factors in the round and considered the specific mitigating factors relating to this contravention, Ofcom has arrived at the decision to not fine BT.

## What we have decided – in brief

**BT contravened its obligations under SMP Condition 10.1, namely its obligation to meet all QoS obligations for 2022/2023.** Based on information received as part of our investigation, we have found that it failed to meet the following three standards for the period 2022/2023:

- Schedule 1, Direction 1 requiring the Dominant Provider to comply with QoS obligations in relation to the provision of network access to Relevant Ethernet Services and Dark Fibre Access in certain leased line access and certain Interexchange Connectivity markets, Quality of Service Standard 1, which requires that the mean Time to Provide of Completed Orders is no more than 38 working days;
- Schedule 3, Direction 3 requiring the Dominant Provider to comply with QoS obligations in relation to the provision of network access to Metallic Pathway Facility (MPF), Single Order Transitional Access Product (SOTAP) and Generic Ethernet Access Fibre To The Cabinet (GEA-FTTC) services in certain wholesale local access markets, Quality of Service Standard 2, which requires the completion of a minimum of 94% of the provision of MPF and GEA-FTTC services on time; and

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<sup>1</sup> Ofcom, 18 March 2021, [Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-2026. Volume 7: Legal instruments](#), page 60.

<sup>2</sup> BT Telecommunications plc ("BT plc" or "BT") is required to meet specified QoS performance standards across the leased lines access and wholesale local access markets. These standards are implemented under the SMP Conditions imposed on BT plc under the WFTMR. BT plc appointed Openreach Limited ("Openreach") as its agent to perform and undertake its functions including in relation to its compliance with the relevant regulatory obligations. This decision will largely refer to Openreach unless the context requires a specific reference to BT. See also para2.1 below.

- Schedule 3, Direction 3 requiring the Dominant Provider to comply with QoS obligations in relation to the provision of network access to MPF, SOTAP and GEA-FTTC services in certain wholesale local access markets, Quality of Service Standard 5, which requires the completion of a minimum of 85% of repairs for faults that are subject to Service Management Level 2, in aggregate, on time.
- After taking account of the information we have gathered about circumstances which affected performance in 2022/2023 and the steps taken by Openreach to comply with BT's QoS obligations under these circumstances, **we have decided not to impose a financial penalty or any other remedy in relation to these breaches.**
- Our view is that a penalty or another remedy would not, in this case, be appropriate or proportionate to the contraventions. In taking this view we have had regard to all the evidence referred to in this document in the round, together with our published Penalty Guidelines<sup>3</sup> which explain that the central objective of imposing a penalty is deterrence both in terms of the addressee of our decision and the wider industry. We have also considered factors including the following:
  - Each of the three standards was failed by a narrow margin;
  - The 2022/2023 regulatory period saw eight days of industrial action ('IA') by the Communications Workers Union ('CWU');
  - Openreach calculated the impact of the IA on its performance in 2022/23 to be larger than the margins with which it failed each of the three standards;
  - The breach was not flagrant - Openreach has demonstrated it made considerable efforts to meet the performance requirements.

It is important that Communications Providers ('CPs') take compliance with their regulatory responsibilities seriously and that when things go wrong, they recognise this and act quickly and responsibly to remedy any harm that has been caused and that they allow Ofcom to investigate, as appropriate. Notwithstanding our decision not to impose a penalty, we have found some shortcomings in the approach that Openreach took to preparing and responding to IA that we strongly encourage Openreach to address in any future cases where its performance is being impacted.

**This overview is a simplified high-level summary only. Our detailed findings and our reasoning are set out in the full document below.**

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<sup>3</sup> Ofcom, 14 September 2017, [Penalty Guidelines: Section 392 Communications Act 2003](#).

## 2. Introduction

2.1 This Notification (the ‘Notification’) is addressed to British Telecommunications plc (‘BT’), whose registered company number is 1800000. BT’s registered office is 1 Braham Street, London, United Kingdom, E1 8EE. It is addressed to BT – as the registered company with responsibility for complying with the SMP conditions – and also sent to Openreach Limited (‘Openreach’), a wholly-owned subsidiary of BT as BT’s agent. Openreach’s registered office is Kelvin House, 123 Judd Street, London, United Kingdom, WC1H 9NP and its registered company number is 10690039.

### Our investigation

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2.2 On 6 June 2023 Openreach submitted a report to Ofcom describing the relevant factors affecting its 2022/2023 wholesale local access QoS performance,<sup>4</sup> as well as a report on its 2022/2023 leased lines access QoS performance.<sup>5</sup> As required, throughout the 2022/2023 regulatory period Openreach had also provided Ofcom with monthly key performance indicators which included its performance against QoS standards.

2.3 On 27 June 2023 Ofcom opened an investigation<sup>6</sup> to examine the failure of Openreach to deliver on three of the QoS standards, one for certain leased lines access and certain Interexchange Connectivity markets and two for certain wholesale local access markets, as set out in paragraph 4.2.

2.4 On 30 June 2023, Openreach submitted a further report to Ofcom on its performance against its QoS performance standards regarding wholesale local access for the period April 2022 to March 2023.<sup>7</sup>

2.5 In line with our usual processes, once our investigation had been announced, Openreach was given the opportunity to submit additional representations to Ofcom. On 10 July 2023 Openreach submitted such additional representations to Ofcom.<sup>8</sup>

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<sup>4</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*.

<sup>5</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*.

<sup>6</sup> Ofcom, 27 June 2023, [Investigation into Openreach’s quality-of-service performance in leased lines access and wholesale local access in 2022/23](#)

<sup>7</sup> Openreach, 30 June 2023 (unpublished confidential report). *Openreach Wholesale local access Quality of Service Standards Compliance Report for 2022/23*.

<sup>8</sup> Openreach, 10 July 2023 (unpublished confidential letter to Ofcom). *Openreach Additional Representations on 2022/23 QoS Standards*.

- 2.6 Ofcom issued a formal notice on 6 September 2023 requiring the provision of specified information under section 135 of the Communications Act 2003 ('the Act').<sup>9</sup> Openreach provided the information and documents requested on 27 September 2023.<sup>10</sup>
- 2.7 Ofcom issued a provisional decision in accordance with section 96A of the Act on 23 February 2024. BT confirmed that it would not contest those findings and thus did not submit any written or oral representations.
- 2.8 The evidence set out in this document draws on each of the documents mentioned above.

## Structure of this document

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- 2.9 The rest of this document is structured as follows:
- a) In **Section 3**, we set out the relevant regulatory framework.
  - b) In **Section 4**, we consider Openreach's QoS performance in 2022/23 and set out our determination that Openreach contravened its QoS obligations.
  - c) In **Section 5**, we outline our decision regarding the imposition of a financial penalty for this contravention. We have decided not to impose a penalty.
  - d) In **Section 6**, we outline some additional observations regarding Openreach's approach to performance in 2022/23, including some shortcomings in its approach.

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<sup>9</sup> Ofcom, 6 September 2023 (unpublished confidential letter to Openreach Limited), *CW/01273/06/23 – Investigation into Openreach Limited's quality of service performance. Final Notice requiring the provision of specified information under section 135 of the Communications Act 2003.*

<sup>10</sup> Openreach, 27 September 2023 (unpublished confidential letter to Ofcom). *CQ/01273/23 – Investigation into Openreach Limited's quality of service performance. Final Notice requiring the provision of specified information under section 135 of Communications Act 2003.*

# 3. Quality of Service obligations: the relevant regulatory framework

3.1 BT is required by regulations imposed by Ofcom to achieve certain performance standards. If Openreach, BT's agent for those purposes, fails to meet those standards, Ofcom has powers to take enforcement action. In this section we explain the regulatory rules as well as Ofcom's powers regarding enforcement of those rules.

## Overview of the QoS regulatory framework

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- 3.2 Ofcom previously assessed that BT has significant market power (SMP) in certain wholesale markets underpinning broadband and leased lines services. One of the consequences of this SMP finding is that, absent regulation, the dominant provider may not receive market signals from its customers switching to alternative providers to prompt it to deliver the QoS levels that its customers require and this could lead to a greater number of faults, slow resolution of those faults and long delays to the installation of services. Therefore, following a consultation process, Ofcom imposed a series of measures in the WFTMR, including QoS obligations to ensure the provision of an appropriate level of repair and installation service to its customers in relation to each relevant fixed telecoms market.<sup>11</sup>
- 3.3 As Ofcom explained in the WFTMR, to address this SMP we impose remedies on BT, whilst we recognise that *"BT's Openreach division, run by Openreach Limited, is responsible for providing regulated services over the copper and fibre connections between BT's exchanges to homes and businesses"*.<sup>12</sup>
- 3.4 The WFTMR Ofcom rules require Openreach to meet specified QoS obligations across leased lines access and wholesale local access. As set out in the relevant Ofcom statement: *"The QoS are intended to be a lower bound rather than a target for Openreach to achieve"*.<sup>13</sup>
- 3.5 However, under the WFTMR regulation, Openreach can declare High-Level Matters Beyond Our Reasonable Control (MBORC) to mitigate for the wholesale local access standards:
- "in specific circumstances where its normal operational abilities are affected by force majeure events. Declarations of MBORC mean that installations and repairs covered by the declaration are excluded from the measurements against the Quality of Service

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<sup>11</sup> Ofcom, 18 March 2021, [Statement: Promoting investment and competition in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26](#).

<sup>12</sup> Ofcom, 18 March 2021, [Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26, Volume 3: Non-pricing remedies](#), p.1, footnote 1.

<sup>13</sup> Ofcom, 18 March 2021, [Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms market Review 2021-26, Volume 5: Quality of Service](#), p.4, para 2.8.

standards. The High-Level MBORC allowance is applied across an entire Management Region and is intended to take account of events affecting over 2,000 lines; incidents which are/are likely to become the subject of regional or national media interest; and anything likely to impact on the BT and/or Openreach brand. High-Level MBORCs are applied at the end of the compliance period.”<sup>14</sup>

- Openreach makes any MBORC declaration independently from Ofcom and has discretion to apply the allowance where it thinks it is applicable, subject to some limitations such as that it can be applied “in up to two regions per year, for up to eight weeks per event”.<sup>15</sup>

3.6 In practice, Openreach defines “force majeure” events in its contracts with Communications Providers (i.e. events for which MBORC can be invoked), and gives examples.

3.7 In relation to contracts for the provision of Metallic Pathway Facility and Generic Ethernet Access Fibre to the Cabinet services, Openreach told us that:

*“contracts for both MPF and FTTC include in this definition: Industrial disputes (including industrial disputes involving that party’s own employees, provided that such party has used reasonable endeavours to resolve such industrial disputes or prevent them from occurring”*.<sup>16</sup>

3.8 Ofcom’s role is firstly to assess on an annual basis whether Openreach has fulfilled its obligations to meet all of the QoS obligations.<sup>17</sup> If Ofcom finds that Openreach has not fulfilled these obligations, Ofcom’s role is then to determine whether it would be appropriate and proportionate to impose a financial penalty on Openreach for any breach(es) and if so, that amount of that penalty; and to determine whether there are any steps that Ofcom think Openreach should take to comply with its obligations or remedy the consequences of the contravention.

## Ofcom’s investigatory and enforcement powers

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3.9 Ofcom has the power to take enforcement action in relation to compliance with the QoS performance standards for wholesale local access and for leased lines access.

3.10 Under section 96A of the Act, if Ofcom determines that there are reasonable grounds for believing that Openreach is contravening or has contravened a regulatory requirement,

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<sup>14</sup> Ofcom, 18 March 2021, [Wholesale Fixed Telecoms Market Review 2021-26, Volume 5: Quality of Service](#), p. 19, para 3.76-3.77.

<sup>15</sup> Ofcom, 18 March 2021, [Wholesale Fixed Telecoms Market Review 2021-26, Volume 5: Quality of Service](#), p. 22, para 3.97.

<sup>16</sup> Openreach, 30 June 2023, *Openreach Wholesale local access Quality of Service Standards Compliance Report for 2022/23*, p. 2.

<sup>17</sup> The performance reported by Openreach for assessment by Ofcom will have been adjusted to include the application of any MBORC declarations it has made for WLA in that performance year, as permitted under the WFTMR regulation. Openreach also provided the performance before the application of MBORC for WLA products.



Ofcom may give a notification in the form of a provisional decision. The provisional decision must:

- a) set out the determination made by Ofcom;
- b) specify the requirement and contravention in respect of which that determination has been made; and
- c) specify a period to allow for an opportunity to make representations about the notified determination.

- 3.11 Where Ofcom is minded to impose a financial penalty, it is also required to include a provisional determination of that penalty in the provisional decision under section 96A of the Communications Act 2003. Similarly, if Ofcom considers that there are steps that should be taken in order to comply with the condition and/or remedy the consequences of the contravention, these should also be specified.
- 3.12 If, following a notification, Ofcom is satisfied that Openreach has, in one or more of the notified respects, been in contravention of the notified regulatory requirement, Ofcom may impose a financial penalty on BT, in accordance with section 96C of the Communications Act 2003.
- 3.13 The amount of any penalty should be appropriate and proportionate to the contravention(s) for which it is imposed and may not exceed 10% of the turnover of BT's business for the relevant period. In determining the amount of any financial penalty, Ofcom is also required to have regard to its Penalty Guidelines.
- 3.14 In accordance with section 96A(5) Ofcom has considered whether it would be more appropriate to proceed under the Competition Act 1998 in respect of the matters to which this Decision relates. Ofcom has concluded that action under the Competition Act 1998 would not be more appropriate.

## 4. Openreach's performance in 2022/23

4.1 In this section, we assess Openreach's performance and set out our findings that determine Openreach has contravened the requirements set out in SMP Condition 10.

### Openreach's QoS performance in 2022/23

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- 4.2 As noted above, on 6 June 2023, Openreach submitted reports to Ofcom on its performance against its required QoS obligations for the period 1 April 2022 to 31 March 2023.<sup>18</sup> In these reports Openreach provided information which demonstrated that for this period it met all required QoS obligations except for the following three QoS obligations:
- a) For leased lines access, Openreach had to ensure that the mean Time to Provide completed orders was no more than 38 working days in the relevant year.<sup>19</sup> Openreach achieved 38.4 days.
  - b) For wholesale local access, Openreach had to ensure that it completed 94% of provisions for Metallic Path Facility (MPF) and Generic Ethernet Access Fibre to the Cabinet (GEA-FTTC) services, on time for 7 geographic regions (that correspond to Openreach's management regions<sup>20</sup>).<sup>21</sup> Openreach achieved 93.8% for the London and the South East region.
  - c) For wholesale local access, Openreach had to ensure that it completed 85% of its repairs for faults that are subject to Service Management Level 2,<sup>22</sup> on time for 7 geographic

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<sup>18</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*. and Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*.

<sup>19</sup> As set out in Ofcom, 15 July 2021, [Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-2026. Volume 7: Legal instruments](#), Schedule 1, Direction 1, requiring the Dominant Provider to comply with quality of service standards in relation to the provision of network access to Relevant Ethernet Services and Dark Fibre Access in certain Leased Line Access and Interexchange Connectivity markets, Quality of Service Standard 1 – Mean Time to Provide, p. 215, para 4.

<sup>20</sup> These regions are Scotland, Northern England, Wales & Midlands, Wessex, London & South East, East Anglia, and Northern Ireland (NI)

<sup>21</sup> As set out in Ofcom, 15 July 2021, [Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-2026. Volume 7: Legal instruments](#), Schedule 3, Direction 3, requiring the Dominant Provider to comply with quality of service standards in relation to the provision of network access to Metallic Pathway Facility (MPF), Single Order Transitional Access Product (SOTAP) and Generic Ethernet Access-Fibre To The Cabinet (CEA-FTTC) services in certain Wholesale local access markets, Quality of Service Standard 2, p. 231, para 3b.

<sup>22</sup> Defined by Openreach as "Clear by 23:59 next day, Monday to Saturday, excluding public and bank holidays. For example, report Tuesday, clear Wednesday."

regions (that correspond to Openreach's management regions<sup>23</sup>).<sup>24</sup> Openreach achieved 84.2% for the Wales and Midlands region.

- 4.3 In relation to the wholesale local access QoS obligations, Openreach used the high-level MBORC allowance for a series of repair standards for reasons of severe weather and IA. The areas where MBORC was applied were removed from the total denominator for the compliance period in accordance with the QoS obligations. Had Openreach not used MBORC in these instances, it would also have failed to meet a further 6 wholesale local access QoS obligations in addition to the 2 standards it failed to meet that are mentioned in paragraph 4.2 b) and c).<sup>25</sup>
- 4.4 Overall, for the period 2022/23 Openreach met 4 out of the 5 Leased Line QoS obligations and, having taken account of Openreach's application of the high-level MBORC allowance to the standards outlined above, Openreach met 28 out of the 30 wholesale local access QoS obligations.
- 4.5 On 27 June 2023, Ofcom opened an investigation to examine possible contravention of Openreach's QoS obligations in the 2022/2023 regulatory period, and Openreach provided representations and further information, as set out in paragraphs 2.2 to 2.6 above.
- 4.6 Based on Openreach's reported performance for the 2022/2023 regulatory period **we have found that Openreach has contravened its obligations under SMP Condition 10.1 to meet required QoS obligations**, by failing to meet three standards set out in paragraph 4.2 above.

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<sup>23</sup> These regions are Scotland, Northern England, Wales & Midlands, Wessex, London & South East, East Anglia, and Northern Ireland (NI).

<sup>24</sup> As set out in Ofcom, 15 July 2021, [Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-2026. Volume 7: Legal instruments](#), Schedule 3, Direction 3, requiring the Dominant Provider to comply with quality of service standards in relation to the provision of network access to MPF, SOTAP and GEA-FTTC services in certain Wholesale local access markets, Quality of Service Standard 5, para 6b, p. 232.

<sup>25</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, Figure B.2, p.9.

# 5. Consideration of financial penalty

- 5.1 In this section, we set out our consideration of whether it would be appropriate to impose a financial penalty on BT for failing to meet its QoS obligations and, if so, what level of penalty would be appropriate and proportionate. In doing so, we have taken into account the seriousness of the failure to meet the regulatory requirements mentioned above, relevant factors identified in our Penalty Guidelines and, overall Ofcom’s central objective when imposing a penalty of deterrence.
- 5.2 In coming to a decision, we have also taken into account the evidence received from Openreach in the course of this investigation. We set out that based on the information and evidence we have gathered about the circumstances surrounding Openreach’s contravention of its regulatory requirements, our decision is that it would not be appropriate or proportionate to impose a financial penalty in this case.

## Legal framework

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- 5.3 In Section 4 above, we set out our reasons for our determination that Openreach has contravened SMP Condition 10.1 in 2022/2023.
- 5.4 In accordance with paragraph 96C of the Act, Ofcom may impose a financial penalty on a person who has, in one or more of the respects notified by Ofcom, been found in contravention of an SMP condition.
- 5.5 In determining whether to impose a penalty for a contravention, and the size of that penalty, we must have regard to Ofcom’s Penalty Guidelines,<sup>26</sup> which state that the central objective of imposing a penalty is deterrence. In addition, and in accordance with section 97(1) of the Act, any penalty we impose must be appropriate and proportionate to the contravention in respect of which it is imposed.
- 5.6 In line with our Enforcement Guidelines, we will also have regard to our statutory duties. This includes our duties under Section 4 of the Act, as well as our more general duties under Section 3 of the Act, including to further the interests of citizens in relation to communication matters, and to further the consumers in relevant markets, where appropriate by promoting competition.<sup>27</sup>
- 5.7 When determining the level of a penalty, Ofcom must have regard to submissions and representations made by Openreach and any steps taken by Openreach to comply with the

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<sup>26</sup> Ofcom, 14 September 2017, [Penalty Guidelines: Section 392 Communications Act 2003](#), see also Section 392 of the [Communications Act 2003](#).

<sup>27</sup> Ofcom, 12 December 2022, Regulatory Enforcement Guidelines for investigations: Guidelines; [Postal Services Act 2011](#) and [Communications Act 2003](#).

relevant regulatory requirements or remedy the consequences of having breached such requirements.

## Decision not to impose a financial penalty

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### Consideration of a financial penalty

- 5.8 When Ofcom finds a breach of an SMP condition we may impose a penalty<sup>28</sup> where we consider it appropriate and proportionate to do so.<sup>29</sup>
- 5.9 Failure to comply with the requirements of an SMP condition is inherently serious and it is therefore relevant for us to consider whether it would be appropriate to impose a financial penalty on BT in this case, for the failure of Openreach to meet the QoS requirements under SMP Condition 10.1.
- 5.10 Notwithstanding the seriousness with which Ofcom regards a failure to comply with SMP Condition 10.1, in the specific circumstances of this case, and having considered all the relevant factors in the round, for the reasons set out below we have decided not to impose a penalty in respect of the contravention we have identified.

### Assessment against our Penalty Guidelines

- 5.11 Our Penalty Guidelines<sup>30</sup> set out a range of factors which may be relevant in any particular case and Ofcom has assessed those factors carefully in relation to the circumstances of this case. This includes the seriousness of the alleged contravention, the steps taken to prevent and remedy the contravention and whether the contravention occurred deliberately or recklessly. Ofcom has also considered whether there are any relevant precedents and, if so, the extent to which they should be followed in this case. We set out below Ofcom's consideration of these factors.
- 5.12 As explained in paragraph 2.2, Openreach provided two sets of written observations to Ofcom explaining why it did not meet all its QoS obligations and the steps it took to try to meet its QoS obligations. These took the form of two separate mitigation reports covering its performance in the wholesale local access and leased lines markets. These matters were also addressed in the evidence Ofcom received following the formal request for information to Openreach, as explained in paragraph 2.6.

## Openreach's submissions

### Submissions on the occurrence of the contravention

- 5.13 Openreach submitted that IA should be a mitigating factor in Ofcom's assessment of its service performance in both wholesale local access and leased line access. In Openreach's

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<sup>28</sup> Section 96C of the Communications Act 2003.

<sup>29</sup> Section 97 of the Communications Act 2003.

view, “the [industrial] action was unprecedented”<sup>31</sup> and “was extremely challenging to plan for”.<sup>32</sup> Openreach said that IA “was not a factor envisaged when the QoS standards were set, and the absence of any prior industrial action affecting Openreach means it should be considered exceptional”.<sup>33</sup> Openreach submitted that “industrial action [was] the key factor affecting...service performance”<sup>34</sup> in both wholesale local access and leased lines access in 2022/2023. It further submitted that the IA “led to widespread service disruption”.<sup>35</sup>

- 5.14 Openreach placed the IA it faced in the wider context of what it has described as a “difficult” ‘industrial relations environment’ across the economy in 2022/2023, and which it has said was “largely due to the exceptionally high level of economy-wide inflation”.<sup>36</sup> Openreach told us that “in December 2022, approximately one in six businesses [in the UK] were affected by industrial action”.<sup>37</sup>
- 5.15 Openreach reported that it began 2022/2023 performing well and was exceeding all of its QoS requirements before IA began. Additionally, Openreach submitted that there is evidence its recovery approach did work well as it improved Openreach’s performance to the extent that it met the QoS requirements again in Q4. It reported that the recovery of its performance shows that the contravention of its requirements cannot be considered ongoing, and that its senior management “sought to do all they can” so the failure to meet the standards should not be considered reckless or flagrant.<sup>38</sup> The scale of the impact on its performance in Q2 and Q3 of the year meant that the strong performance in Q1 and Q4 could not fully rectify Openreach’s performance for the year overall. Openreach has told Ofcom that the implementation of its recovery plan and mitigating steps allowed it to “significantly restore service levels” and that it considers “this a testament to the importance we place on exceeding the QoS standards and the hard work we undertook to rectify our performance”.<sup>39</sup>
- 5.16 In relation to the leased lines access market, Openreach said “our recovery plan allowed us to exceed the MTTP Standard for P10 and P12, meaning that Q4 was a strong quarter, and we exited the year with an excellent level of performance”.<sup>40</sup> During the course of our investigation, Openreach reported that its current performance year-to-date for FY2023/24

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<sup>31</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.5, para 9.

<sup>32</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.15, bullet 2.

<sup>33</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.15, para 3.19.

<sup>34</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.8, para 3.

<sup>35</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.15, bullet 3.

<sup>36</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.28, para 65.

<sup>37</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.15, para 32.

<sup>38</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.32, bullet 1.

<sup>39</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.3, para 1.4.

<sup>40</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.3, para 1.5.

is exceeding all five standards. Further, Openreach submitted that it has “consistently met the [MTTP] standard”, including during the Covid-19 pandemic period.<sup>41</sup>

- 5.17 Additionally, Openreach submitted that there was “little, if any customer harm”<sup>42</sup> arising from it failing to meet its QoS obligations and has presented evidence of positive customer feedback throughout the year to support this view. For ethernet, the 12-month rolling average score between April 2022 and March 2023 that Openreach received from its customers was +50.2, which is described as an “excellent result...above that of many service-orientated companies”.<sup>43</sup> For copper, Openreach reported that it “ended 2022/23 with our highest ever end customer satisfaction score”, achieving 93%.<sup>44</sup>
- 5.18 Openreach’s analysis indicates that “the impact of IA was significantly greater than the amount by which we missed the QoS standards”.<sup>45</sup>
- 5.19 In relation to leased lines access, Openreach calculated that “the direct impact of industrial action was likely responsible for adding an additional [X] days of provision adding an additional [X] days to the MTTP”. Openreach told Ofcom that this “implies that in the absence of just the direct impact of industrial action we would have comfortably met the MTTP Standard”.<sup>46</sup>
- 5.20 For wholesale local access, Openreach told Ofcom that IA had “limited impact on the amount of work we had to do but reduced the time and resources available to do it”.<sup>47</sup> It submitted that repair was particularly impacted as Openreach is generally required to fix copper faults within one or two working days, which it said was “often unachievable” on days when IA was taking place and as a result, service levels were impacted for several weeks after each IA.<sup>48</sup> Openreach explained to Ofcom that it generally aims to have around [X] worth of work in the copper repair workstack (which it submits is around [X] in the workstack) in order to meet the required repair times and absorb any “shrinkage” from factors including holidays and training.<sup>49</sup> Openreach reported that between July 2022 and January 2023 the workstack was “generally [X] higher than the optimum level. Overall, Openreach estimated the impact of IA on its performance for T2R SML2 in Wales and the Midlands to be [X] points.”<sup>50</sup>

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<sup>41</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.29, para 6.9.

<sup>42</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.25, para 5.1.

<sup>43</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.26, para 5.7. and p.27, Figure 7.<sup>44</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.13, para 30.

<sup>44</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.13, para 30.

<sup>45</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.15, bullet 3.

<sup>46</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.16, para 3.22.

<sup>47</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.18, para 38.

<sup>48</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.5, para 10.

<sup>49</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.18, para 41.

<sup>50</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.27, Fig C.11 and para 64.

- 5.21 While Openreach said that provision was also impacted by IA, this was to a more limited extent than repair as *“the lead time for provision is generally considerably longer”*<sup>51</sup> and Openreach was *“able to bring the workstack back down to pre-IA levels sooner.”*<sup>52</sup> Openreach told Ofcom that the copper provision workstack *“suffered from the same general dynamic as repair, with IA driving a resource shortfall...which in turn drove up the workstack”*. Additionally, Openreach submitted that process dependency increased the impact as *“resource shortfalls that affected one aspect of the provision journey often led to delivery failures”*<sup>53</sup> Overall, Openreach calculated that the “full year IA impact was c. [3<] % points”.<sup>54</sup>
- 5.22 Openreach said that it was aware of the risk of IA following the decision taken by the CWU in May 2022 not to accept BT’s pay offer but that its *“preparation faced the challenge that it was very difficult to predict and forecast the likelihood, timing, location and scale of industrial action”*.<sup>55</sup> Openreach’s submissions explain that it became aware that *“the risk [of industrial action] had increased significantly when the CWU made public that it intended to ballot”* and then *“could only be certain of Industrial Action taking place from the point at which we received formal notification...from the CWU on 15 July 2022”*.<sup>56</sup> Openreach told Ofcom that *“as it had not experienced such widespread IA before”* it had limited data on which to base its forecasts of employee participation and *“only discovered which employees were participating on the days themselves”*.<sup>57</sup>
- 5.23 In addition to the direct effects of IA, Openreach pointed to a further impact from the *“unexpected”* loss of one working day due to the bank holiday for HM The Queen’s funeral on 19 September 2022.<sup>58</sup> Openreach told us that this added to the service challenges in wholesale local access that it experienced in that quarter, by further increasing the workstack for repair performance.<sup>59</sup> Openreach explained that the workstack had already been facing increases because of IA.
- 5.24 Openreach told Ofcom that it *“[had made an error in reporting]”*. This impacted Openreach’s reporting overall but it told us that in relation to its SML2 performance in Wales and the

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<sup>51</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.18, para 39.

<sup>52</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.21, para 50.

<sup>53</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.21, para 49b.

<sup>54</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.27, Fig C.11 and para 64.

<sup>55</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.11, para 3.6.

<sup>56</sup> Openreach, 27 September 2023 (unpublished confidential letter to Ofcom), p.10, para 14.

<sup>57</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.17, para 36.

<sup>58</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.16, para 34.

<sup>59</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.20, para 47bii.



Midlands, it led its performance to be “under-reported by [X]” which means that “the scale of the miss against the QoS standard would be [smaller than without this adjustment].<sup>60</sup>

### Submissions on steps taken by Openreach to prevent the contravention

- 5.25 Openreach considers that it implemented all mitigation measures “as soon as practicable” and that they “represent a rapid and timely response to the threat of industrial action”.<sup>61</sup>
- 5.26 We have identified three categories of mitigating steps taken by Openreach before IA began, across both wholesale local access and leased lines access:
- i) **Customer engagement:** Pre-engagement with communications providers once the risk of IA became clear, to prepare for any disruption and seek to minimise customer escalation during the days of IA. This included industry-wide engagement, bilateral engagement with individual Communications Providers and extending opening hours after each IA period for Openreach contact centres.<sup>62</sup> Openreach explained that as a result of this engagement, it received limited customer escalations on the days of IA.<sup>63</sup> As mentioned above, Openreach said that it ended the year with its “highest ever score for both CP perception and end customer satisfaction”.<sup>64</sup>
  - ii) **IA preparations:** Openreach explained that it is “always alert to the risk of Industrial Action” and that part of its Business Continuity and Incident Management’s team is “regular monitoring of our industrial relations”.<sup>65</sup> From as early as April 2021, Openreach was undertaking simulated response exercises and detailed business and continuity planning for various possible scenarios of IA, including different types of action such as [X]. By May 2022, Openreach had spent several months refreshing its internal ‘IA support’ material and had facilitated [X].<sup>66</sup> In July 2022 Openreach Executive Board discussed the various IA modelling scenarios that had been prepared for Service Delivery and Fibre Network Delivery.<sup>67</sup>
  - iii) **Performance management:** Openreach’s submissions explained that it worked in Q1 to get itself in the strongest possible position to prepare for any IA. Openreach told us that “FND undertook a package of tactical interventions targeted at getting service into a strong position by the end of June 2022 in advance of any industrial action that might have occurred”.<sup>68</sup> Additionally, the Openreach Operations Board was informed in May 2022 that “in advance of any potential [industrial] action, one of our mitigations is to get service in the best possible position”.<sup>69</sup> Measures introduced by

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<sup>60</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.26, para 60.

<sup>61</sup> Openreach, 27 September 2023 (unpublished confidential letter to Ofcom), p.16, para 30.

<sup>62</sup> Openreach, 27 September 2023 (unpublished confidential letter to Ofcom), p.16, para 28.

<sup>63</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.12, para 3.9.

<sup>64</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.12, para 27.

<sup>65</sup> Openreach, 27 September 2023 (unpublished confidential letter to Ofcom), p.9, para 13.

<sup>66</sup> Openreach, 6 May 2022, (unpublished internal Openreach presentation) Openreach Operations Board, Slide 4.

<sup>67</sup> Openreach, 20 July 2022, (unpublished internal Openreach presentation) Openreach Executive, Slides 5 and 6.

<sup>68</sup> Openreach, 27 September 2023 (unpublished confidential letter to Ofcom), p.19, para 33.

<sup>69</sup> Openreach, 13 May 2022 (unpublished internal Openreach notes) Openreach Operations Board.

Openreach which appear to have been seeking to get itself in the strongest possible position include:

- > The suspension of non-critical training, which came into effect a month prior to the first IA.
- > Reduction in non-work time, which came into effect a month prior to the first IA.
- > Suspension of Fault Volume Reduction Proactive Repair Programme, which came into effect 4 weeks before the first IA period.<sup>70</sup>

5.27 Openreach explained in its submissions the measures it put in place to attempt to mitigate the impact of IA and still meet all its requirements in the leased lines access markets.

5.28 Once IA had begun, Openreach explained that it developed and implemented a recovery plan to redress the impact on its service levels in the leased lines access markets.<sup>71</sup> It said that the elements of this recovery plan included:

- i) **Resource:** Reallocating within field engineering more than [X] field engineers to increase man-hours on Ethernet products and retraining [X] planning specialists to undertake ethernet surveying;<sup>72</sup>
- ii) **Working practices:** Openreach said that it “increased collaboration” from making “Openreach-wide changes to its working practices”, including making its office-based working policy more flexible.<sup>73</sup> In addition, it sought to increase weekend completions where possible but explained that its ability to do this for ethernet services is limited as most leased line products are provided to business premises which are typically not open at weekends;<sup>74</sup>
- iii) **Process initiatives:** Openreach said that another element of its recovery plan was driving forward initiatives that were already ongoing by the time of IA. These initiatives aimed to make improvements to its wayleaves, traffic management and civils processes as well as reducing CP delay. In addition, Openreach told Ofcom about its Service Desk 2.0 initiative which was undertaken across 2022/2023 and it described as aiming to “further enhancing our service desk”. The changes implemented as part of this initiative related to areas including customer service training, inbound call capability, escalation ownership and customer order management.<sup>75</sup>

5.29 Openreach said it considered two additional mitigation measures that could have helped it to meet the MTTP QoS standard, but it ultimately decided that they were not appropriate to implement:

- Choosing not to close tail orders (or, in other words, purposefully leaving tail orders open) during March 2023, which Openreach explained would have enabled it to meet the MTTP QoS standard without leading to a breach of the separate ‘Open Tails’ QoS standard.<sup>76</sup> Openreach said it took this decision as it considered it was in its customers’

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<sup>70</sup> Openreach, 27 September 2023 (unpublished confidential letter to Ofcom), p.17, Table 1.

<sup>71</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.14, para 3.17.

<sup>72</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.14, para 3.18.

<sup>73</sup> Ibid.

<sup>74</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.15, para 3.18.

<sup>75</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.22, para 4.15.

<sup>76</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.3, para 1.6.

interests and it “concentrated on delivering for its customers rather than taking artificial steps to target the QoS standard.”<sup>77</sup>

- Using third-party contractors to cover for the absence of internal staff working on provision orders. Openreach said that had it used third-party contractors it “may have been able to continue to provision orders at a normal or close to normal level” but decided that, on balance, it was “not a viable option” given a number of potentially negative consequences that could have arisen from their use. For example, Openreach explained that none of the contractors offered an end-to-end service for ethernet provision and it would not have been feasible to train them in the timescales. Openreach also considered that using contractors could have increased the risk of creating faults, as well as that its ability to repair any such faults would have been impacted by repair staff also taking IA.<sup>78</sup>

5.30 Openreach separately explained the measures it put in place to attempt to mitigate the impact of IA and still meet all its requirements in wholesale local access markets.

5.31 Once IA had begun, Openreach took steps including:

- a) **Changes to working patterns:** Non-working time thresholds were reduced during the period of IA and contractual overtime was introduced for a period of eight weeks from 16 January 2023 to March 2023. The contractual overtime requirements were implemented with two weeks’ notice, which Openreach said is [redacted] the normal notice period and it also told us that the requirements placed on Service Delivery engineers was [redacted]% more than the historical norm. Openreach submitted that the use of contractual overtime was “a critical driver of our service recovery, enabling us to complete an incremental [redacted] copper and fibre jobs per week.” It also said that this came “at an estimated cost of c£[redacted]m” and that the use of contractual overtime was unpopular with its workforce.<sup>79</sup> Openreach has acknowledged that contractual overtime was not introduced until several months after the IA occurred, and after the need for it had first been discussed but has explained that “it would not have been possible to introduce such an unpopular measure in the middle of an industrial dispute, or even in the immediate aftermath.”<sup>80</sup>
- b) **Contractors:** Openreach said that it “maximised” its use of contractors, including by using contractors for repair work for the first time ever. This was introduced at the end of Q3 and Openreach estimated that this contributed “between [redacted] and [redacted] completions per week in hotspot areas such as [redacted], and cost c£[redacted] across the period.”<sup>81</sup> Openreach has described its use of contractors as evidence of “strenuous

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<sup>77</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.17, para 4.2.

<sup>78</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.12, para 3.11.

<sup>79</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.30, para 66a.

<sup>80</sup> Openreach, 27 September 2023 (unpublished confidential letter to Ofcom), p.20, para 36.

<sup>81</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.30, para 66b.

effort” to recover service<sup>82</sup> and told us that the use of contractors has historically been of concern to its unions.<sup>83</sup>

- c) **Use of resources:** Reallocating some resources to focus on “hotspot areas”, for instance by paying for engineers to lodge in other regions<sup>84</sup> and pushing back provision appointments in order to prioritise repair appointments. Openreach also reduced the time spent by its engineers on any work that was not customer-facing. For example, from November 2022 onwards all training that was not safety-related was postponed.<sup>85</sup> Openreach estimated that this resulted in “c[><] customer incremental completions per week, but also impacted [><]”.<sup>86</sup>

- 5.32 Openreach said that it took the lessons learned from the earlier rounds of IA to improve its response and prospects of recovery. For example, during the third round of IA in October 2022, Openreach decided to move provision appointments from strike days in order to reduce the number of appointments missed. In March 2023 the Openreach Operations Board noted that based on the lessons learned from IA, going forward Openreach should [build in more flexibility in how it manages its workstack].<sup>87</sup>
- 5.33 Openreach described the approach it took to recovering its performance in wholesale local access as a “balanced recovery”. It said that this meant that Openreach was not singularly focused on recovering its performance for the services covered by QoS obligations at the expense of all others (for example, FTTP which is not subject to any QoS obligations) and instead, it sought to “improve services across all our products”. It explained that this approach was based on a decision by Openreach to ensure it “balanced resources between FTTP and copper-based services throughout the year, despite the risk this posed to achieving copper QoS standards”.<sup>88</sup> Put another way, Openreach took the decision to “not prioritise meeting the QoS standards for legacy services at the expense of service for FTTP”.<sup>89</sup> Openreach has explained that it took this decision with customer interests in mind, stating that “we avoided taking any actions which may have improved QoS reporting but would not have benefitted customers”.<sup>90</sup>

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<sup>82</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.35, para v.

<sup>83</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.30, para 66b.

<sup>84</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.31, para 66c.

<sup>85</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.6, para 11d.

<sup>86</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.31, para 66d.

<sup>87</sup> Openreach, 10 March 2023 (unpublished internal Openreach notes), Openreach Operations Board.

<sup>88</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.5, para 6.

<sup>89</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.11, para 24.

<sup>90</sup> Openreach, 27 September 2023 (unpublished confidential letter to Ofcom), p.24, para 42.

## Ofcom's consideration of Openreach's submissions

- 5.34 Industrial relations matters are complex, and it is not Ofcom's role to take a view on the merits of such matters. As Openreach submitted that IA should be a mitigating factor in Ofcom's assessment, Ofcom's function is to determine whether it is appropriate and proportionate to impose a financial penalty for its QoS performance if it has been impacted by IA.
- 5.35 We acknowledge that Openreach faced eight days of national IA in 2022/23 that directly affected its QoS performance.<sup>91</sup>
- 5.36 We accept Openreach's analysis of the degree to which its performance was affected and recognise that the direct impact on Openreach's performance is greater than the degree to which it missed its QoS requirements.
- 5.37 In deciding whether to treat the IA experienced by Openreach in 2022/2023 as a mitigating factor in our consideration of a penalty, we have considered the extent to which it was in Openreach's control to be able to respond to the IA it experienced as well as whether, given the accepted direct impact of IA on its performance, it could have been possible for Openreach to have still met its QoS requirements for the year.
- 5.38 We have determined that Openreach did have the opportunity to prepare for the prospect of IA and retained control over how it chose to respond to the impact of IA on its performance.
- 5.39 In May 2022 the Openreach Operations Board was informed that "*over the last year*" IA preparations had been underway, including IA support material, the facilitation of [X].<sup>92</sup> Openreach also provided evidence of modelling exercises that it undertook between May and July 2022 to anticipate possible scenarios.
- 5.40 We accept that there is an inherent unpredictability in undertaking an exercise of this nature. We also understand from Openreach's submissions that IA of the scale that took place in 2022-2023 was the first of its kind for Openreach.<sup>93</sup>
- 5.41 However, Openreach acknowledged that its "*forecasting tools significantly underestimated the level of strike action*". For example, the highest participation modelled for Service Delivery was [X]% but the actual participation rate in the first round of IA was [X]%.<sup>94</sup> A submission to the Openreach Limited Board from the Service Delivery team in June 2022 referred to "[X]% of our team members being a CWU member."<sup>95</sup>

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<sup>91</sup> In 2022 a number of sectors experienced industrial action. As well as telecoms, this included the postal sector. Industrial action in the postal sector was considered as part of a separate investigation conducted by Ofcom this year into [Royal Mail's compliance with its Quality of Service obligations](#) which are of a distinct nature to those imposed on BT.

<sup>92</sup> Openreach, 6 May 2022, (unpublished internal Openreach presentation) Openreach Operations Board, Slide 4.

<sup>93</sup> The industrial action which took place in 2022 was the first national telecoms strike since 1987.

<sup>94</sup> Openreach, 27 September 2023 (unpublished confidential letter to Ofcom), p.10, footnote 10.

<sup>95</sup> Openreach, June 2022, (unpublished internal Openreach presentation), Service Delivery Annual Review, slide 9.

- 5.42 The discrepancies between Openreach’s forecasted scenarios and the IA that took place meant that Openreach’s mitigations and recovery plan had less chance of success as they had not been formulated to respond to the scale of service disruption that Openreach actually experienced. Openreach has acknowledged that this element of its IA planning warrants improvement. In its Post-Implementation Review (PIR) from the first rounds of IA (29 July and 1 August 2022) as reported to the Openreach Operations Board in August 2022, Openreach acknowledged that it needed to “*increase the upper limit of worst-case scenarios*”<sup>96</sup> for future IA planning.
- 5.43 We have also considered whether it could be considered possible for Openreach to have been able to meet its QoS obligation given the known impact of IA on its performance. Or, put another way, whether it could be considered inevitable that Openreach would have failed to meet its obligations given the known impact of IA on its performance.
- 5.44 Openreach’s regular internal QoS reporting included statistics of its performance on a weekly, quarterly and year-to-date (YTD) basis, as well as forecasts based on its performance.
- 5.45 Openreach’s internal documents from the Relevant Period show that the company did consider it possible to meet the QoS requirements and that this view persisted for much of the year. From the evidence we have considered, it appears that the scale of the negative impact on Openreach’s performance became clear from September 2022 onwards, but Openreach did not appear to acknowledge to governance bodies until the beginning of 2023 that it no longer seemed feasible to mitigate against the risk of failure and its QoS performance would not be recovered.
- 5.46 Following careful consideration, we conclude that while IA did pose challenges to Openreach’s performance and did impact its service, it was not out of Openreach’s control to put in place further measures to mitigate the effect of IA on its performance, and particularly had Openreach not, by its own admission, underestimated the level of strike action. We also note more generally that we are not aware of any factors that were outside Openreach’s control that would have prevented Openreach in principle from putting in place sufficient measures to meet the QoS requirements. Therefore, we consider that it was not an inevitability that Openreach would fail to meet all of the QoS requirements as a result of the IA that took place.
- 5.47 Having reached this conclusion, we next consider the steps taken by Openreach to recover its performance and prevent a contravention of the QoS obligations.
- 5.48 Before IA had been confirmed, Openreach undertook scenario planning exercises to forecast what the likely impact on its performance would be and prepare a plan to recover that performance. As explained above, Openreach experienced IA of a scale that was the first of its kind for Openreach. We therefore understand that it might have been difficult to forecast with complete accuracy. However, it remains the case that Openreach appears to have underestimated the potential scale of the IA that would take place. This in turn appears to have had an impact on the effectiveness of its recovery plan. It is therefore reasonable to

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<sup>96</sup> Openreach, 11 August 2022, (unpublished internal Openreach presentation), Openreach Operations Board, slide 6.

consider that Openreach may have been able to recover its performance faster or to a greater extent if its modelling had been more accurate.

- 5.49 We also set out above the mitigating steps that Openreach took in advance of IA. This includes steps to get itself in the “*strongest possible position*” before IA began and to recover performance after IA. It appears that Openreach was successful in achieving the required QoS performance for Q1 and Q4. Openreach told us it “*started the year very strongly*”<sup>97</sup> and then was able to deliver “*record levels of service and customer satisfaction in Q4*”.<sup>98</sup> However, the levels of performance achieved in these two quarters were not sufficient to meet the required level of performance across the whole year.
- 5.50 The evidence we have received contains limited detail about what regional improvements were attempted. Nor have we seen evidence which explains the factors that enabled performance to recover in other regions which had been on-track to fail YTD for copper performance but not in Wales and the Midlands for T2R SML2 or London and the South East for L2C. We are therefore not able to reach an evidence-based conclusion that Openreach had taken all reasonable steps to meet the standards in these two regions or consider how its steps were balanced against efforts to recover in other regions. Similarly, we have not been able to reach an evidence-based conclusion on whether Openreach’s forecasting of the likely impact of the improvements put in place on Openreach’s year-end performance was appropriate.
- 5.51 However, from the evidence we have gathered, it does appear that Openreach made considerable efforts to respond to the impacts of IA and recover its QoS performance. These efforts began before IA had been confirmed and continued until the very end of the 2022/2023 year. We acknowledge Openreach’s submission that these steps had a negative impact on its workforce as well as that these incurred financial cost to Openreach.
- 5.52 It also appears that Openreach did keep the effectiveness of its mitigation measures under review and see some evidence of their having the desired impact of increasing Openreach’s capacity. For example, in October 2022 the Openreach Operations Board was informed that compared to the previous round of IA, [a difference between rounds of IA]”.<sup>99</sup> Similarly, we have seen evidence that in March 2023 the Openreach Operations Board discussed lessons that Openreach learned from IA, including a “[a different approach to repairs]”.<sup>100</sup>
- 5.53 Ofcom has reviewed evidence which demonstrates that Openreach was regularly tracking its QoS performance and reporting to its various governance bodies on its progress. There is also evidence that in these discussions Openreach did consider introducing further mitigating steps as the year went on. For example, in December 2022 the Openreach Policy

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<sup>97</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.3, para 4i.

<sup>98</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.30, bullet 2.

<sup>99</sup> Openreach, 7 October 2022, (unpublished internal Openreach presentation), Openreach Operations Board, slide 3.

<sup>100</sup> Openreach, 10 March 2023, (unpublished internal Openreach notes), Openreach Operations Board.

Board decided to investigate whether it was possible to increase the use of contractor labour.<sup>101</sup>

- 5.54 However, we note that over a period of several months, statistics showing possible failure were reported to internal Openreach governance bodies and these were often not accompanied by analysis of why these specific regions were performing badly, nor of the likely implications of this for Openreach or any information about any specific mitigating actions being introduced to address this performance. As mentioned above, we have also taken into account evidence that demonstrates Openreach considered it possible to recover its performance and this sentiment only seemed to change materially in January 2023 in relation to copper and March 2023 in relation to ethernet.
- 5.55 Taken together, it appears that Openreach may have overestimated the impact its recovery plans would have on its performance and so did not consider it necessary to introduce new mitigating steps as early as it could have, targeted at the standards it was forecasted to miss. We make further wider observations on these matters in Section 6.

### Ofcom's assessment against the Penalty Guidelines

- 5.56 We have considered all of these relevant factors in the round as they relate to our Penalty Guidelines in reaching a decision on whether to impose a penalty in respect of the contravention we have identified.
- 5.57 The factors in favour of imposing a penalty in this case include:
- a) This is not the first contravention by BT of its regulatory requirements to meet QoS obligations. In August 2017 Ofcom issued a Confirmation Decision against BT which determined that it had contravened its QoS requirements in relation to Openreach's performance, which were contained in SMP Condition 7 at the time. However, the circumstances relevant to the breach at that time do not relate to the circumstances of the alleged contravention in this case.
  - b) The inherently serious nature of a failure to comply with an SMP condition. Ofcom takes compliance with QoS obligations very seriously and we would expect to impose a financial penalty in any circumstances where there has been a failure to meet the required standards, and which cannot be justified by some mitigating factor. As outlined above, such a failure has occurred in this case as not all the required regulatory standards were met in the 2022/2023 performance year and we have decided this cannot be justified.
- 5.58 The factors against imposing a penalty in this case include:
- a) As set out above, Openreach argued that its failure to meet the three standards discussed above were primarily caused by the eight days of IA that it experienced and the direct impact that the action had on its performance. Our view is that the QoS obligations were missed by a narrow margin. While, as mentioned above, we do not consider that it was inevitable for the IA Openreach experienced to lead to a failure of its

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<sup>101</sup> Openreach, 13 December 2022, (unpublished internal Openreach presentation), Openreach Policy Board, slide 2.



QoS obligations, we acknowledge that the margin by which Openreach failed to meet its obligations is less than the quantified impact that IA had on its performance.

- b) Openreach has demonstrated that it took several steps to prevent or mitigate the impact on its quality of service in 2022/2023 or, in other words, steps to prevent or mitigate the contravention of its QoS requirements. We have considered evidence that Openreach did continue to make efforts for the duration of the 2022/2023 year to recover performance and sought to end the year in a strong position. Taken together, it appears the contravention was neither deliberate nor reckless.
- c) As discussed above, our assessment is that there were shortcomings in the approach that Openreach took to preparing and responding to IA which reduced the effectiveness of these attempts to prevent a contravention. This includes the modelling exercises undertaken by Openreach failing to forecast the actual scale of participation more accurately, as well as the recovery plan appearing to be less effective in improving Openreach's performance than anticipated, including because some mitigations were not introduced as early as they could have been. However, our conclusion is that there do not appear to be inherent structural weaknesses or gaps in the approach taken by Openreach. Openreach did take the steps we would have expected a regulated provider to take when anticipating an impact on its likelihood of meeting regulatory obligations and appears to have engaged with the spirit of the QoS requirements when taking decisions about how to respond to IA and dips in its performance. Openreach began working in advance of IA to try and forecast its likely impact and introduced new mitigations throughout the course of the year, in addition to regular tracking of its performance. While we would strongly encourage Openreach to make improvements to its approach in future so that it works more effectively, we are satisfied that it had the appropriate systems and processes in place; we therefore do not consider that these shortcomings warrant regulatory intervention.
- d) We have acknowledged that Openreach reported strong performance across half of the relevant year (Q1 and Q4) and has been performing at a level so far in this financial year consistent with meeting the standards. This suggests that duration of the contravention was limited to period which spanned the IA and its immediate aftermath, as well as suggesting that the contravention of the regulatory requirements is not ongoing.

5.59 For completeness, we also note that Openreach did not benefit financially from its failure to meet its obligations and did incur financial costs, as well as negatively impacting industrial relations, by introducing some of its mitigation measures.

## Conclusion on financial penalty

5.60 As set out in our Penalty Guidelines, the central objective of imposing a penalty is deterrence. Any penalty we set is therefore intended to discourage bad conduct and incentivise management to change the conduct of the company. Accordingly, in this case the primary objective of imposing a financial penalty in this case would be to incentivise BT and Openreach to comply with QoS in future periods, including by changing the conduct of the company, encouraging good practice and a culture of compliance across the organisation.

5.61 These standards are part of a framework of regulation that is reviewed periodically and in which we have the power to intervene to impose new standards or amend existing standards. The prospect of future regulation plays an important part in deterrence alongside our decisions in any particular case.

- 5.62 Taking account of the above, we have therefore concluded that a penalty is neither appropriate nor proportionate in this case. We therefore do not consider it necessary in this case to take specific steps – be that imposing a penalty or specific remedies - in order to have a material impact on Openreach so that it is incentivised to avoid recurrences of the contraventions in the future.
- 5.63 In this case, we consider that making a finding that Openreach has contravened the requirements under SMP Condition 10.1 is sufficient. From the evidence we have gathered, we are satisfied that BT and Openreach have the ability and necessary incentives to ensure compliance in future. We consider that Openreach duly recognises the importance of meeting QoS requirements and did endeavour to do so.

## 6. Further observations

- 6.1 The sections above detail the facts of Openreach's performance in 2022/2023 and Ofcom's consideration of whether a financial penalty is appropriate, having considered Openreach's performance and the extent to which it may have been impacted by IA, as well as an assessment of the mitigating steps taken by Openreach.
- 6.2 While, as detailed above, Ofcom has concluded that neither a financial penalty or any other remedy would be appropriate or proportionate in this case, we have also identified some shortcomings in Openreach's approach that it should learn from. Additionally, Openreach's submissions raise some issues that are fundamental to how the QoS obligations are considered alongside the other regulatory obligations placed on BT and Openreach. We therefore consider it would be beneficial to provide clarity on these issues by sharing our observations on these points.

### Preparing for industrial action

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- 6.3 In Section 5 above we discuss the forecasting and modelling work undertaken by Openreach to prepare for IA. This included considering the various IA scenarios that could arise and developing mitigation measures and recovery plans for such circumstances.
- 6.4 The scenarios that Openreach prepared for appear to have underestimated the degree of participation from its workforce and, correspondingly, the impact on its performance that it experienced. This appears to have hampered Openreach's attempts to accurately identify the scale of recovery and specific steps needed to bring its performance back to the levels required under its QoS obligations.
- 6.5 We note that Openreach conducted a PIR exercise after the first round of IA, which identified some learnings for future IA planning. We would expect Openreach to conduct a similar exercise following the conclusion of the last round of IA in 2022 and review its approach overall to identify further learnings for future planning. Now that the IA period has concluded, Openreach should be able to directly compare its forecasted scenarios with the facts of how IA unfolded. While there is some inherent unpredictability in undertaking modelling and forecasting exercises of this nature, we would expect Openreach to reconsider how it approaches identifying the worst-case scenario if any similar circumstances arise in future.

### Openreach's performance reporting

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- 6.6 As discussed in paragraph 5.53 above, Openreach reports to various internal governance bodies about its QoS performance at regular intervals. The evidence we have reviewed suggests that Openreach was aware it was at risk of failure to meet its regulatory requirements from September 2022 onwards but did not appear to acknowledge to governance bodies until the beginning of 2023 that it no longer seemed feasible to mitigate against the risk of failure and its QoS performance would not be recovered. Similarly, it is

not clear from the evidence we gathered, at what point Openreach – including its governance bodies – knew which specific standards and regions would end up missing the required thresholds for the year.

- 6.7 For example, the T2R SML2 requirement in Wales and the Midlands – which Openreach did not meet – was consistently reported as under the required threshold for its YTD performance from September 2022 onwards. In relation to the L2C requirement, performance in London and the South East was consistently reported as below the required threshold from October 2022 onwards. Between September 2022 and March 2023 Openreach’s analysis suggested that other regions were also at risk of missing the T2R SML2 and/or L2C thresholds, but these appeared to have recovered by the end of the year. It is not clear from the evidence we gathered whether there are other factors aside from Openreach’s application of MBORC which explain why this is the case.
- 6.8 In the evidence we gathered, mitigations are generally referred to in the context of improving a particular area of performance (e.g. repair vs provision) rather than being targeted at particular standards or regions. Therefore, while it is apparent that Openreach continued to strive to meet all of its QoS requirements for the duration of the Relevant Period and was still implementing new mitigation measures as far into the year as January 2023 (when contractual overtime was introduced), we have not made any assessment about how effective any of these interventions were implemented to improve the performance against the standards and regions which Openreach ultimately failed to meet. This includes any assessment of whether the interventions were implemented as fast as they could have been. It is also not evident to us whether Openreach’s governance bodies are being given sufficient information as part of Openreach’s regular reporting of QoS performance to take decisions on how to target interventions at particular standards or regions.

## Openreach’s broader obligations

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- 6.9 We note that some of the mitigating steps that Openreach introduced during the Relevant Period sought to mitigate the impacts of IA and improve its performance in other areas of its service, rather than being specifically and solely to recover its QoS performance. For instance, some of the resource gained from the contractual overtime introduced between 16 January 2023 and March 2023 was allocated to FTTP.<sup>102</sup> Openreach submitted that while FTTP is not subject to QoS requirements, FTTP service levels are “*of great importance to both end customers and Communication Providers*”<sup>103</sup> and therefore decided to balance its resource across both.<sup>104</sup> Additionally, Openreach said that it “*sought to take a balanced approach to service during the Industrial Action periods*”<sup>105</sup>, as opposed to focusing solely on recovery of the elements of its service covered by the QoS requirements.

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<sup>102</sup> Openreach, 6 January 2023, (unpublished internal Openreach presentation), Openreach Operations Board, slides 3-4.

<sup>103</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.5, para 6.

<sup>104</sup> Ibid.

<sup>105</sup> Openreach, 27 September 2023 (unpublished confidential letter to Ofcom), p.8, para 9a.

- 6.10 On 22 December 2022, the Openreach Policy Board received a slide deck which described trade-offs for Openreach to take into account when considering further steps it could take to improve its QoS performance. Items listed for discussion included whether to increase further resource available, move more resource to legacy T2R from other activities such as FTTP build or copper/fibre L2C, move resource between regions, or reduce the number of metrics missed or focus on improving all metrics.<sup>106</sup> Similarly, in January 2023 the Openreach Policy Board discussed that the focus was on *“meeting [QoS standards] whilst delivering an acceptable level of FTTP performance”*.<sup>107</sup>
- 6.11 Taken together, from the evidence we have received it is evident that Openreach deliberately did not implement every mitigation measure that was theoretically available to it. This is in part because, as mentioned above, Openreach took the decision to balance its recovery of QoS performance with recovering other elements of its service, such as FTTP. Additionally, Openreach told us that it was *“avoiding taking any actions which may have improved QoS reporting but would not have benefited customers”*.<sup>108</sup>
- 6.12 Openreach submitted that were Ofcom to find it in breach of its regulatory obligations to meet QoS requirements, this would suggest that Openreach had been wrong to attempt to balance recovery of its QoS performance against the needs of its customers and performance of other parts of its service.
- 6.13 In the mitigation report for the leased lines access market, Openreach described the interaction between the MTTP QoS measure and the Upper Tails QoS measure and stated that it continued to close tails in the latter part of the year when it had calculated that not doing so would have improved the MTTP measure.<sup>109</sup> Openreach said that *“if Ofcom was to investigate...this would set a strong precedent that Openreach should prioritise the Standards above other considerations, which will in similar situations lead to Openreach acting against customers’ interests in order to artificially meet regulatory targets”*.<sup>110</sup>
- 6.14 Additionally, as mentioned above Openreach said that IA *“was not a factor envisaged when the QoS standards were set”*.<sup>111</sup>
- 6.15 We disagree with these submissions. While Ofcom acknowledges the fact that it has not received any formal complaints or submissions from Openreach customers or other stakeholders about Openreach’s QoS performance in the 2022/2023 regulatory period, the QoS requirements are in place to ensure that customers consistently receive a minimum standard of service from Openreach. Therefore, meeting these required levels of service is to the benefit of Openreach’s customers. As mentioned above, the regulatory framework already includes a mechanism for performance to be adjusted in certain circumstances

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<sup>106</sup> Openreach, 22 December 2022, (unpublished internal Openreach presentation), Openreach Policy Board, slide 8.

<sup>107</sup> Openreach, 12 January 2023, (unpublished internal Openreach presentation), Openreach Policy Board, slide 2.

<sup>108</sup> Openreach, 27 September 2023 (unpublished confidential letter to Ofcom), p.24, para 42.

<sup>109</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.19, para 4.6.

<sup>110</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.19, para 4.7.

<sup>111</sup> Openreach, 6 June 2023 (unpublished confidential report). *Leased lines QoS MTTP 2022/23*, p.15, para 3.19.

where it has been affected by matters beyond Openreach’s reasonable control (MBORC). This includes circumstances where Openreach’s performance is affected by IA.

- 6.16 In addition to the standards that apply, Ofcom has direction making powers that can be used to introduce new standards or amend existing standards, and these could be used if Openreach’s behaviour in allocating resources were contrary to good outcomes for customers.
- 6.17 We note that, as mentioned above, the MBORC allowance was utilised by Openreach for precisely this purpose and was reflected in its final reported performance for the 2022/2023 year. Openreach applied the MBORC allowance for the full-year results for the two repair metrics (T2R SML2 in 5wd and T2R SML2 in 5wd) in two regions – London & South East, and Wessex – due to the impact of IA.<sup>112</sup> Had Openreach not applied MBORC for IA in this way, in addition to the three standards it missed for the 2022/2023 year it would have failed to meet the two repair standards in both of those regions and UK-wide, which would total a further six missed standards.<sup>113</sup> Further, Openreach told us it did consider invoking MBORC for provision given the impact of IA on its performance but ultimately decided the threshold had not been reached as it had been able to reschedule some provision appointments.<sup>114</sup>
- 6.18 We acknowledge that the QoS requirements are not the totality of the regulatory obligations that Openreach is subject to, as well as the fact that it does adapt its strategic approach in line with the priorities of bodies, including Ofcom. For example, Openreach is required to regularly report to Ofcom with key performance indicators (KPIs) on FTTP, despite the fact that FTTP is not currently subject to any QoS requirements, and this reflects the importance Ofcom and the wider industry has attributed to building customer confidence in FTTP and migrating customers over to FTTP services.
- 6.19 Openreach must take decisions on how to balance its regulatory obligations against its broader priorities and issues of the day, including its assessment of what may be best for its customers overall. This includes taking decisions about how to manage its resource effectively across the breadth of its service. However, it is ultimately Openreach’s responsibility to ensure that it is resourced sufficiently to meet all its regulatory obligations and its own priorities, with sufficient resilience built in. As stated in Ofcom’s latest [Openreach Monitoring Unit report](#), “Openreach’s decisions on the level of and resilience of resourcing and the deployment of those resources have a significant bearing on QoS outcomes”.

## Future compliance

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- 6.20 While we have decided that it is neither appropriate nor proportionate to impose a penalty in this case, we expect BT and Openreach to comply fully with its QoS requirements imposed

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<sup>112</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.8, para 17.

<sup>113</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.9, Figure B.2.

<sup>114</sup> Openreach, 6 June 2023 (unpublished confidential report). *WLA Market QoS Standards. Mitigating Factors Impacting Openreach Service Performance in 2022/23*, p.9, para 18.

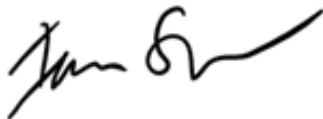
through SMP Condition 10.1. Our decision in this case should not be seen as a precedent that narrow misses of regulatory obligations imposed on BT and Openreach in the future will not result in a financial penalty. Accordingly, Ofcom will give serious consideration to a financial penalty in response to any failure to comply in future years.

- 6.21 Additionally, if there are any future instances of non-compliance with Openreach's statutory obligations to meet QoS requirements, we will consider the factors covered in the discussion above in addition to the specific facts of any future case. In particular, if we consider that the shortcomings we have identified above persist and impact any future performance, we may consider this a repeat infringement by Openreach.

## Interpretation

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Words or expressions used in this Notification have the same meaning as in the Act except as otherwise stated in this Notification.



**Ian Strawhorne**

**Director of Enforcement**