

Openreach's response to Ofcom's consultation

"Proposed Annual Plan 2018/19: Making communications work for everyone"

12 February 2018



Introduction

On 1 December 2017, Ofcom published a consultation “Proposed Annual Plan 2018/19 – Making communications work for everyone” (“the Consultation”).

This response is provided by Openreach Limited.¹

¹ Openreach Limited is a wholly-owned subsidiary of BT Group.

Openreach's comments on Ofcom's proposals

1. Openreach fully supports the three high-level, long-term strategic goals that Ofcom sets out in the Consultation: to promote competition and ensure that markets work effectively for consumers; to secure standards and to improve quality; and to protect consumers from harm.
2. Ofcom outlines how it will aim to pursue these goals, including supporting investment in network infrastructure and seeking to secure widespread availability, affordability and accessibility of good quality communications services across the UK. This shows that there is an underlying alignment between Ofcom's goals and the strategy adopted by the Board of Openreach Limited, which has at its heart better service, faster speeds and broader coverage.
3. Achieving Openreach's strategic aims will deliver ubiquitous world-class digital connectivity that is reliable, widely available and affordable for UK businesses and consumers. However, this is dependent on successful promotion of the right competitive structures and a stable environment for investment by Ofcom and Government.
4. In this response, we focus on the work plans in Annex A1 of the Consultation which will have a significant impact on the ability of Openreach to successfully deliver its strategy and support the achievement of Ofcom's goals. We also comment on the issue of Statutory Information Requests, which we believe should be the subject of a further work plan in addition to those which Ofcom outlines.

Support investment in network infrastructure: We will implement regulation following the Wholesale Local Access market review and continue to work with industry as necessary to support investment in advanced, competing network infrastructure, including co-investment.

5. Supporting investment in network infrastructure is the most important of Ofcom's work plans, since investment underpins achievement of all Ofcom's objectives including choice and high quality services for consumers and businesses.
6. Investment is also the key enabler for Openreach's strategy of better service, broader coverage and faster speeds. Our 'Fibre First' programme launched on 1 February 2018 confirms our commitment to investment. The programme extends our current Fibre to the Premises ("FTTP") build target by 50% to reach three million premises by the end of 2020. This will set us on the right trajectory of achieving our ambition of building a ten million FTTP footprint by the mid-2020s, and, if the conditions are right, to go beyond that, bringing FTTP to the majority of homes and businesses across the UK.
7. To ensure that these investments, as well as potential investments by other providers, go ahead and that the momentum for investment is maintained, a supportive regulatory and public policy framework is essential. Openreach is keen to understand how Ofcom will use this work plan to ensure that such a framework is in place, and we will be very interested to learn more about the Investment Conference that Ofcom plans to hold in the first quarter of 2018/19 (including the specific purpose of the Conference, agenda, invitees, format and intended output).
8. We believe this work plan needs to consider the key enablers for a regulatory framework that supports investment. These should include the enablers that we highlighted when we announced our Fibre First programme:
 - Certainty around the fair bet framework to ensure that initial and subsequent rounds of investment have the opportunity to earn returns that fully reflect the risk taken at the time of investment, and where competition is effective, greater commercial freedom;

- Support for and help with switchover processes when these become required to maximise the benefits of a new investment, for example the switchover from copper to fibre discussed in our comments on the 'Future of Voice' work plan below; and
 - Changes to wider, non-telecoms specific legislation, for example the extension of Cumulo rates relief which we believe is needed to support FTTP infrastructure investment by reflecting its extended timescales. Clearly this is an area where Ofcom needs to influence Government rather than to act directly itself.
9. Ofcom should also review its policy positions to assess the risks that its policies and proposals will have harmful effects on investment incentives. In our view, these effects will result in particular from Ofcom's proposals for a dark fibre remedy in business connectivity (see our comments below on the dark fibre remedy), the imposition of a charge control on Openreach's GEA 40/10 product, and Ofcom's intention to prohibit any geographic differentiation in the rental prices of Openreach's superfast and ultrafast broadband products. These will have the effect of favouring or protecting particular types of providers, and we believe they will chill investment across the industry as a whole.

Effective Openreach reform: We actively monitor and report progress on arrangements for the legal separation of Openreach from BT. We will assess the effectiveness of actions taken in benefiting consumers, including addressing our competition concerns and encouraging new investment in networks.

10. Openreach has made significant progress in implementing the reforms agreed in March 2017 as the outcome of Ofcom's Digital Communications Review (DCR).
- Our first independent Chairman, Mike McTighe, was appointed over a year ago at the end of November 2016, even before the DCR agreement between Ofcom and BT was reached;
 - The Openreach Board has been operational for a year, since January 2017. It has a majority of independent members. As well as the Chairman they are: Edward Astle, member of the Equality of Access Board established under BT's Undertakings and former senior executive at C&W; Sir Brendan Barber, former general secretary of the TUC; and Liz Benison, former chief executive of Serco's UK and Europe local and regional government business;
 - Our CEO, Clive Selley, reports to our Chairman instead of the Chief Executive of our parent company, BT Group;
 - We have launched our new brand, which does not include any references to BT or the BT logo;
 - Treating all our customers equally remains embedded in Openreach's DNA and at the heart of our ethos, but new and more transparent ways of working with our customers are now in place. In particular:
 - Openreach now consults differently – and confidentially from BT – with its customers on major investment decisions. Notably, we consulted our customers last autumn on the demand for and benefits of large scale FTTP, and their responses played a key role in Openreach's decision to launch the Fibre First programme discussed above;
 - Openreach is open to new risk-sharing and co-investment proposals from our customers;
 - Our technical and strategic capabilities have been strengthened: consistent with our greater independence, we have our own Openreach Technology and Information Office, and our own strategy, corporate affairs, legal and regulatory teams;

- Openreach responds in its own right to relevant Ofcom and Government consultations, and we have our own representation on a number of industry bodies.
11. We are keeping up the pace on implementation: in the last two months we have legally incorporated Openreach Limited, appointed our Board members as Directors, and transferred our senior executive team to the new company (the rest of the Openreach workforce will follow once outstanding pensions issues have been resolved and the required TUPE consultation has taken place).
 12. We are proud of what we have achieved on implementing the new, more independent Openreach so far. We are pleased to work with Ofcom's Openreach Monitoring Unit which has been established to help verify our compliance with the letter and the intent of the Commitments and assess the effectiveness of the new arrangements in delivering benefits to consumers, including encouragement of new investment in networks.
 13. We believe the new model of a more independent Openreach is already bearing fruit, with significantly higher investment in FTTP, year on year improvements in service across our copper, fibre and Ethernet portfolios, and new forms of closer collaboration with our customers.

Start the next competition assessment of the Business Connectivity Market: We will take account of the needs of businesses, telecoms companies and consumers in reviewing the provision of higher speed business connectivity services across the UK.

14. The regulation that came into force in 2016 at the conclusion of the last Business Connectivity Market Review (BCMR) was intended to last until March 2019. Last year, however, the Competition Appeals Tribunal found that Ofcom's market analysis in the 2016 BCMR was unsound; that all BCMR obligations, including dark fibre, should be quashed; and that Ofcom should reconsider its analysis of business connectivity markets.
15. Following the CAT's publication of its full judgment in November 2017, Ofcom made unprecedented use of emergency powers to re-impose with immediate effect most of the quashed regulation excluding dark fibre, through a Statement on temporary BCMR SMP conditions ("the Temporary Conditions Statement").
16. Ofcom also issued a consultation proposing the re-imposition of dark fibre from April 2018 to March 2019 – until the next BCMR is due to come into force – in the markets in which it found BT to have Significant Market Power (SMP) under its emergency powers in the Temporary Conditions Statement. These are the markets for wholesale Ethernet leased lines services of all bandwidths at and below 1Gbit/s in the UK excluding Central London and the central business districts of Birmingham, Glasgow and Leeds (see our comments on Ofcom's dark fibre work plan below).
17. Subsequently Ofcom has started work on the next BCMR. In carrying out this review, it is essential that Ofcom take full account of the CAT's judgment, in particular its rulings on product market definition, geographic market definition and the competitive core. Ofcom must also ensure its approach and conclusions are consistent with the principles of the regulatory framework, in particular that remedies are proportionate and that their effect is to promote efficient investment. This means, for example that any mandated minimum service levels must be achievable and set using up-to-date evidence, and that charge controls must allow full recovery of efficiently incurred costs.

Complete review of the dark fibre remedy: We will complete our review of whether it would be appropriate to add a dark fibre remedy to the package of regulation put in place under the BCMR temporary conditions statement.

18. As noted above, Ofcom consulted late last year on adding dark fibre to the remedies for business connectivity markets from April 2018 to 2019 in the markets in which it found BT to have SMP using its emergency powers.
19. Openreach submitted its response to this consultation at the end of the short, five-week consultation period. The non-confidential version of our response is available on Ofcom's website at <https://www.ofcom.org.uk/consultations-and-statements/category-3/dark-fibre>, and its key messages may be summarised as follows:
 - Like many other digital infrastructure investors in the UK, we are opposed to dark fibre because it would reduce incentives for new investment across the industry. It would also be bad for service, since faults are likely to take longer to fix on dark fibre than with active leased lines;
 - Improving the service we offer is our number one priority, and Openreach has made huge progress on service improvement over the last year. We have developed an alternative product, OSA Filter Connect, which we believe will meet our customers' needs without incurring the risks to the industry that dark fibre would present, i.e. reduced investment and a deterioration in service levels;
 - We have consulted our customers on OSA Filter Connect, and the feedback we received was positive. The product is due to be launched on 1 April. Ofcom should allow sufficient time for the effectiveness of OSA Filter Connect to be assessed rather than rushing to impose dark fibre without proper consultation and analysis.
20. The next step in the process is for Ofcom to publish and submit to the European Commission for review under the 'Article 7' process its draft Statement on the proposed dark fibre remedy. We look forward to seeing the draft Statement, but we maintain our view that Ofcom should have considered the remedy as part of the reconsideration required by the CAT and the next BCMR, and not seek to impose it without conducting a full market analysis and without properly assessing the costs and benefits.

Broadband Universal Service: We will continue to provide technical advice to Government when necessary, and report on uptake of broadband services. We will support implementation and monitoring of Government's decisions on broadband universal service policy.

21. Now that the Government has decided not to accept BT's offer of a universal service commitment, Ofcom needs to design, develop and implement a Broadband Universal Service Obligation (USO).
22. This will be a difficult task which will require Ofcom to identify the universal service provider, ascertain the extent of any net cost burden on the USP that will need to be funded and establish a USO fund with clear rules for identifying who must contribute and on what basis.
23. Broader coverage is one of Openreach's key strategic aims, and we are working hard to give people the speeds they need to run and enjoy their daily lives. We played a key role in ensuring that the UK Government's target of 95% superfast broadband availability was achieved in December 2017, and we are determined to get Britain – the whole of Britain – hooked up to decent broadband speeds.
24. We will continue to expand our network to address the remaining broadband not-spots through a combination of our own commercial programmes and our partnerships with local authorities and

communities, and stand ready to support Ofcom in developing workable solutions including the development of a fit for purpose broadband USO.

Future of Voice: We will identify and address issues raised by communication providers' migration to voice over IP, including any potential PSTN switch-off, with the aim of protecting consumers from harm and minimising disruption.

25. Migration to voice over IP and PSTN switch-off are inevitable, but the transition will only be successful if all stakeholders – industry, consumers, businesses and Ofcom – are properly engaged and prepared. We are
26. Openreach welcomes Ofcom's inclusion of this work area in its Plan and we support Ofcom's focus on consumers. We are keen to play an active and constructive role in this process: indeed, we are working on proposals on which we will consult our customers. However, we believe Ofcom should extend the scope of this work plan so that it also takes account of the transition from copper to fibre networks which will take place alongside the migration to voice over IP.
27. Openreach's Fibre First programme will see FTTP made available to three million UK homes and businesses by the end of 2020, and our ambition is to build a ten million FTTP footprint by the mid-2020s. Maximising the benefits of our FTTP roll-out to our customers, and to the consumers and businesses that they serve, will ultimately require complete switchover from copper to fibre in the relevant areas.
28. Our prime focus in planning fibre switchover will be to consult and reach agreement with our customers on how their needs can best be met. We also recognise that the needs of consumers, and particularly vulnerable consumers, are of paramount importance. This will involve in particular agreeing on a portfolio of replacement wholesale inputs for CPs' voice and broadband services and the timetable and other arrangements for the withdrawal of today's copper-based services such as LLU, WLR, GEA-FTTC and ISDN.
29. However, Ofcom will also have an important role to play, in particular in ensuring that consumers are adequately protected, by providing 'in principle' support to the switchover concept and by removing obligations on Openreach to provide copper-based services where and when appropriate.
30. We also believe Ofcom could play a pivotal role in ensuring a smooth migration, as it did in the switchover from analogue to digital TV. We look forward to the opportunity to engage with Ofcom on this matter in due course.

Safeguard and promote UK businesses and consumers' interests throughout the Brexit process: We will consider potential impacts on markets and relevant legislation from the changing nature of our relationship with the EU. We are providing advice to UK Government on topics related to the sectors we regulate, and we will continue to assist Government going forward.

31. As set out below, we support Ofcom's engagement in the development of the EU framework. However, Ofcom and Government need to make plans for a post-Brexit scenario in which the UK may not be bound by or aligned with that framework.
32. The existing EU framework has helped the UK communications market become one of the most competitive in the world, and any separate post-Brexit UK framework should retain its positive features. These include:
 - The clear and evidence-based approach to the assessment of market power and the application of remedies;

- The over-riding principle of proportionality;
 - The promotion of efficient investment and innovation in new and enhanced infrastructures, with any access obligations taking appropriate account of the risks incurred by investors, and providing sufficient regulatory certainty;
 - The alignment of regulation with competition law through the market review process, with ex ante regulation only to be imposed where there is no effective and sustainable competition;
 - The protection of the ability for new providers to enter the market without prior approval through the general authorisations regime; and
 - The requirement for the right of appeal against regulatory decisions to a body that is independent of the parties involved and with due account taken of the merits of the case.
33. At the same time, establishment of a separate post-Brexit framework would provide an opportunity for aspects of regulation to be enhanced in ways that may be considered more difficult to achieve under the EU framework. Such possibilities could include, for example: longer timeframes for market reviews; market definitions that better reflect technological change; withdrawal of regulation from legacy markets; and sunset clauses that would allow obligations that had become redundant to be removed between reviews when certain thresholds were met.
34. We urge Ofcom to open a dialogue with industry on how a post-Brexit framework that is no longer aligned with the EU framework should be formulated to get the best results for consumers and businesses. This would support and complement Ofcom's work in advising and assisting the Government.

EU Electronic Communications Framework: The European Commission published proposals reviewing the Electronic Communications Framework in September 2016. We will continue to work with the European institutions, other EU regulators and the UK Government to help ensure that any new legislation is proportionate, reflects the challenges facing the sector and meets the needs of consumers now and in the future.

35. Although the UK is leaving the EU, the eventual post-Brexit arrangements may be such that we continue to be bound by or aligned with the Common Regulatory Framework. Even if this is not the case, the UK may adopt aspects of the future EU framework that will result from the Commission's proposals. In view of this we support Ofcom's plan to continue to work with the European institutions, other EU regulators and the UK Government to help ensure that any new legislation is proportionate. Openreach is also engaging in the process through our parent company, BT Group.
36. In our view, it is essential that Ofcom seek to retain the positive features of the current framework that we have already highlighted. We also urge Ofcom, in the time that is left before negotiations are concluded, to lobby against proposals that some stakeholders in the process have put forward that we believe would damage investment and discourage network competition. Key examples include the proposals relating to the articles in the draft European Electronic Communications Code set out in the table below:

Article	Topic	Issue
22	Geographic surveys of network deployment	The European Parliament (“Parliament”) has proposed that NRAs should be able to fine any CP that deploys network in a ‘digital exclusion area’ contrary to a previously reported intention. This would be disproportionate and discourage network competition.
59	Power for NRAs to impose access obligations non-SMP operators	Parliament and the European Council (“Council”) are considering extending this power. This could lead to arbitrary and/or less predictable regulation and delays to deregulation.
61	Definition of SMP	Parliament has considering amendments that would lower the threshold for SMP. These would have similar impacts to the proposals above in relation to Article 59.
72	No wholesale price control where there is retail price constraint and effective non-discriminatory access	Parliament and Council have considered proposals that would weaken this provision. Again, this would have a negative impact on investment.
74	No SMP obligations to be imposed in the case of co-investments that meet certain criteria	One of the proposed criteria for no SMP obligations to be imposed is that a co-investment be open to potential co-investors on non-discriminatory terms over the lifetime of the network. Given that most co-investments are likely to involve some element of exclusivity, this criterion may need to be removed or adjusted (for example disapplied during a specified initial phase) if the potential for co-investments is to be realised.

Statutory Information Requests

37. The number and complexity of Statutory Information Requests (“SIRs”) has increased significantly over recent years. Openreach appreciates that Ofcom needs to have up-to-date, complete and accurate information to carry its role, and we have put a great deal effort and resource into improving the way we respond to SIRs.
38. We believe Ofcom should review its own practices and processes in relation to SIRs to ensure they are proportionate and targeted, and that they do not impose unnecessary burdens on stakeholders, in line with Ofcom’s duties and the principles of good regulation. We believe Ofcom should adopt a further work plan for 2018/19 focused on such a review, and we would be pleased to contribute our own ideas and suggestions.