



**Ofcom's Proposed Annual Plan 2019/20**

*TalkTalk submission*

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**NON-CONFIDENTIAL**

# 1 Summary

1.1 We welcome Ofcom's Proposed Annual Plan 2019/20 and continue to support its three high-level, long-term strategic goals to:

- Promote competition and ensure markets work effectively for consumers;
- Secure standards and improve quality for consumers; and
- Protect consumers from harm.

We also support the identification of "moving towards universal availability of high quality and secure communication networks" as a priority work area for the coming year (§1.2).

1.2 However, as we outline below, we consider that there are a number of activities that Ofcom must reflect in its work plan in support of this priority, particularly in respect of promoting investment in full fibre networks. It is not clear whether the omission of these activities indicates that Ofcom does not consider them to be priorities or, much more worryingly, whether it does plan to carry them out at all. Failure to include these activities in its plan, and undertake them in 2019/20, would be likely to diminish investor confidence in Ofcom's commitment to ensuring a competitive environment in which alternative networks can thrive. There would be a significant risk that genuine network competition will not get off the ground, and BT will entrench its monopoly. Ultimately this could lead to lower full fibre coverage delivered at a slower pace, and the majority of the UK would continue to depend on inferior networks not fit to meet the challenges of ever increasing bandwidth demands.

1.3 We also recommend that Ofcom should reconsider its approach to regulation in current and upcoming market reviews in order to promote sustainable competition and drive good outcomes for consumers. Deregulating before effective network competition has become established, as Ofcom has proposed in the Business Connectivity Market Review (BCMR) 2019 and appears to propose in the Access Review (referred to in the proposed Annual Plan 2019/20 as the Single Fixed Telecoms Market Review), will slow investment and lead to higher prices and lower service standards for consumers. Ofcom must include in its work plan a robust analysis of the different regulatory options for stimulating investment (with the aim of ultimately furthering consumers' interests) as well as an evidence based assessment of the costs and benefits of each one. At present, insufficient analysis and evidence has been presented to justify its proposals, as set out in our response to the BCMR 2019.

1.4 Finally, we highlight some areas of Ofcom's work plan of particular interest to TalkTalk, where we intend to continue to play an active role in collaborating to improve consumer protection across telecoms and online. We believe that industry and Ofcom need to continue to work together to drive good outcomes for consumers as communications networks and services evolve.

## 2 Promoting investment in full fibre networks

2.1 Promoting investment in full fibre networks is a vital strand of work within Ofcom's priority to move towards universal availability of high quality communications networks. Ofcom's 2016 Strategic Review of Digital Communications signalled a strategic shift towards incentivising full fibre investment through network competition. Its subsequent Strategic Policy Position paper, published in July 2018, set out how Ofcom planned to modify its

approach to the market review process and manage the transition to full fibre to implement the strategic shift. The paper followed DCMS' Future Telecoms Infrastructure Review (FTIR) in which it announced the Government's digital connectivity strategy. DCMS shared Ofcom's conclusion that network competition is vital in order to achieve nationwide gigabit-capable broadband coverage at pace and set out actions for Government, Ofcom and industry in support of the strategy in the FTIR.

- 2.2 We note that Ofcom's proposed Annual Plan 2019/20 refers to its plan to promote investment in full fibre networks, but only outlines a single work area directly in support of this priority (§3.5). It states that it will conclude its Physical Infrastructure Market Review (PIMR) in Q2 2019/20 with the intention of introducing an unrestricted duct and pole access remedy. We welcome this proposal and have included comments on the PIMR in response to the specific consultation.
- 2.3 We also note that Ofcom refers to its work with the UK Government, devolved governments and administrations, and other bodies, on network infrastructure, which includes a reference to engagement with Government on the FTIR (§4.38). However, the proposed Annual Plan 2019/20 does not include any further detail on Ofcom's role in implementing the FTIR and how this will be reflected in its work plan. We expect the Government will shortly publish its consultation on the Statement of Strategic Priorities for Ofcom following the FTIR conclusions. We consider that the proposed additions to the Annual Plan 2019/20 outlined below will help to ensure that Ofcom is on the front foot with regard to its role in implementing the FTIR and improve clarity to stakeholders about how the programme of work will be delivered over the next year.
- 2.4 We consider that Ofcom must include the following activities to its published work plan in order to support its priority to promote investment in full fibre networks and to deliver its role in FTIR implementation.

Ensuring the conditions are in place for effective competition between network providers

- 2.5 Effective monitoring and transparency mechanisms are required to support the development of healthy competition and ward against anti-competitive behaviour by Openreach. These two activities are closely linked and we set out our specific expectations for each below.
- 2.6 **Proactive monitoring of Openreach.** Monitoring refers to specific activities the regulator must undertake to track how competition develops and identify anti-competitive behaviour. Ofcom's strategic shift towards encouraging network competition, and away from tightly regulating access to a monopoly network, requires it to evolve its regulatory approach. Ofcom must set out the steps it will take to monitor how competition develops in the market and deter any anti-competitive behaviour by Openreach that would stifle competition. As set out in our joint letter with other alternative network providers to Ofcom's Chief Executive, Sharon White, dated 20 November 2018, we are concerned that the risks of anti-competitive behaviour by Openreach are not being addressed. In particular, we are concerned that Openreach may act in a predatory way by deliberately targeting overbuild of its competitors' networks to deter new entrant investment. Sharon White's response to our letter confirmed that Ofcom is *"taking a proactive monitoring role in this area and [is] ready to investigate any anti-competitive behaviour or breach of existing regulatory requirements"*. It also highlighted the Openreach Monitoring Unit's (OMU) continuing role in tracking Openreach's behaviour.

- 2.7 Following these assurances, we expected to see reference to the specific activities Ofcom plans to undertake to proactively monitor and, if necessary, investigate anti-competitive behaviour by Openreach in the proposed Annual Plan 2019/20. The final Annual Plan should be updated to include information on these activities, including Ofcom's intention to share, and possibly consult on, details of its approach to proactive monitoring, in order to assure investors that anti-competitive behaviour will quickly be identified and addressed.
- 2.8 More generally, we note that Ofcom plans to continue to monitor progress following the legal separation of Openreach from BT and will produce another annual compliance report, in advance of a full review of outcomes in 2020/21 (§4.31). We hope that his review will set out clearly Ofcom's expectations of 'what good looks like'. To date Ofcom has not defined what benefits it expects the legal separation of Openreach to deliver, over what time period. Without this clarity, it is difficult to assess – and for consumers to have confidence – that legal separation is working.
- 2.9 **Transparency measures.** Transparency refers to the information the regulator must require Openreach to make public in order to support the development of healthy competition. In the FTIR, DCMS recognised the role that greater transparency around Openreach's build plans could help increase the confidence of investors in alternative networks. Specifically, it said that transparency would allow alternative network operators to choose to compete head-to-head with Openreach, or to allocate capital to roll out in other areas. It said that Government would discuss the implementation of transparency measures with BT and Ofcom. We note that Openreach recently published an update on its proposals to share a 12-month forward view of where it intends to start building and the number of exchanges in plans to connect in these locations over a 24-month period. It proposes to update the information on a three-month rolling basis, including identifying the specific exchanges in plans to build to in the next three months.
- 2.10 Whilst we welcome any improvement in Openreach transparency, the proposed system falls significantly short of what is required to fulfil DCMS's objectives and support investment. We consider that Openreach should share five year build plans, and make commitments to specific exchange locations with more than three months' notice in order for alternative network providers to take account of the information provided within their own build plans. Longer forecasting periods would also help to assure alternative network providers that Openreach is not changing its build plans in an anti-competitive way. We consider that Ofcom's Annual Plan 2019/20 should include work with Openreach and the wider industry to ensure appropriate transparency measures are established, alongside its work on proactive monitoring of anti-competitive behaviour identified above.
- 2.11 **Effective duct and pole access (DPA) implementation.** Effective implementation of the DPA remedy introduced by the 2018 Wholesale Local Access (WLA) review, and further amendments to remove usage restrictions following the conclusion of the PIMR, will be vital to enabling large-scale use of Openreach's network by alternative network providers. Delivering DPA is central to Ofcom's strategic shift towards encouraging network competition and will allow alternative network providers to roll out more quickly, more widely and at a lower cost per home. Sharon White's response to the November 2018 letter from alternative network providers referred to Ofcom's plans to engage further with Openreach on the need to demonstrate its compliance with the no undue discrimination obligation for DPA.

2.12 In order for implementation of DPA to be successful, we believe that Ofcom should identify the following activities in the Annual Plan 2019/20, in addition to its proposed work on the PIMR:

- Engagement with Openreach, industry and the OTA on KPIs and establishing proactive monitoring of no undue discrimination compliance following publication of the WLA Reference Offer by Openreach on 1 April 2019;
- Continued monitoring of DPA implementation following 1 April 2019 to assess its effectiveness and ensure a process of continuous product improvement is established.

2.13 **Establishing principles for switchover to full fibre networks and consumer switching between networks.** Smooth and fair switchover and inter-network switching processes will be important to make sure that consumers are able to benefit from competition between alternative networks. DCMS and Ofcom recognised the importance of managing the transition from copper to fibre and establishing effective switching processes in the FTIR and Strategic Policy Position paper respectively, however the proposed Annual Plan 2019/20 does not include any details of Ofcom’s work in this area. We consider that the plan should be updated to include Ofcom’s planned activities on full fibre switchover and inter-network switching. This work could usefully include scoping the technical, commercial and regulatory challenges presented by the transition and identifying where Ofcom will need to play a leadership role in order to ensure positive outcomes are delivered for consumers. We recognise industry collaboration and participation will be an important part of this process.

### 3 Promoting competition and ensuring markets work effectively for consumers

3.1 The proposed Annual Plan 2019/20 refers to Ofcom’s plan to consult in Q3 2019/20 on the Single Fixed Telecoms Market Review (SFTMR). Based on our understanding of Ofcom’s direction of travel based on the current BCMR consultation and wholesale telecoms geographic markets consultation (which will feed into the SFTMR), we consider that Ofcom must conduct a thorough assessment of regulation required to best support investment and deliver the ultimate goal of furthering consumers’ interests. In particular, should include in its work plan a robust analysis of the different regulatory options for stimulating investment and promoting consumers interests as well as an evidence based assessment of the costs and benefits of each one. At present, insufficient analysis and evidence has been presented to justify its proposals, as set out in our response to the BCMR 2019.

3.2 We note that since the publication of the proposed Annual Plan 2019/20 Ofcom has issued an update on the BCMR. The final plan must be updated to reflect the delayed publication of the Statement from spring 2019 to May 2019.

### 4 Protecting consumers from harm

4.1 We welcome Ofcom’s proposals on consumer protection, and particularly highlight the areas below.

#### Harmful online content

We welcome Ofcom’s plans to work with other regulators and policy-makers on efforts to reduce harmful online content. Ofcom’s experience in regulating both online companies (such as ISPs) and broadcast content, as well as its statutory duty to promote media literacy,

is highly relevant to this debate. We agree with Ofcom's recent statements regarding the lack of consistency of standards of regulation across different modes of content delivery and the confusion this causes consumers. We are also supportive of its conclusion that any future regulatory model should be guided by the principles of protecting audiences and scrutinising companies' own processes. We would support further research by Ofcom on these issues to inform wider discussions on online content regulation. In particular, we would welcome an assessment by Ofcom of the risk to current online safety features (such as parental filters) posed by a shift to DNS over HTTPs, which is being developed by the Internet Engineering Task Force and implemented by certain web browsers.

#### Migration to voice over IP services

- 4.2 We support Ofcom playing an ongoing convening role to help coordinate the transition to all-IP voice in order to minimise disruption to consumers and protect vulnerable people. In parallel, we note Ofcom is planning to consult on a review of interconnection taking account of the transition to All-IP and expect to engage on the need for regulation at the IP exchange.

#### Consumer policy

- 4.3 We welcome Ofcom's work on introducing requirements for end-of-contract and annual best tariff notifications. These requirements will address the consumer harm by helping consumers to switch providers and reducing the loyalty penalty suffered by consumers who do not actively consider their options. TalkTalk believes there is also scope for further work by Ofcom in this area by finding ways to tackle the consumer harm resulting from frequent in-contract price rises.
- 4.4 We also support Ofcom's initiative to improve access by consumers to reliable data about available broadband services. It is important that a sensible, market-driven approach is actively sought under Ofcom's supervision which enables providers and price comparison websites to reach an agreement on the best way forward in this matter.