

Delivering the Broadband Universal Service - Proposals for designating providers and applying conditions

Our response to this consultation comes in two parts. First, we make some comments on issues covered or mentioned in the consultation. We then answer some of the questions posed by Ofcom.

Satellite

The envisioned checking process requires that the Universal Service Provider (USP) ensures whether the premises making the request already has access to decent, affordable broadband. This process must include an assessment of whether a satellite service can meet the USO criteria because it is plausible that, in time, a satellite service *will* meet the USO criteria. Ofcom notes that *“available satellite capacity is likely to increase from 2020 as several major satellite operators are launching new satellites with a footprint over the UK”* (3.22). It also appears to view satellite access as a near substitute for USO broadband provision: in 3.2 Ofcom says that for those whom the cost of USO provision is in excess of £3.400 can *“use an alternative technology, such as commercially available satellite broadband”*.

We also note that satellite providers are offering 100GB of monthly usage with no time of day restrictions (see: <https://bigblu.co.uk/satellite-broadband/>) albeit at a higher price than the cap envisaged by Ofcom. That said, the Universal Service Order refers only to the *capability* to allow data usage of at least 100 gigabytes per month. The Order is not specific about the times of day when usage should occur. We assume that a satellite provider could offer a service that meets the criteria of the Order (including affordability) by requiring the user to consume a proportion of his or her monthly data allowance between (say) 10pm and 6am the following morning. It is important for Ofcom to provide guidance on how it will interpret this leg of the order; it may be that some satellite providers can offer a ‘compliant’ service if they are permitted to designate a certain percentage of usage for off-peak periods.

If satellite services meet the USO criteria Ofcom should consider how information about availability will be made available via the Connected Nations report. If the latter is the bible for assessing the eligibility of the USO request (see 6.29) it needs to include satellite coverage otherwise we risk false positives: premises designated as entitled to the USO service when they should not be.

Wireless

Ofcom quotes BT’s response to its previous consultation.

“BT described the proposal for a one-year delivery timeframe as arbitrary and unrealistic considering how markets work in practice and said that it could risk distracting from wider objectives on digital infrastructure. As set out in Section 3 and 5, BT suggested that its fixed wireless broadband service could reduce the footprint from 600k premises to 150k. Of these,

BT expects that 110k will cost above the £3,400 cost threshold to connect and therefore will not eligible for the USO.” (7.4)¹

Ofcom then states that it is working with BT *“to gather more information on the performance of the broadband services received by its current fixed wireless customers to understand its capabilities of meeting the technical specification of the USO.”* Ofcom intends to conduct these tests over winter 2018/19 and expects *“the results to inform our consideration of whether this technology can provide a decent broadband service that meets the technical specification.”*

Clearly a lot turns on Ofcom’s assessment of the capability of the fixed wireless technology (potentially a fifteen-fold increase in the quantum of premises covered by the USO) and we submit that Ofcom should invite comment on its study. The latter will no doubt draw from ‘on the ground evidence’ perhaps from customers. It might also usefully reference BDUK’s 2016 report on various market test pilots in hard to reach areas². It reports that *“[n]on-fibre based technology suppliers can deliver reliable, superfast-capable broadband speeds and a quality of broadband service that satisfies the vast majority of customers”* and *“[i]nitial feedback from customers revealed that most were positive about their new broadband service. The satisfaction rating was consistently high across fibre, fixed wireless and satellite technologies.”*

More recently, for example, South Norfolk Council last year established an agreement with InTouch Systems that aimed to support the deployment of a new 10Mbps+ capable wireless broadband network in digital disadvantaged parts of the region (i.e. fixed wireless broadband ISP ITSwisp). The work now appears to have completed and as a result there are a total of 33 wireless transmitters (20 on masts and buildings, 13 on churches, 24 located in South Norfolk and 9 just over the border). Apparently, many of those already using the network are receiving speeds of up to 30Mbps, with 10Mbps being the minimum. (See <https://www.ispreview.co.uk/index.php/2018/12/south-norfolk-uk-claims-100-coverage-of-10mbps-broadband.html>).

Additionally, we hope that Ofcom will analyse and set out the interplay between the USO and the coverage requirements (which attract discounted prices) in the upcoming 700MHz and 3.6-3.8GHz auction. The requirement of at least 90% geographic coverage, with specific targets for each Nation,³ may reduce the number of candidate USO premises if the services provided meet the USO quality thresholds.

Efficient Costs

Ofcom makes an important distinction in 7.37 which we support. Leaving aside the issue of whether net costs incurred by the USP are ‘unfair’, these costs will only be permitted compensation for efficient deployment *between* technologies. This means that Ofcom will:

¹ Note the Connected Nations report estimates that 41k premises are unable to get a decent wireless (4G) or fixed broadband service. This is significantly below BT’s figures at 3.31 saying that its estimate of the USO eligible premises is 150k.

² DCMS: Emerging Findings from BDUK Market Test Pilots, February 2016

³ Furthermore, these geographic coverage obligations are to be met within four years of the award.

“consider whether the Universal Service Provider could have delivered the USO more efficiently using different technologies. In assessing the efficient technology choice, we would take account of the ongoing operating costs of the technology deployed, not just capital costs. Any such cost advantages of full-fibre deployment over other technologies, for instance due to lower maintenance costs, should be reflected in that assessment”.

However, we struggle to see how operating cost efficiencies could be material enough to justify FTTP deployment versus FTTC or wireless broadband. This is presumably why BT intends to tackle such a high proportion of the premises that do not get adequate broadband through its wireless broadband service, but puzzling as to why it expects to deliver *“most USO connections with FTTP”* (8.5). In any case, we await to see how Ofcom intends to blend capex and opex to evaluate the absolute and relative costs of deployment in the Summer 2019 consultation.

Furthermore, if a USP provides a USO connection using an inefficient or ‘gold plated’ technology then no part of its net cost should be claimed from the fund. There must be no ex post adjustment to assess what the net cost would have been had the most appropriate technology been deployed, with the latter included in the industry fund. This gives the USPs the right incentives to deploy their (and potentially others’) capital judiciously. We understand that this accords with Ofcom’s views in (for example) 7.37: *“we would only compensate a net cost where it can be demonstrated that the costs incurred in providing connections were efficient”.*

Penetration Assumptions

Ofcom makes an unreasonably bullish prediction about the uptake of USO connections and then compounds the problem by properly providing for the adjustment of the penetration assumption downwards if turns out to be too optimistic.

One benchmark for update would be BT’s assumption under the BDUK programme; this is 61%. Using Ofcom’s analysis in 6.65 onwards, a better assumption would be 60% (although this is still a stretch because it includes demand for speeds far in excess of 10Mbit/s). It is certainly not valid to extrapolate the demand for basic (safety net) 10Mbit/s broadband on the basis of an assumed demand for *superfast* broadband on the assertion that these two area types will mirror one another. Ofcom could helpfully keep in mind a number of influences on uptake:

- The precise geography of areas which might benefit from a broadband USO is unknown, but it seems reasonable to assume that it will be primarily remote regions. On this basis, we consider the characteristics of the ONS category ‘rural hamlets and isolated dwellings’⁴, which makes up 3.5% of all households in England & Wales. (UK wide data does not appear to be readily available) to be relevant.
- One key difference is that such households are significantly less likely to be occupied than those in the rest of the UK: 8.6% have no ‘usual residents’ compared to 4.2%

⁴ Including those in sparse settings

for the rest of England & Wales.⁵ This suggests that providing broadband coverage will be less efficient – the same number of homes passed will result in a lower number of homes connected.

- Such areas also skew older in their population, with 21% aged 65 and older, compared to 16% for the rest of England & Wales. Older individuals are less likely to use the internet, and make less intense use of it when they are online. This again suggests a lower demand in USO areas. Notwithstanding demographics, these areas by definition have never had access to decent broadband, therefore some degree of self-selection would be expected by those individuals that live in such areas.
- As we note above, in 2015 BDUK ran some market test pilots to demonstrate how superfast infrastructure could be delivered to some of the hardest to reach areas of the UK. BDUK surveyed potential customers who had heard of the scheme, but not participated. 39% said that it was because they were happy with the service that they currently receive, and 17% said that they don't use the internet that often (it's just a hobby).⁶

A better approach would be for Ofcom to do its own research on likely uptake. For example, in the Connected Nations Report Ofcom says that “[s]ome 46% of respondents to 2017 Ofcom research said they did not see the need for superfast broadband and a further 15% felt superfast broadband was too expensive for their needs” (2.19).

The potential adverse consequences from over optimistic projections – funding connections when the cost per premises is, in fact, above £3,400 – is highly unlikely to be compensated by potential under funding i.e., not paying for connections that would have met the threshold if the take up assumption had not been erroneously set at 70%. This is for two reasons: a) we submit that the base assumption is too high (see above) and b) there is a one-way ratchet which ensures upward movement in the penetration assumptions if uptake is greater than assumption. Ofcom proposes that USPs monitor actual USO take-up among eligible premises and “*use actual take-up as the basis for demand aggregation if it exceeds the forecast take-up level at any point after the USO is introduced*” (6.61). We cannot fathom why the penetration assumption cannot be adjusted downwards if the projection is too bullish. Paragraph 6.62 contains a vague suggestion that Ofcom “*may review and adjust the forecast take-up level in future, should we consider that it is not set at an appropriate level*”. This is little reassurance to contributors to the fund (and their customers)⁷; instead, Ofcom should commit to reviewing the take-up assumption annually. Alternatively, the USPs should be given the same obligation to adjust the take-up assumption down when this can be justified on the basis of the data collected.

⁵ Communications Chambers analysis of ONS/Nomisweb data

⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497369/BDUK_Market_Test_Pilots_-_Emerging_Findings_Feb_2016.pdf

⁷ Note that in 6.59 Ofcom has thought about fairness between potential recipients of the USO. It should also consider fairness between recipients and funders (who may notionally live in close proximity).

Timing

The USPs can speak for themselves about the feasibility of the delivery time, but we believe that allowance should be made when there is uncertainty about the date of provision of publicly funded (superfast) service. It makes no sense for a wireless USO service (the most efficient technology) to be overbuilt by a publicly funded FTTC/FTTP in (say) mid-2020. This is just wasteful, and could increase the net cost of both the USO and the subsidised scheme. There should be a pragmatic relaxation of the delivery time when there is legitimate uncertainty about the timing of other schemes.

The same reasoning should apply when timescales for publicly funded schemes are known but come later than 2020. For example, Ofcom refers to the Welsh Government's Phase 2 Superfast Cymru programme. This will initially provide access to fast broadband to 16,000 premises by March 2021 in North Wales (Lot 1), the South West and in the Valleys (Lot 3). The majority of these premises will be served by FTTP connections including all premises in Lot 3. It surely makes little sense to provide a 10Mbps/s USO service to these localities a matter of months ahead of the Superfast Cymru programme? Ofcom also notes that the R100 programme in Scotland is due to award contracts in the first phase of procurement in 2019.

Unfair Burden

We appreciate that this will be the subject of a later consultation.

Ofcom acknowledges in 2.34 that net costs are only compensated via an industry fund if they constitute and 'unfair burden'.

At this juncture we note only that the concept of 'unfair burden' has been judicially considered in the Base case [Base NV and Others v Ministerraad, Judgment of the Court (Fourth Chamber) 6 October 2010]. In that case, the court determined that:

- I. it is only on the basis of the calculation of the net costs of the provision of universal service, as referred to in Article 12, that national regulatory authorities may find that an undertaking designated to provide universal service is in fact subject to an unfair burden' (Ofcom recognises this in 9.21);
- II. an 'unfair burden' is a burden that 'is excessive in view of the undertaking's ability to bear it, account being taken of all the undertaking's own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share' (para 42); and
- III. it is not sufficient to conclude that there is a 'loss-making situation' from the provision of universal services (para 46). There must be an individual assessment of the impact of the impact of bearing that cost on the relevant operator (Para 51).

We will obviously develop this theme in our response to the upcoming consultation.

Sharing information with the USP (see attached letter)

Ofcom intends to provide access to information it holds on broadband availability, gathered as part of its Connected Nations reporting (via an API). Ofcom also proposes to make regular bulk data extracts available to the USP on premises that cannot get decent broadband. In the case of the former, this will enable to USP to check whether decent broadband is already available at a given premises and if so, to which provider the requestor should be directed. In the case of the latter, this is intended to enable USPs to calculate whether the cost of providing a USO service to a property exceeds the £3,400 cost threshold, taking into account the extent to which costs can be shared with other eligible properties.

As we have made clear to Ofcom⁸, in we have significant concerns about the provision of the latter bulk data set to the USP. Specifically, we believe that the USP will be afforded an unfair competitive advantage by allowing it, for example, to establish where Virgin Media has recently, or is likely to, expand its network.

We note that Ofcom has proposed a specific Universal Service Condition aimed at reducing such risks. We welcome this proposal, but we do not believe that it is sufficient. Given the sensitivity of the information, we consider that there should be stronger conditions relating to the separation of the information and containment of it within BT for the specific, limited use. Compliance assessments, auditing and other controls should also be implemented (ideally via the Openreach Monitoring Unit).

In the case of the API, we welcome Ofcom's proposal to restrict access to individual address level queries but again, do not believe that the proposed restrictions and controls go far enough. Stronger conditions relating to the separation of the information and containment of it within BT are necessary, together with technical usage controls and compliance/auditing requirements.

If such information is made available, it should be explicitly under the terms of these sole uses in each case. Ofcom must be able independently to monitor any requests to the system or database and the USP should be able, if necessary, to identify the employee that queried the system and be able to evidence the specific USO request which prompted the query.

Calculating the cost of providing a USO connection

We broadly support the high-level approach to the cost calculations Ofcom sets out in this consultation. In particular, that only infrastructure-related costs should be included. Given the circumstances of these calculations (that they are in areas which are not commercially viable to build to, and that they may be subject to a claim from the USP of an 'unfair burden') we believe there is scope for and value in more extensive disclosure of the cost calculations to stakeholders than might be envisaged in other circumstances where commercial confidentiality concerns may carry more weight.

⁸ See our letter to Selina Chaddha of 28 January 2019

We agree that only infrastructure-related costs should be included in demand aggregation calculations. Additionally, where shared infrastructure costs are concerned, these should only be considered in scope where they do not relate to existing, sunk, costs or infrastructure that will be used for non-USO service provision as these costs will (or will have) been reflected in other, commercially viable, business cases adopted by the USP and so could not be considered to contribute to an 'unfair burden'.

Question 1: Do you agree with our proposal to designate KCOM in the Hull Area?

Yes.

Question 2: Do you agree with our proposal to designate BT for the whole of the UK except for the Hull Area?

Yes

Question 3: Pursuant to paragraph 3(2)(c) of the 2018 Designation Regulations, are there alternative proposals from any other person to be designated as a Universal Service Provider instead of BT or KCOM?

Question 4: Do you agree that the threshold for an affordable price for the purposes of USO eligibility should be set at £45 a month (including VAT, connection charges, monthly payments and other broadband charges)?

We see little evidence of a broadband affordability problem (real expenditure on broadband and unit prices per MB carried are falling over time) and as Ofcom notes in 8.23, USO households skew wealthier than non USO by a significant proportion. This type of rule is better instituted when the evidence on the ground demonstrates a need.

Question 5: Do you agree with our proposed approach to how Universal Service Providers should check eligibility for the USO?

Yes, but must include satellite (and mobile wireless options in the future).

Question 6: Do you agree with our proposed approach to how Universal Service Providers should take account of shared connection costs?

No. The update assumption is too optimistic. If it isn't changed, it should be adjustable (up and down) based on evidence.

Question 7: Do you agree with our proposed approach to informing consumers of the outcome of their USO request?

Yes.

Question 8: Do you agree with our proposal to include a universal service condition requiring Universal Service Providers to raise awareness of the USO?

Yes.

Question 9: Do you agree with our proposals set out above, including to set a timeframe of 12 months for the delivery of USO connections unless exceptional circumstances have arisen?

Not entirely, allowance should be made for anticipated publicly funded schemes. We also share concerns expressed by BT, KCOM, CityFibre and Gigaclear that a 12-month delivery timeframe may be overly ambitious. [Confidential]. Given the additional complexities associated with USO deployment, 12 months would appear to set an excessively high bar.

We also have concerns that both proposed USPs have indicated that this timeframe is likely to lead to special measures, such as employing external contractors, as this is likely to inflate costs. If these costs are incurred in pursuit of delivery timeframes that even commercial build often does not achieve, this would raise questions about the extent to which the conditions are justifiable and proportionate. Even if Ofcom decides not to adjust this timeframe, we do not think the USP should expect to recover incremental costs associated with more expensive choices it might make, instead of diverting resources from existing build programmes, if this proves necessary.

Question 10: *Do you agree with our proposals on how exceptional circumstances should be defined and operate?*

Yes.

Question 11: *Do you agree with our overall approach to ensuring USO connections and services are affordable, specifically on:*

- a) our proposal to introduce a two-part obligation imposing (i) an equivalent pricing requirement, and (ii) a safeguard cap; and*
- b) setting the level of a safeguard cap at £45 per month (including VAT, averaged over the fixed commitment period, including any upfront connection charges, monthly payments and other broadband charges)?*

See answer to question 4.

Question 12: *Do you agree with our proposal to ensure that USO customers receive at least the same quality of service as non-USO customers?*

Question 13: *Do you agree with our proposed approach to complaints handling and dispute resolution?*

Question 14: *Do you agree with our proposal to approve the two Alternative Dispute Resolution schemes currently approved under the General Conditions (Ombudsman Services: Communications and the Internet Services Adjudication Scheme) for resolving disputes in relation to the USO?*

Question 15: *Do you agree with our proposed approach to how the Universal Service Providers should report on their performance and maintain records?*

Question 16: *Do you agree with our approach to how Ofcom should report and monitor delivery of the USO?*



Question 17: *Do you agree with our proposed approach to require Universal Service Providers to maintain accounting records?*

We support the above.

**Virgin Media
February 2019**



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28th January 2018

Dear Selina,

Broadband Universal Service Obligation: request for views on proposed disclosure of information

Thank you for your letter of 10 January 2019, requesting Virgin Media's ("VM") views on Ofcom's proposed disclosure of information in relation to the Broadband Universal Service Obligation (the "USO").

We recognise that access to information about the availability of existing services delivered by providers who have not been designated as Universal Service Providers ("USPs") will help to ensure an efficient and effective USO implementation. We also acknowledge Ofcom's efforts to ensure that sensitive and confidential information relating to those providers is treated as such and is not misused. However, we do not believe that Ofcom's proposals for disclosure of that information are sufficient in their current form.

Provision of Bulk Data

Specifically, we are concerned about the ability of BT in particular to 'reverse engineer' the bulk information that Ofcom proposes to provide to it, in order to determine the VM footprint.

We believe that it will be possible for the VM footprint, or at least a very good proxy of it, to be determined from this data. That is, BT could subtract the premises in this list from the overall list of UK premises, to establish a list of premises that would provide an indicative view of VM's presence. In particular, this analysis would enable BT to determine all of those areas where Virgin Media has a footprint but BT has not yet upgraded its own network. We acknowledge that this would not be a definitive record of our entire coverage footprint, given that some of the premises in the list would be served not by VM, but by alternative providers (such as CityFibre, Gigaclear etc) – i.e. the list would overstate slightly the VM footprint. However, given

that deployments by those providers have, to date, been somewhat limited, we believe that the vast majority of premises will be those that are served by VM.

As such, we believe that BT will be afforded an unfair competitive advantage by allowing it, for example, to establish where VM has recently, or is likely to, expand its network and either target retail offers at the premises in question or undertake pre-emptive network upgrades of its own.⁹

We also question whether a premises level data set is actually necessary to help determine costs. Given that BT has significant history and experience of assessing coverage (and therefore upgrade costs and plans) at a postcode level (i.e. via the BDUK State subsidy interventions), we believe that the provision of the data in question at a postcode level will be sufficient.

We note that Ofcom has proposed a specific Universal Service Condition¹⁰ aimed at reducing such risks. We welcome this proposal, but we do not believe that it is sufficient. We consider that there should be stronger conditions relating to the separation of the information and containment of it within BT for specific, limited use. We also believe that compliance assessment, auditing and other controls should be specified and carried out to ensure that BT is abiding by the usage conditions. We believe that there could be a role for the Openreach Monitoring Unit in this regard.

Provision of Access to an API

We welcome Ofcom's proposal to restrict access to individual address level queries and believe that this is sufficient to satisfy the needs of USPs to be able to determine if a service meeting (or exceeding) the USO threshold is already available at a given premises. We also welcome Ofcom's intention to introduce a specific Universal Service Condition to prevent its misuse. However, as with the proposed provision of bulk data, we do not believe that it is sufficient for that purpose. There should be stronger conditions relating to the separation of the information and containment of it within BT for specified use only. We also believe there should be specified technical controls, as well as compliance assessment, auditing and other controls to ensure that BT is abiding by the usage conditions.

⁹ We note that Ofcom itself also acknowledges this risk at paragraph 6.78 of the December 2018 consultation on designating USPs and applying conditions

¹⁰ Proposed Universal Service Condition G1



As such, we are not in a position to consent to the proposed disclosure of VM's information to the USPs in the manner set out by Ofcom. We would welcome further discussions with Ofcom on how our concerns can be allayed and in particular how better safeguards against misuse of the data can be introduced.

Yours sincerely,

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