

Response to Ofcom's Consultation entitled: -

**Promoting investment and competition in fibre networks
Wholesale Fixed Telecoms Market Review ("WFTMR") 2021-26**

By

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This response is not confidential, and we request it be published in full

Introduction

Truespeed Communications Limited (“Truespeed”) provides gigabit services over its fibre-to-the-premises owned network to residential, government, education and businesses in Somerset and the surrounding counties.

It received an initial commitment of some £75 million from Aviva Investors in 2017. Details of coverage and packages offered can be found on the website at <https://www.Truespeed.com/>.

The Consultation

This is an important step in the regulatory process as it both combines market segments which have historically been regulated separately and in addition extends the timescale for the proposed remedies to 5 rather than 3 years.

We are at a critical point in the market development of full fibre, so getting the regulatory framework right is particularly important to support the Government objective of as much “full fibre” as possible by 2025, even though Government has acknowledged that target date is likely to move out.

It is already Government Policy to implement the European Electronic Communications Code (the “EECC”) which consolidates the Common Regulatory Framework consisting of the 2002 Directives.

The EECC continues to emphasise the necessity for the removal of barriers to entry at the infrastructure level¹. In particular it says at Art 3 4 that National Regulatory Authorities must:-

(d) promote efficient investment and innovation in new and enhanced infrastructures,

The concerns we have is that the whole tone of the consultation is to downgrade the importance of the independent sector and provide regulatory support for BT Openreach on a discriminatory basis in “Area 3”. **If this is true, and we believe that it is, then the whole WFTMR process is not supporting customer choice and is not promoting competition especially in Area 3.**

Independent Sector Investment

A recent report by Point Topic and INCA² on the independent sector revealed that committed capital had increase by nearly £1bn in 2019, to total £6.6bn, and that on the current rate of commitment and build the independent sector could reach some 15.7 million homes passed by 2025 or shortly after. Whilst at present homes passed at some 1.2 million is half that of the BT Openreach 2.4 million for “full fibre” FTTP, that gap is likely to close.

It should be considered that BT’s pension liabilities have constrained its financing plans, and it is now seeking external funding for BT Openreach³. Its plans are not fully funded and therefore the risk of it missing its publicised targets must be recognised.

¹ See for example pre-amble para 28, 29, 152 etc

² <https://www.inca.coop/news/altnet-full-fibre-growth>

³ <https://www.telegraph.co.uk/business/2020/05/14/bt-could-sell-stake-openreach/>

Errors of analysis

We are concerned about a series of assertions in the consultation that make, in our view, erroneous assumptions.

- **Separation of Multi-Service Providers from Broadband Only Suppliers** - Ofcom separates out what it calls multi-service providers from “broadband only” suppliers.
 - **Truespeed is not a ‘broadband only’ supplier** - Truespeed’s gigabit fibre network is not “broadband only” as customers can get as well as a bundled voice service any content they wish to from “over the top” suppliers. We do not know of any important content that is not available from a “streamed” source. In addition, the Truespeed network allows streaming of many services at once. This is hardly “broadband only” as far as the customer is concerned. The architecture adopted by Truespeed is point-to-point Ethernet, not GPON and so is highly scalable to potentially terabit speeds⁴. It is therefore superior to GPON now, and in advance of where BT Openreach expects to be in some years’ time after it has finally decommissioned its century old copper network.
 - **The implication is that Truespeed’s network and services are in some way inferior to the proposed BT Openreach offerings does not stand up to scrutiny.**
- **Issues with the treatment of Area 3** - We are concerned about Ofcom’s proposed regulatory treatment of the part of the country labelled “Area 3”.
 - Area 3 is defined as those areas collectively which are unlikely to support more than one infrastructure supplier. The “support” in this case is economic support, not technical support.
 - In other words, the balance of cost and return means that more than one supplier in Area 3 would not be economically sustainable in the medium and long term.
 - It should be noted that Truespeed has rolled out in a significant number of settlements where there is no fibre to the cabinet. It would therefore appear that BT has treated these areas as the lowest priority and thus *de facto* Area 3.
 - Ofcom leaps from the identification of Area 3 as those areas only capable of supporting one infrastructure provider to **assuming** that that provider will, or should, be BT Openreach – **Truespeed is very much in disagreement with this assumption.**
- **Truespeed disagrees with the assumption that BT Openreach enjoys any form of price or operational advantage in the use of poles and ducts in Area 3** - Truespeed have extensive

⁴ IEEE 802.3 is now working on 1.6Tbps Ethernet as from Geneva Plenary with the ITU earlier this year. The standard will operate at up to 60 km over conventional G 652 fibre. First product is likely to be available in 2022.

Experience of using BT Openreach's Passive infrastructure Access ("PIA") regulated products which allow us to use existing BT Openreach poles and ducts. Based on this experience, we can see no basis at all for assuming that BT Openreach enjoys any form of price or operational advantage in the use of poles and ducts in Area 3 compared to any other operator using those same poles and ducts.

- If the Ofcom' premise is correct that BT Openreach enjoys an advantage over a PIA user, then it would raise serious doubts about the "construction" and implementation of the PIA product. PIA is designed to "constrain" the downstream services of BT by allowing market entry at the highest point and source of Significant Market Power – the physical infrastructure. It could not do so if BT still enjoyed a price or performance advantage on pole and duct use in the supply of downstream services such as Fibre-to-the-Premises.
- **The consultation continues to emphasise the importance of PIA in Areas 1 and 2 as an effective remedy. That is inconsistent with its assumptions that Area 3 can only be served by BT Openreach** - To repeat the point, we can see no scale or cost advantage between BT Openreach's use of its poles and ducts compared to other operators' use of PIA such as Truespeed. It is therefore wrong to leap to the conclusion that only BT Openreach can provide fibre in Area 3. For the reasons given above, Truespeed is already providing fibre in areas which BT is implicitly treating as of low priority, lower overall returns and therefore implicitly Area 3.
- **OFCOM assumes wrongly that Area 3 is foreclosed to other infrastructure providers - for economic reasons.** It is of concern that Ofcom is assuming Area 3 is foreclosed to other operators and that the economics are such that there needs to be regulatory incentive to BT Openreach to fibre these areas. Neither of these assumptions is accurate. In particular, as independent networks grow, the cost of addressing adjacent areas also falls, and coverage in Area 3 can be increased.
 - If an independent operator is already in Area 3, (like Truespeed), Ofcom is proposing to provide BT Openreach with regulatory incentives to overbuild existing infrastructure in an area in which its starting point is that only one infrastructure provider can be sustained. **That is wrong in principle and clearly wasteful.** This is also discriminatory and against the general principles enshrined in the EECC, which this consultation and regulation is intended to put into effect. In particular it does not comply with the EECC principal at Art 3.4 that says

"(d) promote efficient investment and innovation in new and enhanced infrastructures,"
 - It cannot be claimed to be efficient to create a regulatory environment that attempts to duplicate infrastructure in an area where the economics can only support one infrastructure supplier, and where the effect of which would be to damage independent operators. It does of course suit BT Openreach and BT Group both of which have repeatedly said they want to see as little physical level infrastructure competition as possible.

- This favourable treatment of BT is also in breach of the current regulatory regime, as the Framework Directive says at Art 8.3 c) that National Regulatory Authorities must (c) [ensure] that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services;
- These obligations flow through from the Communications Act 2003 (the “Act”) (as amended)⁵ S 4 2) to comply with the Framework Directive Art 8.
- In addition, Ofcom is also under an obligation from 2011 to promote “efficient investment” – see S 4 8 aa) of the Act.

Ofcom’s apparent issues with independent operators in Area 3

Ofcom’s principal reasons for favouring BT Openreach in Area 3 seems to us to be based on two concerns.

- The first is that an independent operator with a vertically integrated service offering does not offer consumer choice. Truespeed made a commitment to Ofcom in the last consultation that it would offer a wholesale service, which we are expecting to launch before the implementation of this consultation later this year. **If Ofcom’s primary concern was consumer choice, the remedy would be simple, and that is to mandate that BT Group take wholesale capacity from any independent operator in Area 3.**
- The second concern is that independent operators are not as financially secure as BT Openreach. Given the £6.6bn committed to independent operators, and BT’s now admitted inability to finance its current commitments, that assumption needs to be reassessed.
 - Available remedy - INCA and its members are working on a “safety net” proposal which would grant “step in rights” to other operators to keep operations working for a target of some 2 months. That time is deemed sufficient to remedy the cause of the issues, financial or otherwise and would be sufficient to ensure continuity of customer service. It should be noted that in any case, there is no history since 1982 of an infrastructure-based operator in telecoms or cable TV ceasing to operate for any extended period.

Carrot and Stick approach - In Area 3 Ofcom is proposing both a carrot and a stick. As we have commented above, the “carrot” is discriminatory and against general competition law and communications regulatory law principles.

- The “stick” is a threatened punitive decrease in copper-based service pricing. The intention is to goad BT Openreach into investing or lose revenue. We believe this is mis-conceived and will not have the intended effect for the following reasons.
 - Firstly, reducing revenue will decrease available funds to re-invest in “full fibre”.
 - Secondly, and most importantly, the decrease in retail copper pricing will make copper services more “sticky”. There is a direct relationship between copper pricing

⁵ <http://www.legislation.gov.uk/ukpga/2003/21/section/4>

and switching to fibre. The lower the relative copper price, the lower proportion of consumers will switch.

We have consulted the European Competitive Telecommunications Association⁶ about copper pricing in Europe and whether any other National Regulatory Authority (“NRA”) had considered a similar scheme to that proposed by Ofcom. Far from decreasing copper prices, the NRA’s of Spain, France and Germany have all increased copper pricing slightly, as it boosts the fibre investment case by causing a higher level of consumer switching to full fibre and increases demand and take-up.

- In particular, it is likely to see increased independent entry to the market, and thus an increase in total funding available.
 - It is no accident that Spain has one of the highest FTTP level of penetration of any of the larger European countries at 44%⁷.
- **It is difficult to see how Ofcom’s scheme is superior to the position taken in other markets.**

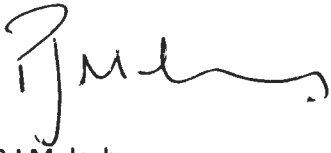
5 year exclusive licenses - Finally, on an informal poll of a number of operators and financial backers, if 5-year exclusive licences were to be granted in Area 2, the likely result would be an increase in funding committed of between 30% and 40%. On the basis of the figures above, that would increase investment in FTTP by between £2bn and £2.6 billion in the near term - comparable with BT’s existing total investment and the result of which would be further homes connected to FTTP across the country especially in the areas deemed harder to reach.

Conclusion

- **The title of the consultation is “Promoting investment and competition in fibre networks”.**
- **We believe the proposals fail on both counts in Area 3 and also partly Area 2 to meet those objectives.**
- **For the reasons given above, we request that Ofcom completely rethinks its approach to Area 3, and also considers 5 year licences, on a “first mover” basis in Area 2 to increase fibre roll-out, and thus align itself more closely with Government objectives.**
- **Truespeed is a member of the Independent Networks Cooperative Association (“INCA”) and supports the submission also being made on behalf of INCA members which raises the concerns and issues described above.**

⁶ See also page 25 of https://www.ftthcouncil.eu/documents/Reports/FTTH_Finance_Report.pdf

⁷⁷ <https://nae.global/en/the-importance-of-ftth-rollouts-in-spain/>

A handwritten signature in black ink, appearing to read 'P J Mulcahy', with a stylized, cursive script.

P J Mulcahy

For and on behalf of

Truespeed Communications Limited

22nd May 2020