

21 November 2016

Jonathan Oxley

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London SE1 9HA

By email only

Dear Jonathan,

Thank you for your letter of 16 November.

Vodafone does not accept the assertion in your letter that the reference in the Undertakings to *'the entirety of FTTC'* should be understood as providing BT with an open ended exemption for any form of technology deployment which may use FTTC assets. This interpretation is:

- contrary to the plain meaning of the words of the Undertakings; and
- inconsistent with the relevant documents produced at the time the Variation was granted.

We do not hold this view as a means to frustrate deployment of ultrafast broadband in the UK. Far from it. Ofcom has set out a vision of 3 competing ultrafast networks in 40% of the country and Vodafone strongly supports that ambition.

From our recently published Group results you will see that:

- Vodafone is the fastest growing fixed broadband provider in Europe with 14m customers;
- We are the largest non-incumbent builder of fibre to the home ("FTTH") with over 7.2m households passed; and
- We now have an ultrafast footprint consisting of our own FTTH and cable assets of around 31m households.

We have taken different approaches in different markets. We are part of a wholesale-only JV with the electricity supplier which is aiming to roll out 500k rural homes and businesses in Ireland and then go further via state funding. We are co-investing with other access seekers in Spain (our NGA fixed line footprint now covers 14.7m

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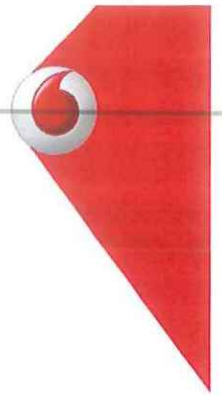
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Page 1 of 5



households of which 9.5 m are on our own network) and co-investing with both access seekers and the incumbent in Portugal. Alternatively, we have provided long-term anchor tenancy to other providers including Metroweb and the electricity company ENEL in Italy (giving us a fibre footprint today of 4.1 m households). ENEL has announced plans to reach 9.5m households in 250 Italian cities.

We set out in detail in our response to Ofcom's Proposal for Comment on Strengthening Openreach's Independence,<sup>1</sup> the need for Ofcom to put in place policies in the UK which support greater fibre investment including co-investment and risk sharing such as those set out in the European Commission's Electronic Communications Code.

Vodafone does not dispute that when BT sought the FTTC Variation seven years ago, faced with *"limited interest from Communications Providers other than BT in investing in FTTC,"*<sup>2</sup> granting the Variation was a practical decision. However, in 2016, when Ofcom is seeking to attract investment to deliver 3 competing ultrafast networks in 40% of the country, allowing BT to use an FTTC Variation granted in the context of a specific super-fast investment to deploy G.Fast is wrong. Any G.Fast investment should be carried out on the same basis as other ultrafast broadband investments and must not be 'grandfathered' under an erroneous interpretation of the current Undertakings.

Therefore, Vodafone continues to believe that Ofcom is obliged to consult prior to any commercial deployment by Openreach taking due account of G.Fast's impact on ultrafast competition, investment and innovation.

### **Ofcom's interpretation is contrary to the plain meaning of the words of the Undertaking**

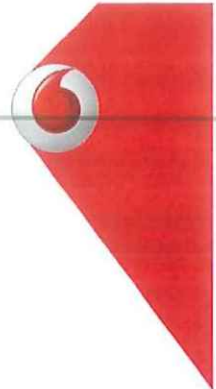
We agree that FTTC is *"a network structure for access"*; indeed the definition of FTTC says so explicitly. But the exemption provided in 5.52 of the Undertakings applies only to 'BT Active FTTC Products' and the question, therefore, is whether G.Fast is a compliant product.

To meet the definition of 'BT Active FTTC Product' additional obligations apply, beyond those of FTTC to which it refers. This can most easily be demonstrated by substituting the full definitions for FTTC and 'BT Active FTTC Product' in 5.52 of the Undertakings. The relevant section then reads:

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<sup>1</sup> Strengthening Openreach's strategic and operational independence: Proposal for comment 26 July 2016

<sup>2</sup> FTTC Variation Consultation at 3.22



"5.52 [Openreach] may control and operate the assets contained within:

*(i) the Transmission Layer of BT's Access Network where required to test, build, implement and operate [an Ethernet based Bitstream Network Access product offered by Openreach as of the date it is available for order and provided over the entirety of [a network structure for access at End-Users' premises at fixed locations in which optical fibres connect a node in an Exchange to a Local Access Node contained in a street cabinet, and copper wires connect the End-Users' premises to the Local Access Node contained in the BT street cabinet],...*

Reference to the wider FTTC concept is, therefore, of no benefit to Ofcom's interpretation. Ofcom cannot simply read the words '*provided over the entirety of FTTC*' as if they said '*provided entirely over FTTC (but not necessarily over the entirety of that network structure for access)*' particularly when it advances no contemporaneous documents or commentary upon which to support this reading.

**Ofcom makes no attempt to reconcile its interpretation with the contemporaneous documents granting of the Variation.**

The FTTC Variation Statement<sup>3</sup> as well as the preceding Policy Paper<sup>4</sup> provide a clear rationale for the requirements that a BT Active FTTC Product would not be such until it:

- (I) was available to order (by BT's downstream competitors as well as BT's own lines of business); and
- (II) was provided over the whole of the FTTC network; that is, BT's investment which was expressly enabled by the FTTC Variation.

When considering BT's variation request, the consultation documents and FTTC Variation Statement make clear Ofcom was weighing up the relative benefits of infrastructure-based and service-based competition. For Ofcom's decision to permit the FTTC Variation to stand, it was necessary that all of the FTTC investment thus enabled was made available to the downstream competitors of Openreach thus ensuring the widest possible service competition (and overcoming the acknowledged detriment to passive access and infrastructure competition). Put another way, BT could not gain the benefit of the FTTC Variation by making only a sub-set of enabled cabinets available to downstream competitors. The FTTC Variation Statement says:

<sup>3</sup> [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0025/36970/statement.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0025/36970/statement.pdf)

<sup>4</sup> Ofcom Statement: "Delivering Super-fast broadband in the UK- promoting investment and competition" 3 March 2009. (the "Policy Paper")





*Our objectives in agreeing this variation to BT's Undertakings are to deliver benefits to consumers by supporting early investment in super-fast broadband and, where appropriate, promoting competition....*

*In agreeing this variation with BT we have therefore sought commitments designed to maximise the opportunity for effective and sustainable competition based on BT's wholesale active products. This is because we consider that such products correspond to the point in the value chain downstream of which competition is most likely to be effective and sustainable. We have also sought commitments from BT intended to provide the option for competition based on passive inputs to develop over time.<sup>5</sup>*  
(emphasis added)

This is a similar rationale to the 'sunset clause' provisions referred to at 5.61 of the Undertakings and described in my earlier letter. There, Ofcom was concerned to ensure that the FTTC Variation would not stand if BT did not make a sufficiently large FTTC investment over which service-based competition could take place; namely, 500k customer premises able to be served with super-fast broadband by 31 December 2010.

Moreover, it is clear from the FTTC Variation Consultation<sup>6</sup> that Ofcom was considering the relative benefits of the specific superfast investment proposed by BT with the benefits of passive or active competition. 3.17 of the FTTC Variation Consultation considered the incremental capex and opex costs associated with maintaining the SLU boundary in the case of that investment and 3.19 to 3.20 considered the impact on prices, customer experience and take up. *"BT has argued that the resulting lower revenues, combined with the additional costs it has identified would undermine its proposed FTTC investment plans."*

For all the reasons above and those set out in my letter of 21 October, we maintain our view that G.Fast is not an 'BT Active FTTC Product',

**BT's choice to restrict G.Fast to super-fast enabled cabinet deployment significantly reduces the benefit of its roll out for UK consumers and businesses**

In any event, even if Ofcom's reading of the Undertakings is correct (which Vodafone does not accept) then it must be the case that any Openreach deployment of G.Fast

<sup>5</sup> [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0025/36970/statement.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0025/36970/statement.pdf) at 3.10 and 3.13

<sup>6</sup> Proposed variation to BT's Undertakings under the Enterprise Act 2002 related to Fibre-to-the-Cabinet 3 March 2009.

<sup>7</sup> FTTC Variation Consultation at 3.21



under the current Undertakings is limited to deployment directly from super-fast enabled cabinets.

This severely constrains the potential benefits of such a roll out for UK consumers and businesses. Assuming this network topology, Vodafone has asked Point Topic to predict where BT is most likely to direct Openreach to deploy G.Fast. Their research concludes that:

- Only 6.5% of UK homes will be covered by gigabit-capable fibre by 2020; and
- BT's G.Fast rollout will increase UK ultrafast household coverage by less than 5%

When BT promises 10 m G.Fast covered households, we believe it is important to understand that, in the overwhelming majority of cases, these will not be new consumers benefiting from ultrafast broadband where they did not already have that option from the cable network today.

I attach a copy of the research and accompanying press release which we intend to release shortly.

We would be happy to meet with you and your legal team to discuss this matter further. As with my previous letter, Vodafone requests that you take due account of this letter and publish it, together with your letter to me of 16 November, as part of Ofcom's ongoing consultation 'Strengthening Openreach's Independence'.

Finally, I am copying Jon Furmston at the Equality of Access Office as he requested and was provided with a copy of my letter of 21 October.

Yours sincerely

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cc: Steve Unger, Ofcom  
Clive Carter, Ofcom  
Brian Potterill, Ofcom  
Jon Furmston, Equality of Access Office