BUUK Infrastructure House Woolpit Business Park, Woolpit, Suffolk, IP30 9UP
Tel: +44 (0)1359 240 363 Energy
Fax: +44(0)1359 243 377
www.bu-uk.co.uk

Telecoms Access Review team
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Email: selina.chadha@ofcom.org.uk keith.hatfield@ofcom.org.uk

22 July 2024

Dear Selina / Keith,

Proposed approach to / timetable for Ofcom's Telecoms Access Review (TAR)

I am writing to you on behalf of Open Fibre Networks Limited (OFNL), part of the BUUK Infrastructure Group of companies, to provide our views on Ofcom's March 2024 publication regarding the Telecoms Access Review 2026 (TAR) which presented Ofcom's early thinking on its approach to / timetable for the TAR. This letter first provides an overview of OFNL, including our role in the fibre industry, and then goes on to present our current thinking with respect to the scope / focus of the TAR and the types of issues we think it should cover. We would very much welcome the opportunity to discuss these views with you in more detail.

An introduction to BUUK and OFNL

BUUK Infrastructure (BUUK) is a leading UK multi-utility infrastructure investor, working across Great Britain and competing against incumbent utility companies. We have provided over 2 million utility connections and now serve customers across 30,000 discrete networks and six essential utilities. Our main shareholder is Brookfield, a global investor in property, infrastructure and renewable energy. We cover every utility vector and can therefore provide a unique perspective on evolving utility and regulatory policy.

We apply our considerable experience, across multiple utilities, to the fibre industry via OFNL which has been providing gigabit ready full fibre broadband connections to the new build housing sector since 2008. Our fibre networks are often chosen by developers in preference to the solutions offered by the monopoly incumbent. We also operate a wholesale business, Open Fibre Networks (Wholesale) Limited (OFN(W)L), offering wholesale services to Communication Providers across the UK.

Our view of on Ofcom's proposed approach to the TAR

We very much welcome the publication of Ofcom's early views on its approach to / timetable for the TAR given the transparency it provides to the industry about how Ofcom intends to undertake this important review. We also value the opportunity that it provides to industry participants to input our thoughts on the types of issues that we think the TAR should cover. In addition, we welcome the early

BUUK infrastructure

BUUK Infrastructure Energy House
Woolpit Business Park, Woolpit,
Suffolk, IP30 9UP
Tel: +44 (0)1359 240 363
Fax: +44(0)1359 243 377
www.bu-uk.co.uk

engagement that we have had on the TAR with the Ofcom team and look forward to this continuing as we progress further through the TAR process.

We note that in the TAR document Ofcom refers to its intent to "continue with the same underlying objectives" which suggests that the regulator does not foresee the need to make significant changes to the strategy that it presented in the 2021 Wholesale Fixed Telecoms Market Review (WFTMR). We are concerned with this approach. We think there is a clear rationale for a deeper review of the fibre market to assess emerging issues, such as the Openreach exchange exit programme, as well as long-running issues such as the separation arrangements applicable to BT Consumer and Openreach. While we do not think an overhaul of the current arrangements is needed, we believe that end-customer benefits could accrue from targeted strategic changes under the TAR.

In particular, we strongly believe Ofcom should move away from its position of encouraging network-on-network competition. We acknowledge Ofcom's long-held view that conditions unique to the fibre market mean there is a rationale for the duplication of network assets in the form of physical network-on-network competition. Indeed, Ofcom recently stated that "[w]hen firms compete to build better networks, that leads to more investment and innovation". While we agree with this sentiment and believe competition should be facilitated wherever possible, we also note the significant sunk costs associated with the construction of network assets and question whether the resulting benefits that accrue are sufficient to outweigh this. We note that in other utility sectors, innovation is typically facilitated via specific targeted funding which explores evolving technologies and new ways of working. For this reason, we strongly believe Ofcom should move away from its position of encouraging network-on-network competition. Instead, we think Ofcom should focus on creating the right conditions for competition to thrive in the provision of retail services recognising that this will naturally facilitate greater levels of end-customer choice.

In this regard, we think there is scope to inject greater levels of competition into the provision of retail services, and this could facilitate end customer benefits in the form of greater choice and the potential for reduced costs. The ensuing sections present our views on the specific issues that we think Ofcom should consider as part of the TAR which includes the following.

1. Openreach exchange closure and Physical Infrastructure Access (PIA);
2. Openreach exchange closure and treatment of Ethernet Access Direct (EAD);
3. Exchange closure and access to required duct space; and
4. Current levels of BT and Openreach strategic and operational independence.

We are aware that there are other AltNets within the industry that also have concerns about issues 1 and 2. Indeed, we are actively engaging in, and contributing to the costs of, the work being progressed by the Independent Network Cooperative Association (INCA) to collate views on, and subsequently complete analysis of, the issues that are common to AltNets. While we are aware that many of the AltNets have ongoing concerns about levels of BT and Openreach strategic and operational independence, it is clear that the rationale underpinning their concerns differs to ours. In this respect, many AltNets would like to see market conditions emerge under which BT Consumer chose to use some of their networks in preference to Openreach. However, our position within the industry, serving new build housing developments, means that we are relatively unique.

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In this respect, we serve a group of customers that BT Consumer will not be able to access without using our network. Given that using our networks would allow BT Consumer to acquire a new, previously inaccessible group of consumers, we would expect the retailer to be interested in the future use of our network. But, despite repeated attempts to engage BT Consumer, and its subsidiaries, on this matter we have been unsuccessful and have not managed to get past an initial discussion. In light of the commercial opportunity available to BT Consumer, we do not understand why the retailer has been unwilling to engage in constructive discussions. We therefore have concerns that the continued affiliation of BT Consumer and Openreach is leading to a situation where the retailer will not consider the use of any other network. We think this is an issue that should be addressed via the TAR to avoid further distortions of the competitive market and optimise end-customer benefits.

1. Openreach exchange closure and Ofcom ‘Area’ classifications

As you know, Openreach is planning to exit around 4,600 of their current 5,600 local exchanges by the mid 2030’s; retaining around 1,000 enduring receiving exchanges which will all be Openreach Handover Points (OHPs) for Fibre to the premise / cabinet (FTTP / FTTC) services. Openreach has initiated five pilot projects to attain insights on and refine the process that will need to be established to support the wider programme of exchange exits. The current timetable envisages that Openreach will have exited 108 priority exchanges by 31 December 2030 and that the remainder will be completed in the early- to mid-2030s.

Our key concern for the 2026 to 2031 period is that, as the remaining 1,000 exchanges will be OHPs where communication providers (CPs) connect to receive FTTP and FTTC traffic, areas that are currently classified as Area 2 or 3, in line with Ofcom’s WFTMR definition, may be reclassified as a ‘competitive’ Area 1. This is particularly concerning given that, at present, all local exchange areas are either classified as Area 2 or 3 and none of the local exchange locations are classified as Area 1. We understand that Openreach is not planning to amalgamate the existing 5,600 local exchange areas into more consolidated groupings (i.e. they will use the existing area classifications) and the quantity of local exchange areas will remain unchanged, at 5,600, but a concern around regulatory classification remains.

OFNL request: In line with the arguments made by INCA in its market definition paper, we do not think that any of the existing exchange areas are currently characterised by sufficient levels of competition to be categorised as Area 1. In this respect, we still think it is unlikely that any analysis completed by Ofcom will identify many, if any, exchange areas where BT faces competition from two or more established rivals. We therefore agree with the INCA assertion, that it is likely that the whole of the UK will continue to fall within either an Area 2 or 3 classification. We also agree that Ofcom should not seek to change the criteria for Area 1 which was set out in the WFTMR, as this represents an aspirational target for the sector which, if achieved, will ultimately deliver true choice to consumers.

When considering the role of the area 3 definition within the TAR, we think it will be critical to have regard to the government policy established to support the UK-wide deployment of fullfibre networks. In this respect, we note that the focus of this policy has been on encouraging private sector investment where this is commercially viable, and providing government subsidies where it is not; with the latter regions designated ‘Area 3’.

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In line with INCA arguments, we believe the only rationale for retaining an equivalent of the current Area 3 definition as part of the TAR would be to enable Ofcom to differentiate areas according to the associated market interventions it intends to pursue. And this raises a key question around whether the level of competition faced by BT should necessitate different regulatory interventions in different areas. If this is the case, we think Ofcom should progress analysis to identify the conditions under which, and associated locations where, different interventions are appropriate, proportionate and justified; to avoid creating uncertainty which could dampen investment incentives. Right now, there is no difference in the remedies applied to Areas 2 and 3, but the regulatory objectives differ substantially; leading to confusion and unnecessary frustration in the investment community. We would therefore welcome clarity from Ofcom on this issue as a priority and, to this end, think that an early consultation on market definition would be extremely helpful.

Notwithstanding any decisions that Ofcom may take around the classification of areas 1, 2 and 3, we note the importance of retaining the concept of Local Access EADs. At present, users can procure a low-cost fixed fee EAD (no distance) charge within local exchange areas and we think it will be critical that these products remain available once the exchange closure programme is completed and the enduring OHP exchanges are operational.

2. Openreach exchange closure, PIA and dark fibre

Implementation of the Openreach exchange closure programme will create another potential issue for OFNL during the five-year period from 2026 to 2031. Under the initial proposed Openreach programme of work, which will involve the closure of 108 exchanges, 12 of the existing OFNL PIA routes from our new-build sites to local exchanges will be affected by an exchange closure. Our current understanding is that the associated OFNL assets are at risk of being stranded as Openreach do not plan to migrate External CableLinks to the enduring receiving exchanges. Once the full programme of exchange closures has been rolled out, a further 153 OFNL new-build sites will be affected.

Figure 1 below provides details of the 12 sites affected by the priority exchange exits which are due to be complete by 31 December 2030.

[redacted]

[redacted]	Closing Exchange	Distance build (km)	Enduring Exchange	Extension Distance (m)	Total PIA Distance (m)	Ofcom LE Area
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	Closing Exchange	Distance build (km)	Enduring Exchange	Extension Distance (m)	Total PIA Distance (m)	Ofcom LE Area

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[redacted]

OFNL request: We think there are two potential options that could address this issue.

- The first is that Openreach could be mandated to provide a cabinet mounted Optical Distribution Frame (ODF), with connectivity to an enduring receiving exchange outside of each of the exchanges that they plan to exit. This would allow CPs to establish dark fibre connectivity to support their existing assets, by ensuring that existing CableLink infrastructure is effectively connected to the enduring receiving exchange; thus allowing existing services, procured from Openreach by CPs, to be migrated.
- Under the second option Openreach could be mandated to reimburse CPs for the costs they face associated with the necessary changes they will be required to make to their network architecture to allow for existing dark fibre installations to connect to an enduring receiving exchange. Both potential solutions would help to ensure that CPs are not disadvantaged by the Openreach decision to undertake its exchange exit programme.

While we do not have a strong preference for either option, we anticipate that further detailed analysis would provide insights on their respective suitability.

3. Exchange closure and access to required duct space

As the Openreach Exchange Closure program progresses, we anticipate that space within ducts will be offered at a premium; recognising that CPs are likely to plan their network infrastructure using common routes to the OHP exchanges. We note that Ofcom's August 2017 response to the WLA consultation on pricing proposals for Duct and Pole Access made reference to the view expressed by Openreach in its consultation response that "25mm was…a reasonable space to enable network deployment with room for growth". Since 2017 PIA fibre technology and installation techniques have also evolved; enabling CPs to install smaller cables and subducts that save space but still address connectivity needs. We understand that installation of 25mm diameter cables remains common practice within the industry and have concerns that duct space will become more congested if this continues.

OFNL request: We think that Openreach should seek to encourage CPs to adopt smaller diameter cables / sub-ducts to avoid unnecessary congestion. In the absence of such an approach, additional civil works will likely be needed to make more duct space available, and this will inevitably lead to an

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Fax: +44(0)1359 243 377
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increase in the volume of duplicated duct network; involving unnecessary and inefficient costs. We note that, as highlighted by INCA in its paper Shortterm requirements for improvements to the PIA remedy under the WFTMR, the current 25mm sub-duct product provides more capacity than most PIA users require. Indeed, in many cases, cables of a smaller diameter are used in the space available and PIA users do not deploy sub-ducts at all. It therefore seems that the current "25mm sub-duct" product is unnecessarily large and this does not optimise the usage of duct space.

We understand that the reason Ofcom specified the use of a 25mm product in the WFTMR was in recognition of the Openreach view referenced earlier in this section. However, given the planned Openreach exchange closure, industry users anticipate that there will be increased duct utilisation around enduring exchanges, which is likely to lead to increased constraints on the Openreach network. We therefore think that Ofcom should review the existing PIA product and, reflecting on the results attained, require Openreach to offer additional smaller diameter PIA duct access products at a lower price. This would encourage CPs to consume smaller diameter PIA duct access products; helping to more accurately reflect the actual use of duct space by users and reduce future levels of duct congestion.

4. BT and Openreach strategic and operational independence

Discussions regarding the strategic and operational independence of BT Consumer and Openreach within the BT Group, have been ongoing for many years. This section of our submission covers the following issues.

- A high-level account of key discussions on BT Consumer / Openreach separation that have taken place to date.
- An overview of the potential market impact of continued affiliation between BT Consumer and Openreach.
- Further evidence suggesting that more separation is needed.
- Some proposed solutions that would help to address our concerns.

Key industry discussions regarding BT and Openreach independence

The first time that Ofcom officially consulted on the issue of BT Group separation was in the 2005 Strategic Review of Telecommunications (SRT). In the Phase two consultation Ofcom highlighted that it had "reasonable grounds to suspect that competition was being restricted in markets for the supply of wholesale access and backhaul services" which "provided BT with the incentive and the ability to discriminate against its downstream competitors". Ofcom also acknowledged the concerns that had been raised by industry players that "BT needed to be made to deliver some kind of transactional or functional equivalence". Recognising these concerns, in its conclusions document Ofcom explained that in "June 2005, BT [had] offered …a set of undertakings in lieu of Ofcom making a reference to the Competition Commission" and that it was "accepting such undertakings from BT". The undertakings provided by BT committed to (1) the establishment of functional separation between its upstream network business and downstream retail services and (2) the provision of upstream network access on an equivalence of inputs (EOI) basis.

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The second time that Ofcom officially consulted on this issue was in its Initial Conclusions from the 2016 Strategic Review of Digital Communications (SRDC). Ofcom acknowledged that "BT ha[d] a crucial role to play in ensuring that consumers and businesses enjoy good communications services, given its…position" and noted that "the vertically-integrated structure of BT inherently affects the way in which BT makes significant decisions". Ofcom therefore undertook a review of BT Group performance, and identified that it had breached the undertakings, agreed as part of the SRT, 59 times since their establishment in 2006. Recognising this, Ofcom noted its concern "that the current model of functional separation fails to remove sufficiently BT's ability to discriminate against competitors" and therefore that "risks to competition remain." As such, Ofcom "decided to reform the relationship between Openreach and BT Group to give the former greater independence and autonomy" and to assess whether "a strengthened model of functional separation could deliver th[is]". In taking this step, Ofcom also "reserved the right to progress structural separation" in the future.

In March 2017, BT notified Ofcom of changes to the Openreach Division under which it would: incorporate Openreach as a wholly owned private company; require Openreach to adopt the commitments in the undertakings; and require Openreach to enter the Openreach Agency and Services Agreement (ASA) / adopt the Governance Protocol. It agreed that the organisation would continue to operate in accordance with the undertakings until Ofcom released BT Group from them. In parallel Ofcom established the Openreach monitoring unit (OMU) to monitor the compliance of Openreach and BT Consumer with the commitments.

In the March 2021 WFTMR, Ofcom emphasised its support for network competition which it believed "should bring benefits to consumers in the long term from innovation…choice, stronger incentives to price keenly… and higher quality of service". Later that year, in December 2021, Ofcom released its fifth OMU report in which it concluded that "Openreach ha[d] continued to operate with a high degree of strategic and operational independence from BT". We provided feedback to Ofcom on the conclusions of this report; and the letter that we submitted is attached at Annex 1. Ofcom published its sixth annual OMU report in June 2023 and similarly concluded that the "Commitments ha[d] generally proved to be successful", and that they "continue[d] to see evidence that they are well-established and well-embedded across BT and Openreach". We also provided feedback to Ofcom on the conclusions of this report; and the letter that we submitted is attached at Annex 2.

While we very much welcomed the June 2023 OMU report and the commitment that Ofcom made to "strengthening the OMU's operation…so that it remains an objective, vigilant and transparent safeguard", we questioned the motive for the need to strengthen the OMU given the overall conclusion that the "Commitments have generally proved to be successful".

Potential market impact of BT Consumer / Openreach affiliation

If functional separation, between two entities owned and operated by the same parent company, had been successful we would expect the commercial retail arm of the business to be motivated to serve customers where the potential existed for that organisation to increase its returns. In doing so, we would also anticipate that the retail service provider would utilise the wholesale services of relevant operators that presented the best value offerings within the industry. In this respect, if functional separation had been effective, we would expect the main motivator, driving retailer behaviour, to be around the objective of accruing the best possible return. In turn, the retailer would have incentives to take advantage of the best value commercial offerings while maintain a high quality of service for

BUUK infrastructure

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their end customers. We have not observed BT Consumer, as the commercial retailer, operating in this way.

Indeed, empirical data shows that BT Consumer remains loyal to Openreach and does not yet use the services of AltNets operating in the fibre industry. This is illustrated in Figure 3 below which presents an overview of the top 10 internet service providers (ISPs) operating within the industry, alongside their affiliated brands, customer numbers and use of AltNets.

Figure 3: Top 10 industry ISPs, customer numbers and interactions with AltNets

ISP		Affiliates	Est. customer no's	Percentage	AltNet activity
1	[redacted]				
2					
3					
4					
5					
6					
7					
8					
9					
10					

Source: ISPreview.co.uk

Despite being the largest ISP in the market, BT Consumer does not have any engagement with AltNets. The three other ISPs in the top 10 that exclusively use affiliated network provider services are proportionately far smaller in size (with an aggregate market share of 5.5%) and therefore have significantly less scope to distort the market.

We believe the data above in Figure 3 is indicative of continued affiliation between BT Consumer and Openreach given that (a) BT Consumer could reach more customers by partnering with AltNets and (b) there may be better value offers in the market that BT Consumer could take advantage of. We are therefore concerned that this market failure could be indicative of a more pervasive culture of preferential treatment across BT Consumer and Openreach, and that this may be a symptom of more ingrained discriminatory behaviours that may be harder to identify and address.

Our experience of the fibre market aligns with the empirical data presented in Figure 3, whereby we have seen that BT Consumer exclusively uses Openreach assets. This is of particular note in cases where an AltNet provides fibre infrastructure to a new development of commercial and / or end customer properties; with BT Consumer only able to serve these customers if it enters into a contract with the relevant AltNet. This strategy means AltNets are unable to offer BT Consumer services to

BUUK infrastructure
BUUK Infrastructure House Tel: +44 (0)1359 240 363 Energy
Fax: +44(0)1359 243 377
Woolpit Business Park, Woolpit, www.bu-uk.co.uk
Suffolk, IP30 9UP

end customers and this constrains new entrant market penetration, and levels of competition, as some developers will only appoint a fibre provider where they are able to provide BT Consumer products. In addition, the exclusive use of Openreach networks by BT Consumer means that customers living in / operating from new developments that are not served by Openreach will not be able to access BT Consumer products; reducing overall levels of end customer choice. This directly conflicts with Ofcom statements where the importance of end customer choice has been emphasised.

As outlined above, in its Initial Conclusions from the 2016 SRDC, Ofcom highlighted that the rationale for enforcing legal separation of BT and Openreach was linked to concerns that the vertically integrated structure of Openreach within the BT Group left the company with an ability to discriminate against competitors. Ofcom went on to suggest that, without action, this could undermine incentives for companies to invest; influencing price, quality and service availability. We fully support Ofcom's thinking in this area. However, we believe that its regulatory focus should be expanded to recognise that the industry position BT Consumer holds could equally allow the company to discriminate against BT Group competitors. Indeed, as set out above, we think there is evidence indicating that BT Consumer is behaving this way and It is unclear why equivalent protections have not been put in place.

We believe the BT Consumer strategy of exclusively using Openreach networks undermines incentives for AltNets to invest as it effectively forecloses a significant portion of the market to competition. This could, in turn' directly threaten the development of effective network competition which Ofcom stated in the 2021 WFTMR should bring benefits to consumers from innovation, choice, incentives to price keenly and higher quality of service. BT Consumer's decision to exclusively use Openreach network services also has a significant impact on the availability of BT services, and resulting end customer choice, as these services can only be offered where Openreach network assets are already installed. This means that certain portions of the market do not have access to services from the biggest ISP in the market; reducing consumer choice. We also note that Ofcom's approach is at odds with other utilities e.g. energy, where the 'Big 6' remain subject to strict regulatory controls; and this is particularly of note given that BT is the only former-monopoly in fibre.

Further issues suggesting more business separation is needed

The 2023 OMU report states that the success of the Commitments has been at least in part a result of the decisions and choices of key BT and Openreach leaders and then goes on, in the following paragraph, to refer to the anti-competitive comments made by BT's then-Chief Executive, Philip Jansen, in February 2023. The two statements appeared to be in direct conflict with one another. The comments that Philip Jansen made were from his position as Chief Executive of the BT Group, encompassing BT and Openreach; and were a direct and public indicator of the messaging that he gives to employees across both companies. It represented a clear signal that, top-down communications within each of the organisations are very unlikely to be aligned with the spirit of the Commitments. It naturally raises questions around the types of messages that were being communicated internally if these are the diluted messages that the BT Group Chief Executive provided to journalists.

We recognise that the Chief Executive of Ofcom, Melanie Dawes, took swift and targeted action to express her significant concerns about Philip Jansen's comments and to remind him of the commitments the BT Group had made to fair competition, including the work of the OMU. We are also aware that, Philp Jansen stepped down as CEO of the BT Group in January 2024; handing over control to Alison Kirkby. While we acknowledge that the change in leadership could have a positive impact, we note that change management is notoriously difficult and drawn-out; and we suspect it will likely take time to address a culture that has been embedded over the past five years. This also does not account for the fact that other members of BT Group senior management may have similar perspectives to Jansen.

In addition, we note the reference in the 2023 OMU that breaches of the Commitments had been relatively minor occurring at a rate of less than 10 a year and that, where breaches had been identified, Ofcom had worked with BT Consumer and Openreach to hold them to account. However, the report does not provide any detail regarding the breaches identified and therefore does not give the required comfort that these issues were, in fact, minor or that they have been fully resolved. Notwithstanding this, it is concerning that any breaches of the Commitments have taken place.

We do not think the incidence of up to 10 breaches a year is immaterial particularly when we consider that, in the context of the regulatory environment where information asymmetry is a pervading issue, this may not represent the full picture. We also note that in the 2016 SRDC Ofcom stated that, in the 10 years since the Undertakings were put in place, "BT ha[d] breached them in a non-trivial manner, 59 times" and that it "would have expected to see a steady decline in the number of breaches". This was a contributing factor in Ofcom's decision to "proceed…with a formal notification to require the legal separation of Openreach from BT". Extending the same logic, it would seem reasonable that given the number of breaches identified in the most recent OMU report, Ofcom should consider whether the arrangements established to secure the independence of BT and Openreach are continuing to deliver in line with desired outcomes. This assertion is strengthened by the fact that the Undertakings have been in place for six years and we would therefore expect that, if they were going to be effective in delivering desired outcomes, the companies would be operating in the spirit / to the letter of the provisions as part of their business-as-usual practices. This does not appear to be the case.

Proposed solutions

In an ideal world, our enduring concerns about the continued affiliation of BT Consumer and Openreach within the BT Group would be addressed via full structural separation of the group into two standalone entities. This would align with the approach that was taken in 2009 via the 'Third package' of European legislation whereby energy retailers and generators were required to unbundle their operations from their affiliated transmission networks. As set out above, in the 2016 SRDC Ofcom "reserved the right to progress structural separation"; and this therefore remains a backstop that could be implemented if BT Consumer and Openreach continue to display the anticompetitive behaviours discussed above. We recognise that full separation would likely involve significant cost and resource to achieve but we would be interested to understand how these costs compare to the benefits that could accrue; and therefore consider there would be merit in Ofcom progressing a targeted cost-benefit analysis (CBA) in this area.

An alternative, less radical solution could be developed based on a proposal that was included within the industry 10-point plan for Openreach reform which was referenced in the 2016 Ofcom document Strengthening Openreach's strategic and operational independence. The specific proposal was to "requir[e] BT to tender for network providers for its retail operations". Ofcom chose not to consider this element of the 10-point plan as it did not "relate…directly to Openreach's strategic and

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operational independence" but we think this remains a viable option to address concerns about anticompetitive behaviour and could be explored in more detail. We therefore think there would be value in Ofcom, and industry as appropriate, revisiting the proposal.

Another even lighter-touch solution would be focused on facilitating increased visibility of the new build market and BT Consumer / Openreach performance. In this respect, Ofcom could require formal monitoring and reporting on BT Consumer / Openreach performance in the provision of services to the new build market segment; as appropriate setting agreed targets for industry-wide service levels. The adoption of similar approaches in the water and waste industry has led to a significant improvement in incumbent performance and we anticipate it could facilitate a positive change in BT Consumer behaviour, helping to support competition.

I hope these comments are helpful. I would be very keen to discuss our response with you in more detail; please feel free to get in touch via [redacted]

Yours sincerely

[redacted]

Keith Hutton

BUUK Group Regulation Director