Implementing the broadband Universal Service Obligation

BT's Response to Ofcom's consultation on designation regulations

15 October 2018

Executive summary

1. This document sets out BT's response to Ofcom's Consultation on designation regulations published on 13 September 2018 (the "September 2018 Consultation"), and should be read in conjunction with our response of 4 September 2018 to Ofcom's Call for expressions of interest of 19 June 2018 (the "June 2018 Consultation").

2. As we said in our response to the June 2018 Consultation, we fully support the Government's objective of giving everyone in the UK a legal right to a decent broadband connection by 2020, up to a reasonable cost threshold. This is an important part of the wider Government ambition to improve fixed and mobile networks in the UK and to ensure that even the hardest to reach areas are not left behind.

3. We broadly support Ofcom's proposal for a direct designation approach of the broadband Universal Service Provider ("USP"). We agree with Ofcom that this is a more efficient and quick way of implementing the USO, than an auction or a procurement process.

4. However, we consider the draft designation regulations set out in Annex 1 of the September 2018 Consultation (the "2018 Regulations"), should be amended to **require the notification of proposals for designating USP to set out the conditions** Ofcom is proposing to impose on a person designated as a USP, including conditions relating to compensation mechanisms. In the current draft, Ofcom has discretion as to whether to include its proposed conditions in the notification. This should be changed to be a necessity. This would allow the person stated in the notification, and potential alternative USPs, to consider such conditions when providing representations on the notification, consistent with Ofcom's stated objective in paragraph 2.24 of the September 2018 Consultation to be *"efficient, objective and transparent"* - it is important for interested parties to understand the basis on which designation is proposed.

5. We would welcome further clarification of the implication of the proposed revocation of the Electronic Communications (Universal Service) Regulations 2003 (the "2003 Regulations"), and the application of the 2018 Regulations to all future and past USP designations. We note that the proposed 2018 Regulations omit all references to the relevant EU legislation. We consider it is important that Ofcom, in its final statement, **reaffirms that policy objectives and regulatory principles set out in EU legislation remain core to its designation process** and conditions imposed under s.66(1) of the Communications Act 2003 (the "Act"). Similarly, we would ask Ofcom to **reintroduce provisions ensuring due process**, which have also been omitted from the revoked regulations, in the final 2018 Regulations.

6. The above points are discussed in more detail in our response below, and we will be happy to provide any further comments at Ofcom's request. We believe our proposals below would help to ensure an efficient, objective, transparent and non-discriminatory designation process, in line with the Universal Service Directive[1] and s.66(7) of the Act.

[1] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 (as amended) on universal service and users' rights relating to electronic communications networks and services as amended by Directive 2009/136/EC, at Article 8(2).

1. Designation of USP (section 4 of the draft 2018 Regulations)

1.1 In the September 2018 Consultation, Ofcom sets out the reasons for proposing to proceed with a direct designation approach, and why it considers this approach most likely to effectively meet its primary objectives. As required under s.66(1) of the Act, Ofcom is consulting on draft regulations setting out the process by which providers will be designated.

1.2 The proposed 2018 Regulations, with a few exceptions (see below), broadly replicate the 2003 Regulations they propose to revoke. Ofcom proposes the 2018 Regulations will apply to all future and past USP designations, albeit revocation of the 2003 Regulations would not impact existing designation of BT and KCOM or the conditions imposed on them (2.26-2.27 of the September 2018 Consultation).

1.3 We broadly support Ofcom's proposal for a direct designation approach of the broadband USP. However, we consider the draft 2018 Regulations should be amended to require the notification of proposals for designating USPs to set out the conditions Ofcom is proposing to impose on a person designated as a USP, including conditions relating to compensation mechanisms.

1.4 This would allow the person stated in the notification, and potential alternative USPs, to consider such conditions when providing representations on the notification, consistent with Ofcom's stated objective in paragraph 2.24 of the September 2018 Consultation to be *"efficient, objective and transparent"* and with s.66(7) of the Act - it is important for interested parties to understand the basis on which designation is proposed. Moreover, Ofcom will need to be clear itself, for example, about compensation mechanisms in order to know what risk it would be expecting interested parties to bear and therefore whether the obligation it was proposing was proportionate.

1.5 In the current draft, Ofcom has discretion as to whether to include its proposed conditions in the notification. Section 4(3) of the draft 2018 Regulations provides:

*"(3) The notification **may also set out the conditions** that OFCOM are proposing to set on a person designated as a universal service provider in accordance with sections 45 to 48C and 67 of the Act."*

We consider sub-section (3) should be amended so that inclusion of the proposed conditions in the notification is a necessity. This could be done by replacing the word "may" with the word "shall" in sub-section (3), and by inserting the words ", including conditions relating to compensation mechanisms," after the word "conditions" in sub-section (3).

1.6 That would also be consistent with Section 3(3) of the Act which requires that *"(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; …"* And it would be in line with Ofcom's proposed next steps set out in the June 2018 Consultation (1.17 and 5.17).

1.7 We note that although the 2003 Regulations also use the term "may" rather than "shall", the circumstances here warrant the inclusion of the proposed conditions in the designation notification itself. In the context of broadband USO, the need for transparency for all parties – including proposed designated and potential alternative USPs, Ofcom and other stakeholders – is particularly important, in light of the potentially significant investment required to meet the obligation, the dependencies between the conditions imposed (such as timing for delivery) and the level of investment required, and the lag between network infrastructure build and any cost recovery. Inclusion of the proposed conditions in the notification would allow interested parties (notably proposed designated and

alternative providers) to consider the proposed designation and conditions as a whole, and provide them with an opportunity to convey views to Ofcom prior to its final decision on designation.

2. Revocations and review of designations (sections 3 and 5 of the draft Regulations)

2.1 Section 3 of the draft Regulations provides:

> *"(1) The Electronic Communications (Universal Service) Regulations 2003(4) are revoked in their entirety.*
> *(2) Any designation of a universal service provider made, and any conditions set, under the Electronic Communications (Universal Service) Regulations 2003, prior to the revocation of those Regulations shall have effect as if made under these Regulations."*

2.2 We consider Ofcom should provide further clarification of the implications of the proposed revocation of the 2003 Regulations, and the application of the 2018 Regulations to all future and past USP designations, beyond the clarification in 2.26-2.27 of the September 2018 Consultation.

2.3 Firstly, whilst Ofcom has decided to adopt direct designation as its approach in this instance, we assume that it will decide the appropriate process to follow in future USP designations – i.e. the revocation of the 2003 Regulations does not mean all future USPs will be subject to direct designation. Ofcom's reasons for adopting direct designation in the context of broadband USO might not be applicable to subsequent designation of providers for other elements of a universal service. For example, Ofcom relied on there being *"insufficient interest from providers in delivering the USO on a national basis, or in the same geographic areas, to run an effective competition"* (1.7, 2.18-2.19 of the September 2018 Consultation). This may not be the case for subsequent designations. Whilst the draft 2018 Regulations rightly is not prescriptive about the designation process, we think it would be helpful for Ofcom to confirm in its final statement that designation processes proposed will be appropriate to the circumstances.

2.4 Secondly, we would like to seek some further clarity on the relationship between designation under the proposed 2018 Regulations and any designation of a USP made (and conditions set), under the 2003 Regulations, prior to revocation of those Regulations. As Ofcom notes, BT (and KCOM) have already been designated as USPs in respect of the services set out in The Electronic Communications (Universal Service) Order 2003. Ofcom confirms such designations - made under the 2003 Regulations – will continue to have effect (2.26-2.27 of the September 2018 Consultation). We therefore assume that Ofcom does not propose to seek representations on those existing designations as part of the process for designation of a broadband USO, and the latter will be subject to its own separate conditions. We would be grateful if Ofcom would provide such confirmation, or alternatively provide further detail on the process intended to apply to those existing designations.

2.5 Thirdly, we note that the proposed 2018 Regulations omit all references to the relevant EU legislation, included in the 2003 Regulations. In particular:

- Section 2 – definition of universal service by reference to the Universal Service Directive
- Section 3 – Policy objectives and regulatory principles (giving primacy to Article 8 of the Framework Directive)
- Section 4(12) – requiring all USO conditions to comply with the Universal Service Directive

2.6 UK USO legislation is based on, and consistent with, the EU Common Regulatory Framework ("CRF") and, once transposed into UK legislation, the European Electronic Communications Code ("EECC") replacing it. The EU Directives set out important policy objectives and regulatory principles, including due process provisions, which are relevant here, and which will continue to guide Ofcom under s.66(1) of the Act. The above references in the 2003 Regulations provide clarity and transparency over the application of EU USO policy objectives and regulatory principles set out in relevant EU legislation (and relevant case law) and consistency with UK law. In the absence of express references in the 2018 Regulations, we

would like Ofcom, in its final statement, to reaffirm that policy objectives and regulatory principles set out in EU legislation remain core to its designation process and conditions imposed under s.66(1) of the Act.

2.7 In particular, Section 3 of the 2003 Regulations provides:

> *"**Policy objectives and regulatory principles***
>
> *3.—(1) It shall be the duty of the Director in carrying out any of the functions set out in these Regulations to act in accordance with the policy objectives and regulatory principles in Article 8 of the Framework Directive.*
> *(2) Where it appears to the Director that any of those policy objectives or regulatory principles conflict with each other, he must secure that the conflict is resolved in the manner he thinks best in the circumstances.*
> *(3) Where it appears to the Director that any of his duties in section 3 of the Telecommunications Act 1984 conflict with one or more of those policy objectives or regulatory principles, priority must be given to those objectives and principles."*

2.8 Article 8 of the Framework Directive set out those policy objectives and regulatory principles, pivotal to the CRF, including: technologically neutral regulation; users' choice, price and quality; no distortion or restriction of competition; efficient investment in infrastructure and innovation; no discrimination between providers; consistent regulatory practice and application of the CRF across the EU; access for all citizens to services specified in the Universal Service Directive; appropriate dispute resolution procedures; protection of personal data and privacy; provision of clear information; addressing the needs of specific social groups; and integrity and security of public communications networks.

2.9 To provide clarity and transparency, we consider it would be beneficial to stakeholders for Ofcom to reaffirm in its final statement the continued application of the above principles and objectives. In particular, this would underline that the USO process adopted by Ofcom takes account of the need for:

- Proportionate and technologically neutral regulation, which promotes competition, efficient investment in infrastructure and innovation, in line with Article 8 of the Framework Directive. This includes the need for Ofcom to consider both fixed and wireless technologies, and commercial roll out, in its decisions on USP designation and USO conditions, and ensure an appropriate compensation mechanism for USPs;
- Efficient, objective, transparent and non-discriminatory designation process, in line with Article 8(2) of the Universal Service Directive, and s.66(7) of the Act. This includes the need for Ofcom to set out the proposed conditions, including their reasons and effects, in the designation notification; and
- Mechanisms for efficiently recovering net costs of USO, which shall respect the principles of transparency, least market distortion, non-discrimination and proportionality, in accordance with the principles of Annex IV, Part B of the Universal Service Directive, in line with Article 13 of that Directive.

2.10 Fourthly, we note other omissions from the 2003 Regulations, of provisions ensuring due process for designation:

- Sections 4(4)(b) and (c) - providing the notification may also set out the effects and reasons of the proposed conditions
- Section 5 - Notifications for conditions set on universal service providers
- Section 6 – Appeals

2.11 We consider such provisions are an integral part of the designation process and it is therefore important for this to be set out in the designation regulations. In particular, as we explain above, it is important that Ofcom sets out in the designation notification the proposed conditions, including their effects and reasons and process for notification of such conditions, as well as appeal routes available to designated and alternative USPs to challenge the designation and/or conditions imposed, should they decide to do so. We therefore consider the draft 2018 Regulations should be amended to include the above provisions. This would be consistent with Ofcom's stated objective in paragraph 2.24 of the September 2018 Consultation to be *"efficient, objective and transparent"*, and with the requirement to ensure an efficient, objective, transparent and non-discriminatory designation process set out in the Universal Service Directive and in s.66(7) of the Act.

2.12 Finally, the draft 2018 Regulations also include some additions to the 2003 Regulations, including conditions relating to review of designation (section 5). In particular, we are uncertain how the review of designation under section 5 of the proposed 2018 Regulations would differ from the existing review process and how (if at all) that would impact the review of our (and KCOM's) existing designations. For example, if such a review process resulted in changes to existing designation conditions, we consider it would be appropriate for Ofcom to allow for a fair and transparent consultation process, affording interested parties the opportunity to provide representations, under section 5(2) of the regulations. We would welcome clarification of this matter, including the interrelationship with the 3 year review process provided for existing universal services in the EECC.