

BT's response to Ofcom's consultation

"Delivering a more independent Openreach"

28 April 2017

I. BACKGROUND / OVERVIEW

1. This response to Ofcom's Consultation¹ is made on behalf of British Telecommunications plc ("**BT**") in the light of Ofcom's indication that it considers that the voluntary commitments offered by BT as part of its formal notification dated 10 March 2017 (the "**Revised Notification**") under section 89C of the Communications Act 2003 (the "**Communications Act**") satisfy its competition concerns. The Revised Notification sets out the details of, and pre-conditions for, BT's intended reorganisation of the governance and structure of the BT corporate group in order to enhance substantially the independence of the Openreach business.
2. A separate response is being submitted on behalf of Openreach Limited which was incorporated as a separate legal entity on 24 March 2017 as part of BT's implementation of the Revised Notification.
3. As part of the Revised Notification, BT has put forward a series of commitments (the "**Commitments**") which it intends to adopt as a substitute for the Undertakings agreed with Ofcom in 2005 (the "**2005 Undertakings**")². Ofcom has suggested that it should formally release BT from the 2005 Undertakings within 30 days of BT's notification that the pre-conditions have been met. BT also supports and welcomes Ofcom's proposal to release BT from the 2005 Undertakings. While the Undertakings have provided an effective framework for the creation of a functionally separate network access business and have facilitated significant wholesale and retail competition over the last 10 years, the challenges and the opportunities facing the industry today have changed substantially. A number of the Undertakings are now obsolete, redundant or will be superseded by the Commitments offered by BT, once the pre-conditions have been satisfied. In addition to this and as recognised by Ofcom,³ existing ex ante regulation will continue to operate concurrently and can be used to address any concerns Ofcom may have on a market-by-market basis.
4. BT welcomes the central finding made by Ofcom as part of this consultation that the Revised Notification is a reasonable and practical way to address the competition concerns identified by Ofcom as part of its "Strategic Review of Digital Communications" (the "**Strategic Review**"). BT also welcomes Ofcom's stated preference⁴ for a voluntary rather than mandatory approach, with the

¹ Ofcom's consultation "Delivering a more independent Openreach, Update on BT's voluntary notification under s.89C Communications Act 2003 and consultation on releasing the BT Undertakings pursuant to section 154 Enterprise Act 2002", 17 March 2017 ("**2017 Consultation**").

² In 2005, in lieu of a market investigation reference to the Competition Commission, BT provided the Undertakings to Ofcom under Part 4 of the Enterprise Act 2002 ("**Enterprise Act**").

³ See paragraphs 4.16, 4.18 and 4.23 of the 2017 Consultation.

⁴ See paragraphs 1.11 and 1.12; and paragraphs 3.19, 3.29 and 3.30 of the 2017 Consultation.

consequence that there is no need to proceed with a formal notification⁵ to the European Commission.

Ofcom's 2015 Strategic Review objectives

5. Ofcom began its Strategic Review more than two years ago, in March 2015, by publishing the Terms of Reference⁶ under which it proposed to conduct a review - similar to that undertaken in 2005, but including a broader set of policy aims and covering markets other than the traditional telecommunications markets. BT agreed that this was appropriate, given that ten years had passed since the previous review and that period had brought about significant developments in technology and the broader digital economy as well as changes in the regulatory framework.
6. However, as noted in our previous responses and recently acknowledged by Ofcom⁷, the potential change to the Openreach arrangements was only one of several sets of measures that were contemplated by Ofcom as capable of achieving its strategic objectives in the coming decade⁸. A large number of other measures were also considered with a view to delivering Ofcom's wider policy goals.⁹ As discussed in more detail in Section V below, it is important to bear this broader context in mind when identifying the specific measures

⁵ It is our understanding that Ofcom's intention was to seek formal mandatory separation by imposing, with the approval of the European Commission, an exceptional remedy pursuant to ss. 89A and 89B of the Communications Act which follows the requirements set out in Article 13a of the Directive 2002/19/EC ("**Access Directive**") as amended.

⁶ Since March 2015, Ofcom has issued a number of consultation documents including the *Strategic Review of Digital Communications, Discussion Document* ("**Discussion Document**"), published in July 2015, followed by a further paper entitled *Initial Conclusions from the Strategic Review of Digital Communications* in February 2016 and, most recently, *Strengthening Openreach's strategic and operational independence Proposal for comment* ("**Ofcom's 2016 Proposals**") published in July 2016, which included various types of enhanced functional separation that Ofcom considered were necessary in order to deal with its concerns.

⁷ See paragraph 1.25 and Section 7 of the 2017 Consultation.

⁸ In its July 2015 Discussion Document Ofcom defined the policy outcomes it was seeking to achieve under the following four broad headings: (1) Investment and innovation, delivering widespread availability of services; (2) Sustainable competition, delivering choice, quality and affordable prices; (3) Empowered consumers and businesses, able to take advantage of competitive markets; and (4) Targeted regulation where necessary; deregulation elsewhere.

The assessment of whether the functional separation of Openreach based on the 2005 undertakings remains as an appropriate measure in the future was considered under a number of these headings, along with other potentially relevant topics such as considerations on how to ensure the applicable regulation successfully protects efficient investment and the measures that may need to be implemented to secure quality of service for consumers and businesses.

⁹ Some measures, such as the need to further develop duct and pole access and proposals for dark fibre in business markets, are under consideration or are in the process of being implemented.

against which the success of the new model will need to be monitored and assessed.

7. BT strongly supports Ofcom's overarching objectives of promoting investment and innovation as well as sustainable competition, all of which are important to the goal of meeting rapidly increasing demand and consumer expectations. These objectives include wider deployment of broadband access on a fast and reliable basis and advancing fibre deployment in more locations, while also developing other important investments that are necessary for the next generation of converged networks expected in the short-to-medium term, particularly further deployment of 4G networks and accelerating the development of 5G networks. BT is committed¹⁰ to supporting these common objectives and investments provided that it is able to achieve a reasonable return on its capital and risk. BT also recognises the importance of achieving ongoing improvement of BT's customer experience, not just as regards its retail consumers, but also in terms of meeting the needs of other communication providers ("CPs") and wholesale partners.
8. The Strategic Review process has been lengthy and detailed, allowing all stakeholders extensive and repeated opportunities to express their views. Now that Ofcom is satisfied that its concerns can be effectively addressed by BT's Revised Notification, the process merits a swift conclusion so that BT can proceed with implementation of the Commitments. That will, in turn, provide the regulatory certainty and confidence for BT and other CPs and service providers to plan their future investments and deliver innovative services for the benefit of consumers.

Background to BT's voluntary proposal

9. Since the start of the Strategic Review, BT has engaged with Ofcom to understand the precise nature of Ofcom's concerns and the evidence on which Ofcom relies, and to seek to identify ways in which these concerns could be addressed promptly and in an effective and proportionate way.
10. Whilst BT and Ofcom have had diverging views on a number of topics during this process, including the characterisation and extent of the competition concerns identified by Ofcom, the need for further functional separation as an element in addressing such concerns¹¹ and the costs and deconsolidation

¹⁰ Details of BT's planned investments can be found here: <http://www.btplc.com/UKDigitalFuture/>

¹¹ As set out in detail in BT's response to the consultation outlining Ofcom's 2016 Proposals, BT is not convinced that there is a theoretical or economic basis which successfully links Ofcom's alleged (but unproven) theory of harm to the need for further separation. In addition, BT does not consider that Ofcom has advanced credible evidence to support its concerns that BT might have the incentive and ability to engage in "strategic discrimination" in relation to network projects that benefit its own downstream businesses over investments linked to the strategic ambitions of its competitors. Finally, BT does not consider that Ofcom had explained clearly how additional separation will mitigate the risk that Ofcom has identified as against other regulatory measures to which BT is already subject.

issues¹² associated with implementing Ofcom's July proposals, BT has gone to great lengths to cooperate with Ofcom in seeking to develop a new governance model for Openreach which will provide greater independence and transparency as well as greater customer focus on the needs of CPs.

11. In the spirit of cooperation, and with a desire to reach a quick resolution and resolve regulatory uncertainty over the course of the Strategic Review, BT has made a number of voluntary proposals to Ofcom, including a formal notification in July 2016 (the "**July Notification**"). The most recent proposal, set out in BT's Revised Notification, is a result of further detailed discussions with Ofcom over the past few months. Through the Revised Notification, BT has sought to build on its earlier offer in the July Notification in order to satisfy Ofcom's challenging requirements on matters such as the legal incorporation of Openreach and the transfer of assets and employees, while guarding against the risks of disproportionately high costs and undermining fundamental corporate governance requirements. BT has provided some high level comments below on the areas where it was unable to move further towards Ofcom's requirements and the reasons why it was necessary to include the pre-conditions that must be satisfied before the Revised Notification can be implemented.
12. Over the past two years, BT and Openreach have also engaged with other CPs, including Vodafone, TalkTalk and Sky, on a formal and informal basis (e.g. through CP industry briefings by Openreach) in order to understand their concerns, so that these can be addressed through BT's proposals. BT therefore believes that the Revised Notification also responds effectively to the points raised by third parties.

Important benefits of voluntary settlement over mandatory regulation

13. As acknowledged in the 2017 Consultation¹³, delivering the enhanced separation desired by Ofcom through a voluntary settlement will allow BT to provide a range of benefits more quickly than if the same goal had been sought using formal regulation. BT is therefore confident that this is the most suitable and appropriate solution for the UK market.
14. BT considers that a voluntary settlement has clear advantages in terms of speed, clarity and regulatory certainty, which will benefit not only BT and Ofcom, but also consumers and CPs. Implementing the solution quickly will bring about advantages for the whole industry by allowing all participants to focus on the relevant priorities that matter to customers and the UK economy.

These issues are covered in detail in Section 3 and Section 4 of BT's response to Ofcom's 2016 Proposals, dated 4 October 2016, and available here:
https://www.ofcom.org.uk/__data/assets/pdf_file/0029/93647/BT.pdf

¹² The costs and consolidation issues were described in detail Section 4 of BT's response to Ofcom's 2016 Proposal, dated 4 October 2016, and the expert reports in the Annexes available here:
https://www.ofcom.org.uk/__data/assets/pdf_file/0029/93647/BT.pdf.

¹³ See paragraph 1.12; and paragraphs 3.29 and 3.30 of the 2017 Consultation.

As such, BT has sought to reach this type of settlement for some time already and believes that the clarity and certainty needed for future investment will be achieved through this effective and enduring regulatory model.

15. Importantly, while the Revised Notification entails significant implementation challenges, in terms of timescales, complexity and financial consequences for BT, it also successfully avoids the potential deconsolidation issues and disproportionate costs raised by Ofcom's 2016 Proposals that were identified by BT in its previous submissions¹⁴. In particular, these include the significant pension costs that would have been incurred if Ofcom's 2016 Proposals published in July 2016 had been implemented.
16. Against this background, we believe that a voluntary resolution to Ofcom's Strategic Review is the best way forward that will usefully allow all stakeholders to focus on delivering investment and innovation for the benefit of consumers and the industry more generally, while avoiding significant costs and the need for a protracted regulatory process.¹⁵ While the conditions which require completion before the Revised Notification can be implemented will take some time to be met, Openreach has already begun and will continue to deliver those elements as soon as it can. This should help bring immediate benefits for CPs, consumers and businesses.
17. Finally, BT notes that, in advancing its Revised Notification, BT has sought to address Ofcom's desire for greater independence of Openreach and to respond constructively to Ofcom's chosen approach – the Commitments will be implemented in good faith and in compliance with both the letter and the spirit of their terms. Nonetheless, in its previous submissions during the Strategic Review, BT expressed substantial reservations about the theory of harm postulated by Ofcom, and the lack of legal basis or factual justification for the imposition of enhanced functional or quasi-structural separation as the central element of Ofcom's 2016 Proposals¹⁶.
18. BT remains concerned that, while it is fully committed to the implementation of the Commitments as part of its Revised Notification, and the consequential changes to BT's governance that have been agreed with Ofcom, such changes in governance cannot in themselves guarantee all the outcomes that Ofcom (and BT) seek to achieve. BT addresses these issues in more detail in the final section of this submission, Section V below.

¹⁴The costs and consolidation issues were described in detail Section 4 of BT's response to Ofcom's 2016 Proposal, dated 4 October 2016, and the expert reports in the Annexes available here: https://www.ofcom.org.uk/__data/assets/pdf_file/0029/93647/BT.pdf

¹⁵ Ofcom rightly refers to such considerations at paragraphs 1.12 and 3.29 of the 2017 Consultation.

¹⁶ In particular, BT has set out in detail in its previous responses the reasons why there are no "exceptional circumstances" in terms of market or regulatory failure, no persisting competition problems in relation to wholesale access or the development of infrastructure competition without the need for intervention. Moreover, BT remains of the view that mandatory structural separation is not permitted by the UK or EU telecommunications regime. These issues are covered in detail in Section 3 and Section 4 of BT's response to Ofcom's 2016 Proposals, dated 4 October 2016, and available here: https://www.ofcom.org.uk/__data/assets/pdf_file/0029/93647/BT.pdf

II. BT'S REVISED NOTIFICATION

The Revised Notification meets Ofcom's requirements

19. BT's Revised Notification was provided to Ofcom on 10 March 2017 and comprises the following set of documents¹⁷:
- a. **Notification** under section 89C of the Communications Act which, subject to various specified pre-conditions, sets out BT's intention to enter into a series of Commitments as a substitute for the 2005 Undertakings, a Governance Protocol and an Agency and Services Agreement ("**ASA**") (see further below).
 - b. **Commitments to be given by BT and Openreach Limited to Ofcom**: they are based on the existing 2005 Undertakings which have been updated and revised to reflect various developments including, in particular, the establishment of the new model of legal separation and changes in the applicable regulatory regime.
 - i. In summary, BT commits to the following, subject to various pre-conditions set out in more detail below:
 - To incorporate Openreach Limited;
 - To establish an independent board for Openreach Limited (the "**ORB**"), i.e. comprising a majority of independent (unaffiliated) directors;
 - To transfer all the employees who currently work in the Openreach Line of Business (the "**Openreach Division**") to Openreach Limited so that, following such transfer, Openreach Limited will have control over the employment of its personnel;
 - To delegate authority to Openreach Limited to set the strategy of the Openreach Division, oversee its performance, develop and implement its Annual Operating Plan and Medium Term Plan and manage and operate its activities, assets and trade (the legal ownership of the assets and benefit of trading however remaining with BT);
 - To run the Openreach Division as a functionally separate division of BT;
 - To ensure that the Openreach Division treats all customers equally, including in relation to customer consultation, strategy and investment decisions;
 - To ensure that the Openreach Division conducts customer consultations with respect to any proposed significant investments related to the future development of its networks, by means of a three-stage process, the first of which (the confidential phase) will remain confidential within Openreach;
 - To ensure Openreach's customer confidential information and commercial information and policies remain confidential; and

¹⁷ <http://www.btplc.com/UKDigitalFuture/TheOffer/index.htm>

- Openreach Limited will also be bound by the Commitments.
 - The Commitments have only limited application in Northern Ireland.
- c. **Conditions:** compliance with the Commitments is conditional upon the prior satisfaction of the following four pre-conditions (the “**Conditions**”), which are discussed further below:¹⁸
- The adaptation of the Crown Guarantee or the provision of a new guarantee in respect of Openreach Limited’s pension liabilities insofar as they relate to the pension benefits currently covered by the Crown Guarantee;
 - Approval of the Trustee of the BT Pension Scheme to admit Openreach Limited as a participating employer in the BT Pension Scheme;
 - TUPE consultation; and
 - Release from the 2005 Undertakings.
- d. **Governance Protocol** which sets out the governance of Openreach Limited and the Openreach Division:
- The terms of reference (powers and obligations) of the ORB, including the independence of its members;
 - The role of the Openreach Executive and CEO;
 - The appointment and reporting of the Openreach CEO by / to the Openreach Chairman;¹⁹ and
 - The process for agreeing Openreach’s Annual Operating Plan and Medium Term Plan and for ensuring and monitoring Openreach’s performance.
- e. **Agency and Services Agreement (or ASA):** the agreement between BT and Openreach Limited which provides the framework applicable between the two companies with respect to the implementation of the Commitments, notably in respect of how BT will engage Openreach Limited to manage and operate the Openreach Division’s activities, the transfer of the Openreach employees to Openreach Limited and Openreach Limited’s role as BT’s agent in customer and supplier relationships.
20. We welcome the acknowledgement in the 2017 Consultation²⁰ that our Revised Notification now addresses all of Ofcom’s competition concerns and, in particular, that it deals successfully with the aspects in our July Notification which Ofcom had previously considered to be deficient. We agree with Ofcom²¹ that the new arrangements strike the right balance between greater independence for Openreach while limiting the costs of implementing a new organisational structure and ensuring the continuity of appropriate corporate

¹⁸ The Conditions are necessary to avoid the disproportionate costs that would have been incurred by BT if Ofcom’s 2016 Proposals had been implemented (see further footnotes 12 and 15 above).

¹⁹ An overview of the Openreach new governance arrangements is available here: <http://www.btplc.com/UKDigitalFuture/Agreed/governance1pager.pdf>

²⁰ See paragraphs 1.11-1.13 and paragraphs 3.25-3.30 of Ofcom’s 2017 Consultation.

²¹ See paragraph 6.3 of Ofcom’s 2017 Consultation.

governance within the BT Group, consistent with its position as a public listed company.

21. BT has made considerable concessions in the Revised Notification to address Ofcom's requirements, including its agreement to incorporate Openreach Limited as a separate legal entity and to transfer around 32,000 Openreach employees to the newly created entity, following the satisfaction of the Conditions and a TUPE consultation, including in relation to the pension arrangements described in more detail below.
22. The Commitments clearly set out the responsibilities of Openreach Limited's Board and Executive in relation to the Openreach Division including in relation to strategy and performance, but also permit a degree of interaction between Openreach Limited and BT Group that is necessary to enable BT Group to meet its legal, regulatory and corporate governance obligations.²² We are pleased that Ofcom has recognised²³ that such interactions need to continue for the orderly functioning of BT as a consolidated, publicly listed company.
23. The Governance Protocol summarised above also makes clear that Openreach Limited will have greater independence with respect to important strategic decisions. Further to this, Openreach Limited will be able to manage and operate the Openreach business, its activities, assets and trading in accordance with the terms of the Commitments and the ASA. Openreach will also have its own corporate branding and logo, which will not feature the BT insignia, and will have greater independent control over its spending within a budget to be agreed with BT.
24. CPs will benefit from a more robust and transparent consultation process with Openreach with a new confidential phase.

Conditions to be satisfied ahead of completing the implementation

25. The Revised Notification is subject to the four Conditions set out in paragraph 19 above which must be met before full implementation can occur. The first two Conditions, relating to the Crown Guarantee and Trustee consent to Openreach Limited becoming a participating employer in the BT Pension Scheme, are necessary to provide appropriate protections for relevant employees' pension benefits. The third Condition, TUPE consultation, is required by law²⁴ in order to protect transferring employees' interests and employment rights. The last Condition relates to BT's release from the 2005

²² In order to retain its status as a public listed company in the UK, BT must be capable of complying at all times with its listed company obligations and with corporate governance best practice. A reporting relationship between the Openreach CEO and BT CEO must therefore be maintained. BT could not agree to changes to the corporate arrangements that would, for example, trigger deconsolidation, such as a lack of control of Openreach. It is for this reason that we have retained a veto right over the Openreach Board's proposed choice of CEO, the ability to appoint and remove a majority of the Openreach Board and a sufficient level of control over the parameters of Openreach's budget via mechanisms described in the Governance Protocol.

²³ See paragraphs 1.19 and 6.3 of the 2017 Consultation.

²⁴ The transfer will take place by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE Regime**").

Undertakings to ensure the orderly running of Openreach without duplicative and outdated regulation.

Condition 1 and 2 - Crown Guarantee and Trustee approval

26. The arrangements in the Revised Notification contemplate a transfer of a large number of employees to the new Openreach Limited. Those employees who are currently active members of the BT Pension Scheme are able to accrue benefits in the Scheme with members benefiting from the Crown Guarantee should BT plc become insolvent in the future. To ensure that the pension arrangements of such transferred employees are not negatively affected, Openreach Limited should become a participating employer in the BT Pension Scheme.
27. Two main issues prevent this from occurring at present:
 - (a) The terms of the Crown Guarantee are set out in legislation²⁵ and its coverage is restricted to liabilities of BT plc to the BT Pension Scheme.
 - (b) The agreement of the Trustee of the BT Pension Scheme is required before Openreach Limited can be admitted as a participating employer in the BT Pension Scheme and the Trustee has indicated that it does not consider it can agree to this, if the arrangements continue to operate in their current form. This is because, under the current Crown Guarantee legislation, liabilities that Openreach Limited may have to the BT Pension Scheme in respect of transferring employees would not be covered by the Crown Guarantee. Admission on a non-guaranteed basis could potentially dilute the benefit of the existing Crown Guarantee protection.
28. The first Condition included as part of the Revised Notification therefore requires either the Crown Guarantee to be adapted to deal with this, or a new guarantee in respect of Openreach Limited's pension liabilities to be set up. The terms of any such new guarantee would need to be equivalent in operation and scope to the Crown Guarantee provided in respect of BT plc's pension liabilities, and acceptable to BT and the Trustee.
29. The Digital Economy Act 2017, which received Royal Assent on 27 April 2017, provides the Secretary of State with the power to make regulations to give effect to the required Condition regarding the Crown Guarantee.
30. Assuming the Crown Guarantee is resolved on a basis that is acceptable, BT expects to be able to agree with the Trustee terms on which the Trustee would be willing to give its consent for Openreach Limited to participate in BT's Pension Scheme, thereby satisfying the second Condition.

²⁵ Section 68 Telecommunications Act 1984, as amended.

Condition 3 - TUPE consultation

31. Provided that the pension arrangements above are in place, the transfer of employees can be finalised. Approximately 32,000 employees are likely to be assigned to Openreach Limited at the point of implementation and will transfer automatically to Openreach Limited under the TUPE Regime.
32. Under the applicable legislation, both BT and Openreach Limited must inform and consult with recognised trade unions or elected employee representatives in relation to any employees who may be affected by the transfer or any measures taken in connection with it prior to such transfer taking effect. Completion of the consultation process to the satisfaction of BT is therefore a Condition which must be satisfied before the Revised Notification can take effect.

Condition 4 - Release from the Undertakings

33. The Condition regarding the release from the Undertakings is set out in more detail in Section III and Annex A below.

Timeframe for implementation and need for finality

34. Some of the Commitments have already been completed since they reflect the offer made in BT's July Notification which BT has been implementing during the last nine months. For example, an independent Openreach Board, its Chairman and Non-Executive Directors have been appointed.²⁶ In addition, Openreach Limited has now been incorporated as a separate legal entity. BT and Openreach are also in the process of developing comprehensive and robust additional plans for implementation within BT and Openreach.
35. Details of the governance arrangements that have already been implemented and the plans that are being made and are in the process of being delivered by Openreach are set out in Sections 2 and 3 of the separate Openreach response.
36. BT and Openreach are fully committed to implementing the remainder of the provisions in the Revised Notification as quickly as possible, subject to the satisfaction of each of the Conditions. BT envisages that full implementation could take around 12 months, subject to resolution of all matters relating to the Crown Guarantee. This timeframe reflects BT's estimate of the time it may take to deliver the Commitments from an operational perspective and to resolve the legal and regulatory challenges that BT expects to satisfy the Conditions.
37. As mentioned above, a key reason why the voluntary settlement is expected to be successful is the greater long term regulatory certainty that it should provide for Ofcom and BT as well as other interested parties such as CPs and the BT Pension Scheme Trustee. As acknowledged by Ofcom,²⁷ such certainty should help reduce the associated investment risk facing industry at a key point in the

²⁶<https://www.openreach.co.uk/orgp/home/aboutus/ourorganisation/ourexecutiveteam/executiveteam.do>

²⁷ See paragraph 3.29 of the 2017 Consultation.

move to fibre delivery, although wider regulation also plays a key role in this respect. In this context, we would note that the provision of the necessary certainty for all stakeholders (including BT) would be undermined should the settlement be re-opened prematurely: for the new model to succeed, it should be given a sufficient period of time and stability, and opportunity to work.²⁸

²⁸ See Section 6.3 of BT's response to Ofcom's 2016 Proposal, dated 4 October 2016, and the expert reports in the Annexes available here:
https://www.ofcom.org.uk/__data/assets/pdf_file/0029/93647/BT.pdf.

III. RELEASE FROM 2005 UNDERTAKINGS AND TRANSITIONAL ARRANGEMENTS IN THE INTERIM PERIOD

38. Release of BT from the Undertakings is the final Condition for the Revised Notification to come into force. The 2017 Consultation specifically seeks views on Ofcom's proposal to release BT from the 2005 Undertakings 30 days after receiving notice from BT that all four Conditions have been satisfied (a period which may take around 12 months). BT supports this proposal in principle.
39. In the meantime, BT is committed to implementing as many aspects of the Revised Notification as possible in advance of its coming into force. For example:
 - a. The Openreach Chairman was appointed in November 2017 and the other three independent members of the Openreach Board in February 2017, before Ofcom accepted BT's voluntary commitments;
 - b. The Openreach Board is up and running and has already held four meetings. The Openreach Board Audit, Risk and Compliance Committee ("**OBARCC**") has also been established; and
 - c. Openreach is pressing ahead with implementation of new processes set out in the Notification, in particular those relating to the development and approval of Openreach's Annual Operating Plan and Medium term plan and consultation with CPs on significant new network investments.
40. This advance implementation demonstrates BT's good faith and its strong commitment to greater independence for Openreach and transparency for Openreach's customers. It will also help to ensure a smooth transition when the undertakings are removed and the Governance Protocol and Commitments come into force.
41. There are, however, a number of areas, set out in Annex A to this response, where the Undertakings could potentially inhibit our ability at this stage to advance our implementation programme. BT would not want these matters to stand in the way of early implementation, and so would like to work with Ofcom to ensure that this is not the case.

IV. IMPACT OF BT'S REVISED NOTIFICATION ON THE EXISTING SMP CONDITIONS

42. Ofcom has recognised²⁹ that some requirements of the 2005 Undertakings have already been replicated as part of the ex ante regulatory regime over the past 10 years because Ofcom has built them into specific SMP conditions as part of the periodic market review process.
43. The 2017 Consultation³⁰ states that SMP regulation will remain the principal vehicle through which Ofcom will continue to impose regulatory conditions. It is worth noting that, having received the Revised Notification, Ofcom is required to:
- a. take account of the effect of the Revised Notification on existing SMP regulation³¹ as soon as reasonably practicable (under section 89C(4) of the Communications Act). This mandatory and forward looking requirement means that Ofcom must assess the impact of BT's Revised Notification on the SMP conditions that it has already imposed (and may proceed or continue to impose) in various markets – or in the words of Article 13b(2) of the Access Directive, carry out “a co-ordinated analysis of the different markets related to the access network”; and
 - b. carry out reviews of its functions with a view to ensuring that its ex ante SMP regulation does not impose or maintain regulatory burdens that are unnecessary (under section 6 of the Communications Act).
44. In Section 5 of the 2017 Consultation, Ofcom recognises that the Revised Notification is likely to have a direct impact on its assessment of relevant markets in the context of the Business Connectivity Market Review (“**BCMR**”), the Wholesale Local Access (“**WLA**”), Wholesale Broadband Access (“**WBA**”) and the Narrowband Market Review (“**NBMR**”).³²
45. Ofcom does not, however, provide any detail as to how it intends to discharge its obligations under section 89C(4) and section 6 set out above, nor how it proposes to take these obligations into account in conducting this new co-ordinated market review assessment process as part of its current and ongoing market reviews. This is especially pertinent for market reviews that have recently been completed, such as the BCMR, or are in the process of being completed, such as the NBMR and WLA. For those markets, if the impact of the Revised Notification is not being assessed now and no clarity is provided on how such assessment will be taken into account as part of Ofcom's final conclusions, the opportunity for Ofcom to reconsider its SMP approach will not

²⁹ See paragraph 3.5 of the 2017 Consultation.

³⁰ See paragraph 4.18 the 2017 Consultation.

³¹ Section 89C(4) of the Communications Act requires Ofcom, once it has received a notification under section 89C, as soon as reasonably practicable, to consider the impact that the proposal is likely to have on SMP services conditions set in relation to the services markets which, in Ofcom's opinion, will be affected by the proposal.

³² See paragraph 5.2 of the 2017 Consultation.

come about until the next review cycle which may not complete for another 2.5-3 years (which is likely to be after the Revised Notification is implemented).

46. We are not convinced that the approach³³ that Ofcom appears to be proposing to adopt, whereby its assessment of the impact of the Revised Notification will be performed as and when market reviews ordinarily arise, is consistent with the requirements in section 89C(4) and section 6 of the Communications Act. The Revised Notification clearly should be an immediate consideration for Ofcom in determining its approach to SMP regulation as part of any ongoing market reviews. There are, therefore, good reasons for Ofcom to reassess its regulatory strategy straight away in order to consider whether its regulatory approach should become less prescriptive, less interventionist or more flexible and lighter touch. There is scope potentially to move to deregulation, especially if Openreach (and BT) are changing how they are operating and engaging with CPs. There may also be other instances where Ofcom may not need to impose additional regulatory burdens.
47. The on-going NBMR and WLA market reviews provide the right opportunity for Ofcom to specifically consider the way in which the enhanced independence of Openreach as part of the Revised Notification will affect its methodology in applying SMP obligations or other economic approaches to regulation in these markets. These are forward looking reviews which are intended to reflect likely and foreseeable developments over the three years of the review. We have made some specific high level comments in relation to these reviews below:
- a. **WLA:** Ofcom's approach to assessing the impact of the Revised Notification in the WLA Consultation reinforces our uneasiness about the way in which Ofcom intends to discharge its obligations set out in paragraph 43 above. As part of the on-going WLA consultation, Ofcom has not sufficiently considered the impact of the Revised Notification on the WLA SMP conditions, especially given the considerable impact of the proposals relating to price controls. The assessment is set out in a couple of paragraphs only³⁴ concluding that Ofcom does "*not consider that any new SMP regulation is necessary specifically to take account of these arrangements and nor do we consider that any of our proposals are not unnecessary or requirement [sic] amendment.*"³⁵
 - b. **NBMR:** it would be appropriate as part of the NBMR process for Ofcom to revisit its analysis as expressed in Ofcom's Consultation document issued in December 2016, which predates the Revised Notification. At that time, Ofcom was envisaging that it would have to impose

³³ The approach is set out at a high level in Section 5 of the Consultation, especially paragraph 5.5.

³⁴ The assessment makes two very general comments in a cursory way: that the creation of Openreach Limited, with a majority independent board will enhance the existing arrangements and should secure greater operational and strategic independence for Openreach; and that, given the goals of the Openreach reform is to facilitate new models of investment, including co-investment, the new proposals, which include requirements for equivalence of inputs, will provide a greater flexibility for co-investment opportunities, with specific cases to be considered on their merits. See paragraphs 4.46 to 4.48 of Ofcom's WLA Market Review – Volume 1, dated 31 March 2017, available here https://www.ofcom.org.uk/__data/assets/pdf_file/0033/99636/Vol1-Market-review.pdf.

³⁵ See paragraph 4.49 of Ofcom's WLA Market Review – Volume 1, dated 31 March 2017, available here https://www.ofcom.org.uk/__data/assets/pdf_file/0033/99636/Vol1-Market-review.pdf.

mandatory enhanced separation through a drawn out regulatory process and was concerned about competition concerns in the interim. Now that Ofcom has accepted that the Revised Notification addresses its competition concerns in terms of Openreach's independence and potential incentives to discriminate, Ofcom should reassess the competition concerns it had identified in the NBMR Consultation document in December 2016³⁶.

- c. In particular, Ofcom proposes to find that BT has SMP in the Wholesale Fixed Access Exchange Line (“**WFAEL**”) Market and that the charges for BT's Wholesale Line Rental (“**WLR**”) should be subject to a fair and reasonable condition. Ofcom also proposes that this fair and reasonable condition would prevent the imposition of a margin squeeze between WLR and downstream BT charges. As explained in BT's NBMR response³⁷, any fair and reasonable condition would need to be applied flexibly given the potential conflict between the principle that Openreach should independently determine its WLR charges based on Openreach costs, and Ofcom's proposed regulation of Standalone Fixed Voice. It is not obvious how to maintain Openreach independence if BT is placed under a regulatory obligation to achieve a sufficient margin between WLR charges which may have to rise to reflect increasing costs and a regulated downstream charge that would be decreasing under Ofcom's proposed Standalone Fixed Voice regulation. At the least, BT considers that Ofcom should reappraise its December 2016 proposal in view of the Revised Notification in accordance with Article 13b of the Access Directive and section 89C(4) of the Communications Act.
- d. Even if Ofcom were to reach the same conclusions with respect to the competition concerns it has found in NBMR (despite BT's arguments to the contrary), it should also reconsider whether a SMP condition is required in the WFAEL market in light of the weakening SMP of Openreach³⁸ and the impact of the Revised Notification.

- 48. In light of the desirability of encouraging investment and innovation in relevant markets as per section 3(4)(d) of the Communications Act, Ofcom must also give proper consideration to the impact of the SMP obligations on its objectives as regards DCR. In particular, Ofcom should consider carefully the extent to which both existing and proposed SMP conditions, including price controls in particular, in the WLA, NBMR and BCMR markets will impact on BT's return on capital with the potential negative effect on incentives to invest.

³⁶ https://www.ofcom.org.uk/data/assets/pdf_file/0016/95011/Narrowband-Market-Review.pdf

³⁷ BT's 24 March 2017 Response to Ofcom's consultation on the proposed markets, market power determinations and remedies for wholesale call termination, wholesale call origination and wholesale narrowband access markets.

³⁸ BT's 24 March 2017 Response to Ofcom's consultation on the proposed markets, market power determinations and remedies for wholesale call termination, wholesale call origination and wholesale narrowband access markets.

49. A further consideration for Ofcom is the constraint on, or weakening of, any SMP that BT is deemed to enjoy as a consequence of the enhanced customer consultation arrangements in the Revised Notification, and whether this may allow a less burdensome and prescriptive form of regulation.
50. For example, UK airport regulation allows for constructive engagement between regulated airports and their large, well informed and well-resourced airline customers, and for commitments to be embodied in the regulatory settlement (see, for example, the commitment framework used for Gatwick airport instead of a price cap).³⁹
51. In water and energy, a lighter touch regulatory approach is used where a company can demonstrate active engagement with customer groups. As part of the water regime companies are expected to take the views of customers into account when they develop their business plans and customer acceptability is a key factor in Ofwat's decisions. More specifically, customer engagement is an important factor in determining whether Ofwat will accept the companies' business plans and the degree of scrutiny by Ofwat of these plans.

³⁹ In 2014 the CAA introduced a lighter touch framework for the economic regulation of Gatwick Airport Limited based on a set of commitments, given by Gatwick to its airline customers, which include a maximum level of airport charges over the seven years to March 2021 and a system of service quality rebates. The commitments framework was favoured, in part, because it was expected to encourage bilateral contracts that could be better tailored to the needs of individual airlines and their passengers, and would facilitate efficient investment as Gatwick would have flexibility to tailor investment to the needs of airlines. <http://publicapps.caa.co.uk/docs/33/CAP%201502%20DEC16.pdf>

V. MONITORING AND SUCCESS MEASURES

52. BT confirms its commitment to deliver as quickly as reasonably possible the outcomes Ofcom is seeking to achieve with respect to BT's implementation of and compliance with the Commitments in the Revised Notification.
53. However, as indicated in its earlier submissions⁴⁰, BT has some scepticism regarding the alleged risk of strategic discrimination and has reservations about whether enhanced separation between BT and Openreach will be sufficient in itself to achieve Ofcom's wider investment objectives. In the light of those reservations, BT or Openreach should not be held accountable for any perceived market problems, unless it is demonstrated that they are causally linked to its failure to deliver on functional separation as specified in the Commitments.
54. BT has previously raised concerns with the way in which Ofcom was proposing to evaluate the success of its intervention because the measures of success were not precise enough, they did not relate directly to Ofcom's 2016 Proposals for enhanced functional separation and they involved outcomes which would not be within BT's direct control. It remains our view that BT can only be legitimately assessed against outcomes that relate to actions that BT or Openreach can take and be responsible for themselves.
55. In terms of monitoring, we are pleased that Ofcom has sought to clarify the way it expects to monitor BT's and Openreach's implementation and compliance with the Revised Notification through its three-tier monitoring system described in Section 6 of the 2017 Consultation. We are very open to this process and committed to implementing the various practical and governance arrangements set out in the Revised Notification as well as delivering the behaviours and means of engagement that are within the control of BT and Openreach. However, we have some concerns with the metrics applicable to the third monitoring area "Independence and equal customers' treatment" that are discussed in more detail below.
56. While we recognise that prompt and effective responsiveness and open engagement with CPs (including via a confidential phase, where appropriate) is key, it is also important for Ofcom not to conflate the delivery of independence and equal treatment with the broader outcomes it wishes to achieve in the UK market.⁴¹ The former are within Openreach's and BT's control, but there could be a myriad of reasons behind different market outcomes, and BT should not be penalised simply because outcomes do not materialise as hoped for, or because success is dependent on the actions of other parties. The assessment of whether the new regulatory model has been successful will therefore require a sophisticated balancing exercise and careful analysis. Ofcom has already recognised⁴² that this analysis should reflect the fact that a change to the Openreach arrangements is only one of various measures designed to achieve

⁴⁰ See Section 6 BT's response to Ofcom's 2016 Proposals, dated 4 October 2016, and available here: https://www.ofcom.org.uk/__data/assets/pdf_file/0029/93647/BT.pdf

⁴¹ These are set out in paragraph 1.25 of the 2017 Consultation.

⁴² See paragraph 7.5 of the 2017 Consultation.

the broader policy objectives in the Strategic Review. It may take a considerable amount of time, and the contribution of many different regulatory and policy initiatives (working individually and in tandem), to achieve all of those aspirations, so the Commitments in the Revised Notification cannot be expected to deliver all of those broader market objectives in the short to medium term.

Monitoring BT's implementation and compliance with the Revised Notification

57. Ofcom proposes the monitoring areas to cover the following:
- a. the implementation of the Revised Notification, which, subject to satisfaction of the four Conditions, BT has a significant influence over, and is something that it is resolved to deliver as quickly as possible;
 - b. compliance with the new formal governance arrangements as set out in the Revised Notification that BT also commits to fulfilling over the coming years; and
 - c. an assessment of how the new governance model (as set out in the Revised Notification) supports independence and treats customers equally.
58. We are very open to Ofcom's proposed monitoring of the implementation process and our compliance with the Commitments and Governance Protocol set out in the Revised Notification. The metrics with respect to (a) and (b) above include additional reporting via annual reports and transparency requirements, which we are comfortable with. In terms of the deadlines for implementation, we would simply note that BT anticipates that full implementation would take around 12 months, partly due to the length of time required to meet the Conditions.
59. As noted in paragraph 39(b) above and set out in detail in Section 3 of Openreach's response to this Consultation, we have already set up the OBARCC, a new compliance unit within Openreach. We are also in the process of appointing a body (the "**BT Compliance Committee**"), which has a similar mandate under the auspices of the BT Group Board for the remainder of the BT corporate group. Detailed implementation plans are also being developed and are in the process of being delivered. This means that CPs can be confident that compliance with, for example, the new governance arrangements and the requirement for maintaining confidentiality over proposals CPs may wish to submit to Openreach will be respected vis-à-vis the remainder of the BT corporate group.
60. However, we harbour some concerns in relation to the metrics applicable to the third monitoring area, described in paragraph 57(c) above dealing with "Independence and equal customers' treatment". Ofcom has stated that its intended objective is to "ensure that the new model delivers against broader

policy objectives”. We set out below our concerns with the way in which the objectives and metrics in this area have been expressed.⁴³

61. First, in Figure 4 Ofcom refers to metrics such as the number of consultations, new products/services proposed, new investment ideas etc. that it expects to observe once the Revised Notification has been implemented. We do not consider that such a hard quantitative metric will work or be informative in isolation, or that there can be an absolute threshold for these metrics, below which Ofcom can conclude that the Revised Notification has been unsuccessful. We are of the view, instead, that the observed outcomes for each metric must be interpreted in the light of the relevant contextual factors which Ofcom can explore through a parallel qualitative investigation. The views of not only CPs but also BT and Openreach should be taken into account as part of this process.
62. Second, the metrics in this context (e.g. the number of consultations, new products/services proposed, number of approved/rejected proposals) are different from the metrics relating to implementation of and compliance with the Revised Notification set out above in paragraph 57(a) and (b) above. For one, these metrics require certain actions to be taken by CPs and are not, therefore, fully under BT’s control.
63. If, for example, a particular CP were to approach Openreach initially with a potential co-investment or large-scale investment idea, but never progressed past a particular stage of discussion or went on to reject the project, BT could not be held responsible for any lack of “success” of that project. There could be a variety of reasons for its “failure”, including the fact that perhaps the project was not commercially viable, that the CP had unrealistic expectations about the outcome or was not fully committed to sharing the associated costs in a fair or proportionate way. We are nonetheless happy to provide transparency to Ofcom on how these factors have been weighed and the rationale for rejecting any project(s) more generally.
64. For this reason, it is absolutely key that the qualitative exercise of accepting CP’s views via customer interviews, targeted information gathering, case studies and complaints (as envisaged by the 2017 Consultation⁴⁴), should also apply to Openreach and BT. This will allow Ofcom to appropriately interpret the quantitative measures it is proposing to apply by also considering the relevant

⁴³ Figure 2 on page 4-5 and Figure 4 on page 25-26 of the 2017 Consultation describes the key metrics / methods for monitoring compliance with the requirements for “Openreach [to] act independently and treat customers equally”:

- Number of consultations with customers and stages reached (confidential, public, committed);
- New products and services proposed;
- New investment ideas and / or commercial models for investment;
- Number of approved and rejected proposals and relative rationale; and
- Final agreed AOP / MTP and BT and Openreach financial reporting including investment levels, CAPEX and OPEX; and
- Openreach customers’ views.

⁴⁴ See paragraph 6.28 of the 2017 Consultation.

qualitative aspects, such as the reasons why the number of consultations is high or low and the rationale behind the approval or rejection of particular projects. In this context, there can be no absolute threshold for these metrics below which Ofcom determines the arrangements not to be working. The observed outcomes for each metric must be interpreted in the light of the relevant contextual factors which Ofcom can explore through the parallel qualitative investigation.

Need for open dialogue with Ofcom and CPs

65. Given the radical new features of the Revised Notification, the absence of any similar regulatory model anywhere else in the world and the high stakes with it potentially not delivering the outcomes in a way that suits all stakeholders, we would expect and appreciate an open dialogue with Ofcom and other CPs.
66. Such discussions will be key in enabling BT and Openreach to deliver our side of the bargain and, where appropriate, to highlight what adjustments to implementation may be needed to ensure efficient delivery and operation of the Revised Notification. There are a variety of complex operational changes that will require detailed planning and sophisticated execution, some of which may require a degree of “learning by doing”. Similarly, Openreach (and BT) will face practical and technical challenges with the delivery of a future ultra-fast network which will be a complicated investment project to deliver in any event, but especially now that we will be using new processes, such as the new CP confidential engagement stage.
67. In such circumstances, we plan to be open with Ofcom, but would also expect Ofcom to be flexible and open to discussion in assessing our performance in order to acknowledge the uncertainties involved and the likelihood of some challenges along the way. Ofcom’s engagement with BT in the context of the 2005 Undertakings was extremely accommodating, given their radical and untested status at the time. BT would now appreciate a similar approach to the challenges we expect we will be facing under the Revised Notification, especially at the implementation stage. We are pleased that Ofcom appears to be open to continuing this approach with respect to the Revised Notification.⁴⁵
68. We would, for example, expect to receive notice either from Ofcom (or a particular CP) if there are concerns with the way in which we are setting up and running Openreach’s new engagement processes with CPs to afford us the opportunity to make adaptations or further enhancements to such processes. Simply logging multiple “complaints” by CPs, or categorising them as a “breach”⁴⁶ without giving Openreach the opportunity to address any issues raised could not, in our view, be deemed as a “blocker to investment” or a failure of the Revised Notification. This would not be an appropriate way to assess compliance with the metrics selected by Ofcom. Similarly, even if there are

⁴⁵ See paragraph 7.11 of the 2017 Consultation.

⁴⁶ In paragraph 6.24 of the 2017 Consultation, Ofcom refers to “persistent breaches in a particular area” – dialogue and engagement with CPs, including where CPs express some dissatisfaction or complaint with current Openreach processes, do not necessarily amount to a “breach” which should lead Ofcom to conclude that there may be a problem with that relevant process.

multiple complaints or expressions of dissatisfaction by CPs, these cannot be taken to amount to a breach by BT/Openreach or a conclusion that the process is not working successfully unless the broader context for the complaint has been considered in detail by Ofcom. This is where the balance of having qualitative measures capable of assessing the reasons for certain outcomes will be of assistance to all concerned.

Enforcement

69. Ofcom notes that, while BT's Revised Notification is voluntary by nature⁴⁷, a number of mechanisms have been built into the arrangements to provide the opportunity for Ofcom to monitor compliance with the arrangements in a way that allows further regulatory intervention, if necessary⁴⁸. Ofcom also has additional SMP powers and other enforcement powers⁴⁹ as well as a statutory dispute resolution function in the case of disputes relating to the provision of network access.
70. As part of the 2017 Consultation, Ofcom refers to the idea of repeated, serious breaches or material compliance failures by BT or Openreach as a reason for potential intervention in future, referring to a potential time-frame of three years. For the reasons set out above, particularly in the early stages of implementation, BT expects that Ofcom as well as CPs will raise any concerns they have early on with BT directly so that they can be addressed as quickly as reasonably possible by Openreach or BT (as appropriate). Such dialogue should provide an opportunity to resolve concerns in a pragmatic way without the need for formal action. This is, indeed, consistent with the approach adopted by the EAB at present.
71. BT notes that the various references in the 2017 Consultation also suggest a process whereby, in the event of repeated or serious breaches by BT, Ofcom would need to notify BT of its concerns.⁵⁰ In this respect, BT would expect to be provided with reasonable notice in the event that Ofcom has a significant concern with its implementation or response to enforcement action to enable BT and/or Openreach to remedy the issue as quickly as possible without the need for any more intrusive enforcement action. While we do not anticipate such a situation arising in this context, given the structure of monitoring and information gathering, it is important to ensure that Ofcom clarifies in advance the nature of any formal process it may wish to undertake, including the legal power it proposes to use as the basis for such intervention. If such intervention is considered necessary by Ofcom, it must be proportionate and amenable to

⁴⁷ See paragraph 4.21 of the 2017 Consultation.

⁴⁸ See Section 6 of the 2017 Consultation.

⁴⁹ Section 167(6) of the Enterprise Act 2002.

⁵⁰ See paragraph 6.36 and 7.12 of the 2017 Consultation. In addition, paragraph 4.23 of the 2017 Consultation specifically refers to Ofcom's enforcement powers under section 94 of the Communications Act which provides that a breach by BT of a SMP condition, for example, would result in Ofcom notifying BT of its concerns and providing BT with the opportunity to address them and make submissions on the subject. A similar process is provided for in respect of 'repeated or serious' breaches of regulatory conditions under Article 10(5) of Directive 2002/20/EC on the authorisation of electronic communications networks and services, 7 March 2002 ("Authorisation Directive").

judicial review in order to comply with the legal requirements in UK and EU legislation⁵¹.

Openreach only one measure as part of broader Strategic Review

72. There are a number of broader strategy objectives set out in the consultation documents within Ofcom's 2016 Proposals. These include:
- a. continued end-to-end competition and investment from players across the communications sector, including Openreach;
 - b. continued regulatory action to promote competitive investment, quality and efficient pricing. Such actions include enhancing duct and pole access, regulated pricing in the wholesale local access market review and minimum service levels;
 - c. public policy to secure the widest possible availability of services, for example supporting the Government's broadband USO policy or applying mobile coverage obligations in spectrum licences; and
 - d. general consumer protections, for example automatic compensation when things go wrong.
73. As acknowledged by Ofcom, the new Openreach arrangements represent only one aspect of its broader strategy to deliver better broadband outcomes for consumers and businesses⁵² and the changes to the Openreach arrangements were only one of numerous potential measures identified by Ofcom at the start of the Strategic Review process. Ofcom has also acknowledged that there are other key elements, such as continued competition and investment from other CPs, public policy considerations and, very importantly, continued regulatory action to promote competitive investment, all of which are necessary to deliver the wider market outcomes for consumers, businesses and CPs.
74. Similarly, other regulatory measures, such as the plans to open up Openreach's network of underground ducts and telegraph poles to allow other CPs to lay fibre networks, and protections ensuring minimum quality of service requirements and general consumer protections (e.g. automatic compensation) will need to be considered as part of the regulatory measures designed to achieve these broader goals.
75. Due account should therefore be given to the role of these policy and regulatory initiatives in the monitoring or enforcement programme for the Revised Notification, and what degree of responsibility that can appropriately be attributed to Openreach.

The Revised Notification as a long term solution

⁵¹ This is consistent with the processes applicable under section 94 of the Communications Act and Article 10 of the Authorisation Directive.

⁵² See the 2017 Consultation at paragraph 7.5.

76. Ofcom itself acknowledges that the wider outcomes it is seeking to achieve will take longer to deliver⁵³ which supports a timeframe no less than the time between Ofcom's two most recent strategic reviews i.e. 10 to 12 years before the results of the Revised Notification can be evaluated successfully.
77. It is clear that the existing regulatory processes of market reviews and SMP regulation that have been applicable for some time will continue in accordance with the requirements of the provisions in the Communications Act. Likewise, universal service issues should be pursued in accordance with the existing procedures under the applicable provisions of those pieces of legislation.
78. A sufficient period of time needs to pass for the next stage of market reviews to take place so the various applicable SMP reviews can fully take the Revised Notifications into account as part of their assessment. Similarly, a sufficient period of time needs to be given for the implemented arrangement to deliver on the compliance objectives before the success of the Revised Notification can be fully evaluated.
79. For example, Ofcom mentions that it expects to know whether the new model is delivering for consumers and businesses within 3 years of implementation.⁵⁴ As we have said many times before, in order to achieve the stability required for its success, the status of any voluntary solution such as the Revised Notification should not be re-opened prematurely and the new arrangements must be given adequate chance to bed in.
80. Consistent with Ofcom's previous approach in terms of the review of the telecoms market, we do not expect that a further fundamental review period would be less than 10 years (in contrast to regular interim reviews on its ongoing operation and the usual cycle of market reviews of individual markets for the purposes of SMP regulation). This timeline is also in line with the approach adopted with respect to the BBC Charter, the review period for which has recently been extended from 10 years to 11 years⁵⁵. It is, indeed, our expectation that once the on-going Strategic Review process is complete, any additional changes to the overarching regulatory regime would require a new broad and strategic process to be followed again.
81. We are of the firm view that, once properly established, the Revised Notification will provide a long-term solution. Therefore, we would argue that the Commitments need to be in place for a sufficient period of time to allow teething problems to be resolved promptly, for a learning curve to be established and for their effectiveness be assessed properly. Such enduring commitment to the new model by all stakeholders is absolutely key in order to continue to promote regulatory certainty and therefore long-term investment.

⁵³ See paragraph 1.29 of the 2017 Consultation.

⁵⁴ See paragraph 1.29 of the 2017 Consultation.

⁵⁵ The way the BBC is governed and funded is set out by Royal Charter - each Royal Charter runs for 10 years. In December 2016 the Government completed its Charter review process with the publication of a new Charter for the BBC to run from the beginning of 2017. The new charter period will change from 10 to 11 years, to remove it from any political cycle.

VI. CONCLUSION

82. BT welcomes the central finding made by Ofcom as part of this consultation that the Revised Notification is an effective and reasonable way to address the competition concerns identified by Ofcom as part of its Strategic Review. BT is convinced that a voluntary approach provides the most suitable and appropriate solution without the delays, cost implications and other complications associated with a formal notification to the European Commission for mandatory enhanced functional separation.
83. This approach also provides the regulatory certainty that is necessary to allow BT to invest and play its part in achieving the strategic objectives of wider deployment in broadband and fibre as well accelerating the development of 5G and the converged networks of the future.
84. BT is pleased that Ofcom has recognised that the new model in the Revised Notification needs to balance Openreach's independence with the requirements of good corporate governance. The Commitments clearly set out the responsibilities of Openreach Limited's Board and Executive in relation to the Openreach Division including in relation to strategy and performance, but also permit a degree of interaction between Openreach Limited and BT that is necessary to enable the BT corporate group to meet its legal, regulatory and corporate governance obligations as a consolidated, publicly listed company and ensure it is able to achieve a reasonable return on its capital and risk.
85. BT has already taken steps to implement some of the Commitments as part of its July Notification and is in the process of developing comprehensive and robust additional plans for implementation within BT and Openreach. BT envisages that full operational implementation could take around 12 months, including time for satisfaction of the Conditions. However, there are aspects where BT considers that it would be beneficial for all stakeholders if BT could proceed to implement at the earliest opportunity. Those aspects (set out in Annex A) relate to obsolete or time limited obligations in the Undertakings, which no longer serve any real purpose or areas where it would make sense to move to the new governance model now that the Openreach Board has been established. We would like to engage in discussions with Ofcom on the optimal way forward to ensure a smooth transition process in this context.
86. Once fully operational, the new model should be given a sufficient period of time and stability to become established – BT considers that an induction period of not less than 10 years should apply before the settlement model is susceptible to review.
87. In terms of monitoring and compliance going forward, BT is conscious that the Commitments have been offered in the context of a broader Strategic Review which seeks to achieve a wide range of policy objectives beyond the independent governance of Openreach. Those wider market outcomes may not be achievable in the short to medium term and are not dependent exclusively on actions taken by BT or Openreach. It is therefore important that BT or Openreach should not be held accountable for any perceived market problems, unless it is demonstrated that they are clearly causally linked to its failure to deliver on functional separation as specified in the Commitments.

88. The compliance regime must be based on measures of success that are clearly identified in advance and which are directly related to the Commitments. BT can only be held accountable for outcomes that are within its direct control and responsibility not those influenced by external factors. Further, in terms of performance, hard quantitative metrics will only be of limited value in isolation. Any quantitative measures should be supplemented with qualitative views from all stakeholders (including BT and Openreach alongside other CPs) so that the outcomes delivered by the Revised Notification can be assessed properly within the broader market context. The application of hard absolute thresholds will not be appropriate in circumstances where there could be a variety of reasons for perceived “failure”.
89. BT looks forward to engaging in open dialogue with Ofcom, with adequate notice of the desired metrics and their intended interpretation, application and anticipated timelines. BT would appreciate the opportunity for discussions if it becomes clear that a particular metric is not reasonable or appropriate, and to suggest alternatives or modifications, if in due course it appears that the metrics have not worked as intended. Again, BT would expect to be notified of any performance concerns (identified by Ofcom or raised by CPs) and be provided with the opportunity to remedy any issues. In the first instance, such resolution should be sought through voluntary or other enforcement means before Ofcom has recourse to formal enforcement action or invokes the threat of further enhanced functional separation.
90. BT appreciates the possibility of engaging with Ofcom and CPs to proceed with swift implementation of the Commitments. This should provide long-term regulatory certainty and confidence for all stakeholders to plan their future investments and deliver innovative services for the benefit of consumers and the industry more generally. The improved approach to governance and transparency will underpin such success and should facilitate early resolution of any issues in a constructive and open manner without the need for regulatory disputes. BT looks forward to constructive engagement all round on the new settlement model.

ANNEX A

Reporting line of the Openreach CEO

1. Section 5.25 of the Undertakings requires the CEO of Openreach to report solely and directly to the CEO of BT Group plc. BT believes that it is in the interests of all stakeholders for the new arrangements, whereby the Openreach CEO reports directly to the Openreach Chairman and is accountable to the Openreach Board in relation to the full range of his/her duties, (whilst retaining accountability to the BT Group CEO in respect of certain matters only) to be implemented as quickly as possible.

Openreach brand

2. Section 5.48 of the Undertakings provides that the Openreach brand will be used in proximity to an endorsement containing the words “a BT Group business” and the BT corporate logo. However, starting the rebranding required by the Notification of the vehicles, buildings, uniforms and other collateral (i.e. by removing the reference to BT Group and the BT logo) as quickly as possible will provide a visible sign of BT and Openreach’s commitment to the new arrangements. BT expects that Ofcom and other CPs would welcome this. Additionally, the rebranding costs and workload will be reduced if BT can start the rebranding process now, rather than having to wait until it is released from the Undertakings.

Equality of Access Board

3. Currently, the EAB monitors BT’s and Openreach’s compliance with the Undertakings as required by section 10 thereof. Once the Conditions have been fulfilled and the Governance Protocol and Commitments are in operation, the role of monitoring their compliance will be carried out by the OBARCC (among its other responsibilities) for Openreach and the BT Compliance Body for the rest of BT. As already noted, the OBARCC has already been established and the Openreach Board would like it to take over its compliance role as soon as possible. BT is currently in the process of setting up the BT Compliance Body.
4. BT believes that Ofcom and other stakeholders would welcome establishment of the new compliance bodies within Openreach and BT as soon as BT is ready to do so. This would contribute to the greater independence for Openreach in a timely manner, without waiting for all conditions to be met. Further, an early switch-over to the new bodies would enable the operation and processes for these bodies to be fully tried and tested and running smoothly by the time the Commitments and the Governance Protocol come into force. Whilst the Undertakings remain in force, these bodies would be responsible for reviewing BT’s compliance with the Undertakings (as opposed to the Commitments) in relation to their respective areas of responsibility – i.e. Openreach and BT separately.

System separation

5. The system separation provisions in Sections 5.44 and 5.45 of the Undertakings are largely obsolete or time-expired, and BT has met the specified milestones. Once the conditions have been met, it will be for the Board of Openreach Limited to satisfy itself that the separation arrangements are sufficient to protect Openreach information. BT believes that it will be in the interests of all stakeholders for the Openreach Board to assume this responsibility at the earliest opportunity by putting Openreach in of charge its systems strategy in advance of the Commitments coming into effect. In view of this, BT would like to switch over to the simpler, more relevant and more transparent system separation commitments in the Notification as soon as possible. Doing this would also be of benefit to BT in that it would do away with the need for costly external audit requirements that are obsolete and no longer deliver any benefits to any stakeholders.
6. To be clear, BT currently intends to leave the systems which have been physically separated as they are, and similarly to retain the user access controls that currently exist.

BT Wholesale

7. Ofcom has indicated in the consultation that it does not consider there to be a need to retain any Undertakings obligations in relation to BT Wholesale and BT's retail lines of business. BT agrees.
8. Section 6 of the Undertakings contains commitments in relation to the maintenance of separate product management organisations, with separate management and associated bureaucracy, including separate scorecards. When the Undertakings were given, this made sense, given the state of development of broadband competition at the time. However, the current situation is that there is only one small team (currently consisting of five people) that manages the declining Wholesale Calls product which has to be kept separate from the rest of the BT Wholesale product management unit. This is a disproportionate and unnecessary restriction that is of no benefit to other CPs. BT Wholesale believes it would be able to serve its customers better if it was no longer restricted by these product management separation requirements. Furthermore, it will facilitate a smoother and more effective transition to the new arrangements: if the organisational changes have taken effect prior to the Commitments coming into force, it will enable BT to deliver simpler compliance training and guidance.
9. In conclusion, BT considers that it would be of benefit to the establishment of a more independent Openreach and, in turn, to all stakeholders for BT to be able to proceed with implementation of these matters at the earliest opportunity. We are ready to discuss with Ofcom the optimal way forward on each of the matters raised above.