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Three's response to Ofcom's consultation on release of the 2005 Undertakings

1. This is Three's response to Ofcom's consultation on releasing BT from the 2005 Undertakings, pursuant to section 154 of the Enterprise Act 2002.

Ofcom's DCR represents a missed opportunity

2. Three reiterates its disappointment with Ofcom's decision not to pursue the full structural separation of Openreach. Despite the imposition of functional separation and equality of access in 2005, BT has continued to demonstrate its ability and willingness to discriminate against rival downstream CPs in the provision of wholesale access services and in its investment decisions. This incentive will only increase following BT's acquisition of EE, because BT is now the main backhaul supplier to UK MNOs and also a downstream rival in the retail mobile market.
3. Ofcom has decided to give BT yet another opportunity and to impose a largely behavioural remedy, instead of a truly structural solution that would address BT's incentive to discriminate. Ofcom's preferred solution of legal separation will still afford BT Group the ability to influence the strategic decision-making of Openreach, for example, through the following mechanisms:
 - determination of the overall level of funding available to Openreach;
 - review of draft Openreach operating plans (by BT Group CEO and CFO);
 - appointment and removal of Openreach chairman¹, independent non-exec, and BT-nominated Openreach Directors;
 - removal and power of veto over the appointment of the Openreach CEO²;
 - secondary lines of accountability and reporting from the Openreach CEO to the BT Group CEO.

¹ Subject to notification to Ofcom.

² Subject to notification to Ofcom.

4. The commitments also fail to address Ofcom's concern that Openreach does not have its own R&D capability. Instead, the commitments explicitly allow for the continued use by Openreach of BT Group centres of excellence and support services.
5. Structural separation with no common ownership is the only solution that will address Ofcom's underlying competition concerns. The DCR therefore represents a missed opportunity by Ofcom to implement an effective and enduring solution to the competition concerns arising from the vertically integrated nature of Openreach within the BT Group.

BT's voluntary commitments are not legally binding

6. Notwithstanding the inadequacy of legal separation as a solution to Ofcom's competition concerns, the voluntary commitments offered by BT (under section 89(C) of the Communications Act 2003) are not legally binding.
7. This is in contrast to the existing BT Undertakings made pursuant Section 167 of the Enterprise Act 2002. These allow Ofcom, in the event of a breach, to apply for a court injunction to restrain BT and/or impose a financial penalty. Similarly, a CP which suffers loss as a result of a breach may take legal action against BT for damages and other relief.
8. This means that even where a condition of the Undertakings appears to be replicated by a provision in the voluntary commitments (either by means or outcome) it will not be legally enforceable unless also replicated by an existing market-specific SMP condition. The voluntary commitments therefore offer less protection to rival CPs, and ultimate end-consumers, than currently provided by the existing BT Undertakings.
9. Three also notes that Ofcom will be obliged to take account of BT's voluntary commitments when reviewing and setting SMP conditions in the future. It is therefore conceivable that BT will use the existence of the commitments to in fact push for a relaxation of existing SMP conditions in upcoming market reviews.

The Undertakings must remain in place until an effective and legally binding solution is implemented

10. For the reasons set out above, Three does not agree with Ofcom's proposal to release BT from the 2005 Undertakings. The voluntary commitments regime proposed by BT does not address Ofcom's underlying competition concerns, nor does it offer a level of protection commensurate with that provided by the Undertakings. The release of the undertakings in these circumstances therefore represents a step backwards which is likely to be harmful to competition in downstream markets, and ultimately end-consumers.