

Verizon response to the Ofcom's consultation on Delivering a more independent Openreach

Introduction

1. Verizon Enterprise Solutions ("Verizon") welcomes the opportunity to respond to Ofcom's consultation on Delivering a more independent Openreach¹.
2. Verizon is the global IT solutions partner to business and government. As part of Verizon Communications – a company with nearly \$131 billion in annual revenue – Verizon serves 98 per cent of the Fortune 500. Verizon caters to large and medium business and government agencies and is connecting systems, machines, ideas and people around the world for altogether better outcomes.
3. Please note the views expressed in this response are specific to the UK market environment and regulatory regime with its unique Openreach regime and should not be taken as expressing Verizon's views in any other jurisdiction, where the regulatory and market environments could differ from that in the UK.
4. While Ofcom asks only one question in the consultation, given the importance of the issues considered we have provided a wider response to more fully reflect our high level views on the direction of travel.

Response to the consultation

Our concerns with the procedure adopted by Ofcom

5. Firstly we would like to set out some procedural concerns with the way that Ofcom has conducted this consultation:
 - Given the importance of this consultation and the impact that it will have on the entire UK telecoms market, we are very disappointed that Ofcom had only allowed a very short initial 4-week consultation (eventually extended to 6 weeks) in a particularly busy regulatory period to respond.
 - Furthermore, the consultation does not ask for industry's view of the Commitments despite the outcome of the negotiations obviously having a profound impact on their businesses. Ofcom's public announcement on 10 March 2017 makes it appear that Ofcom has predetermined that the BT

¹ <https://www.ofcom.org.uk/consultations-and-statements/category-3/delivering-a-more-independent-openreach>

Commitments adequately address its competition concerns (and therefore Ofcom has made the decision not to impose legal separation) without considering stakeholders' views. This approach is difficult to reconcile with the requirements under section 89C(4) of the Communications Act 2003 (CA03) and the process of decision making under public law.

- We note that there is also no impact assessment included in the consultation which is a major oversight on Ofcom's behalf, and on the face of it, appears difficult to reconcile with section 7 of the CA03. How can Ofcom be sure that there are no unintended negative consequences without conducting such an assessment?
 - Given that not all of the documents which form part of the Commitments were actually available for public scrutiny at the time of the publication of the consultation, it is impossible for industry and Ofcom to fully scrutinise the deal in full. For example, the Agency agreement was published discreetly on 30 March and the Articles of Association have yet to be published at the time of writing. Again, given the importance of this arrangement for the entire UK telecoms market, this is unacceptable.
6. Verizon is concerned that the entire process appears to have been rushed through by Ofcom. This suggests that a set of Commitments which is "just good enough" in Ofcom's opinion was seen as preferable to getting the best solution (even if that were take longer and require a more complex regulatory procedure), and preferable to adopting a robust and legally defensible process. Surely, in this vitally important change in the market, getting the right answer is more important than getting a quick answer.

The Commitments are not yet fit for purpose

7. We broadly agree with the direction of the Commitments from BT regarding the legal separation of Openreach (OR), but we have reservations about some key parts of the Commitments, which currently render them unworkable and not fit for purpose (as set out below).
8. We are pleased to see that some of the issues which have diminished the industry's confidence in the OR regime in the UK for years have been addressed to some degree (at least at a high level); in particular the establishment of a majority independent OR Board and the transfer of the OR workforce into the new legal entity, and a requirement for OR to treat all its customers equally. The

Commitments therefore feel like a step closer to the final solution, but with still some way to go.

9. However, we have concerns that Ofcom is rubber-stamping a solution which does not genuinely comprise legal separation in substance. The most serious of those are that:
 - a. Openreach Limited will not own the assets used to provide its services: their management will simply be 'outsourced' to OR. This is fundamentally inconsistent with the concept of legal separation and profoundly undermines OR's autonomy. Indeed, the arrangement under the Commitments may reduce the degree to which OR management is free to exercise independence and use the relevant assets. Without this transfer of assets, OR will be caught between BT as the contracting party granting a leasehold interest or other right of use, and BT as the largest purchaser of the services that OR provides. This asset arrangement significantly undermines the effectiveness of legal separation of OR from BT.
 - b. There does not appear to be any assurance that BT will not direct OR's investment strategy and approach through control over OR's budgetary allowance from the BT group. By setting the overall budget envelope, BT will retain an effective veto on OR's overall direction and decision making: able to starve it of funding if its investments do not suit the group as a whole.
 - c. The concern still remains that BT Group has the ability to use the substantial profits made by OR to further its own interests in other areas of the business, rather than using them to re-invest in the network which benefits all providers (including downstream BT divisions). It is not clear whether and how the Commitments will overcome this issue. In this sense, Ofcom does not seem able to achieve its policy aim of improving quality of service in the OR network through investment. One key outcome must be a far greater level of independence of the OR Board and greater freedom to make investment decisions independent of the control of BT Group, taking into account the views of its customers, and not simply focusing on profit maximisation. As yet this is not fully clear.

d. Finally, it is also highly unsatisfactory that providers will continue to have to contract with BT plc, with OR merely acting as its agent. It is unclear how the contractual relationship between BT and OR with third parties will work under the proposed Agency agreement. This appears not only contrary to the whole principle of legal separation, but raises questions about practicality of the arrangements. It is also unclear how BT Wholesale will be able to contract with itself for services – this is again contrary to the idea of separation. A quick review of the Agency and Services Agreement (only published on 30 March 2017) suggests that there are also significant issues such as:

- i. OR will continue to rely on certain employees and other non-capital assets in BT plc (e.g. regulatory, legal, HR) (see Clause 10), despite the high-level promise to transfer employees to OR. Even leaving aside that assets will not transfer, employees will. Again, this undermines the aim of legal separation with OR acting as a “real” independent company.
- ii. BT has broad step-in rights, which can be triggered by BT even where it simply *anticipates* (in its sole discretion) that action is required to prevent regulatory action (see for example clause 12.1). Where they are triggered, BT can take “any such action as it deems necessary”. Again, this is simply inconsistent with the aim of legal separation and with other provisions of the separation regime (e.g. protection of customer information).
- iii. Other concerns highlight that the agreement is far from workable. For example, Clause 18 prohibits disclosure of the fact or subject matter of the agreement. This raises concerns that future variations to the agreement may not be published. Similarly, the termination/variation are both unclear and inconsistent with the Commitments. For example, the agency agreement can be terminated without the commitments being terminated (see Clause 25). These poorly designed provisions and the inconsistencies they produce give BT significant discretion to undermine the Commitments and should, at the very least, have some form of Ofcom consent mechanism.

10. Ofcom must carefully scrutinise the implementation of the Commitments and supporting documents to ensure they really do address Ofcom’s competition

concerns fully, as this is a major change with many complex moving parts. In this respect we note Ofcom states that the BT notification “is *sufficient* to address our competition concerns”² (emphasis added), suggesting that it does just enough. Coupled with this is Ofcom’s clear desire to finalise and implement this voluntary agreement with BT as soon as possible. We welcome the sense of urgency, but caution Ofcom to ensure that this process is not rushed through without due thought and consideration given to the specific outcomes it expects to see, and the resources it will need to maintain due oversight. These outcomes should be communicated clearly to OR so that it has the best possible understanding of how it is expected to behave going forward. This aids clarity, certainty and helps to reduce the likelihood of disputes down the line.

11. In this sense, we believe that it would be beneficial if Ofcom could set out a detailed analysis of how the new Commitments respond to its stated competition concerns, and consult on that detailed analysis, in order to be more transparent and give greater confidence to industry that the process has been robust and not simply a ‘behind closed doors’ bilateral negotiation. A matrix setting out each concern and the specific Commitment(s) that addresses that concern would help the whole industry identify whether the Commitments are truly sufficient, or whether something has been missed or not fully addressed. In this case, the devil is in the detail.

12. We consider that in conducting such an analysis, Ofcom should ensure that:

- a. Competition, in all forms, in the UK telecoms market is not reduced or chilled by the Commitments or the removal of BT’s obligation to comply with the Undertakings; and
- b. It takes the opportunity to radically improve the UK telecoms market by taking swift and meaningful steps to improve quality of service for those providers reliant on the OR network, exploring what more could be achieved in light of the new structure, expanding on the recent quality of service consultation.³

² For example see paragraph 1.11 of the consultation ‘Delivering a more independent Openreach (17 March 2017)

³ <https://www.ofcom.org.uk/consultations-and-statements/category-1/quality-of-service>

Monitoring

13. We welcome Ofcom's proposals on how it will monitor that OR is treating its customers equally, including producing annual reports. It is unclear from the consultation whether Ofcom will publish these reports – we request that the reports should be published in order to allow greater public scrutiny. OR should consult with industry on a pro-active highly transparent basis on new strategic network decisions, including the need for a formal consultation process and requirement to take into account feedback it receives. OR should also be required to justify final investment decisions that it makes, and justify if certain feedback from customers is rejected.
14. To that end, it would also be helpful if Ofcom could clarify how it proposes to conduct a review of the current SMP conditions in place and their applicability to the new OR company structure.

Enforcement

15. Finally, as we move from legally binding Undertakings to voluntary Commitments, we urge Ofcom to ensure and clarify how it intends to enforce these Commitments in the event that BT does not comply with them. Ofcom rightly recognises that monitoring and enforcement are key to the success of the Commitments. An Openreach Monitoring Unit is mentioned, as well as the Openreach Board Audit, Risk and Compliance Committee. We are concerned that the current structure relies on OR policing itself, and Ofcom must be prepared to be vigorous in its oversight of the new arrangements.
16. The voluntary nature of the Commitments brings an inherent risk that enforcement will potentially be more likely to be needed, but also more complex and slower. We would note that the ability of Ofcom to request relevant information looks particularly weak. Ofcom must show its intention to intervene swiftly from the outset where non-compliance is identified, and must not adopt a passive stance or rely on industry to identify concerns.
17. We are also concerned that if operators brought concerns to Ofcom regarding the effectiveness of the legal separation of OR, Ofcom may choose not to pursue the matter on the basis that the concerns were not an 'administrative priority' for Ofcom.

18. Ofcom alludes to the various “good governance” arrangements envisaged by the Commitments, which it would have oversight of. However we do not understand how Ofcom would or even could act to remedy any issues identified.
19. While the threat of structural separation is an option this is not an effective enforcement remedy in the short-medium term. Indeed it is likely to remain a last resort. Ofcom should therefore satisfy itself that it has the appropriate remedies or tools available in order to prevent damage to the telecoms market through a lack of compliance with the Commitments by BT.
20. One option would be to ensure that the Commitments become legal Undertakings. While this would require some further procedural steps, this would provide the greater certainty required.

Conclusion

21. In summary, we consider that while the Commitments offered by BT represent a step in the right direction, there is still some improvement to be had as we still have some concerns about some of the key parts of the Commitments. Furthermore, we urge Ofcom to ensure that the Commitments are properly scrutinised both by Ofcom and the wider industry.