



Non-Confidential

Vodafone's Response to Ofcom Consultation: Delivering a more independent Openreach

27th April 2017



1 Executive Summary

BT proposes to create a legal entity called Openreach Ltd and in addition to introduce a number of governance arrangements to define the relationship between Openreach Ltd. and BT Group Plc. As a result, Ofcom has decided not to pursue its plans to formally notify the European Commission of its competition concerns.

We have grave concerns that the BT proposals do not adequately address Ofcom's competition concerns and that improvements to fibre availability, innovation and competition will fail to materialise. Substantive issues with these arrangements remain:

- a **lack of asset transfer** into Openreach Ltd. which mean that Openreach does not have full commercial control over its network and assets;
- limited opportunity for the **Openreach Executive and Board to freely make strategic decision** without further oversight and review from BT Group plc where account is taken of the impact on BT's consumer businesses. Such a hurdle has the effect of BT Consumer vetoing Openreach business plans.
- as well as the lack of any substantive changes that might drive **behaviour and culture changes**.

In addition, since its July 2016 revision of the Undertakings, BT has removed from its drafting of its Undertakings/Commitments the limitation on G.Fast roll out that constrained it, at most, to the cabinet location, unless otherwise agreed with Ofcom. There is no obvious justification for this and, in fact, the opposite is true: there are clear reasons why this limitation must be maintained. As drafted, Openreach will be able to roll out G.Fast at nodes other than cabinets. This fundamentally undermines Ofcom's ambition for "full fibre". We urge Ofcom to maintain the limit on G.Fast roll out such Ofcom's consent is required if it is to be rolled out beyond the cabinet location, in order to promote fibre investment.

However, in this consultation, Ofcom seeks answers to a single question: *should BT be released from the Undertakings?* We do not believe BT should be released from the Undertakings until Ofcom has published a detailed framework for what happens next:

- **What does good look like:** Ofcom's own goals are to maintain the intensity of competition; create new investment models and see innovation and differentiation in the market place.
- **How will it be measured:** Clarity over Openreach investment plans, location and technology. Improved financial transparency and ring fenced profits for reinvesting. Pro-competition approach to investment including supply of DPA and partner co-investment models.
- **Over what timeframes:** whilst Ofcom sets itself a 10 year vision, if substantial progress has not been made in the next 3 years that sets a new direction, it will be clear that these governance arrangements have not worked.

We know that mechanistically measuring consultations, documents and meetings will not deliver change, just a lot of documentation. A more sophisticated market based assessment of competition, innovation, investment and relationships needs to take place. And whilst we might feel this is long term change, if we are not seeing significant progress in the next 3 years, we are unlikely to get there in 10.

We are sceptical that BT's proposals go far enough to create the separation of decision making and culture of independence that we believe is necessary to address Ofcom's competition concerns. However, this is not to say that the Openreach's leaders will not find sufficient room to make it a success. We look forward to working with Openreach in a more collaborative manner, at this stage, in hope rather than expectation.



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2 Introduction

1. Ofcom has published a consultation asking whether BT should be released from its Undertakings in order to implement BT's proposals to establish an incorporated Openreach (Openreach Ltd) and to implement governance arrangements between Openreach and BT Group Plc set out in three documents: the Commitments, the Governance Protocol and the Agency and Services Agreement.
2. In this document we explain:
 - In section 2: Our disappointment that Ofcom has not consulted on the wider proposals.
 - In section 3: Our concern that there is a significant policy shift on G.Fast investment which has not been discussed.
 - In section 4: Our recommendation that before the Undertakings are released, Ofcom should publish expectations on what "good" looks like, how it will be measured and over what timescales.
 - In Annex 1: Our review of specific details in the governance documents.

3 Assessing BT's offer against Ofcom's competition problem

3. As set out in Ofcom's February 2016 Initial Conclusions, Ofcom's purpose in pursuing reform is to secure greater 'strategic and operational autonomy' for Openreach. Ofcom noted at the time that a strengthened model of functional separation (i.e. legal separation) could be the vehicle to achieve this objective, but that in doing so, Ofcom would need to engage in a detailed consideration of the impacts of any proposals:²

"However, as with structural separation, a strengthened model of functional separation - in particular the creation of a new legal entity - raises legal and practical questions. These include the effect on the BT Pension Scheme and its Crown guarantee, as well as employment, tax, property and other asset ownership issues. We will also consider the need to reconcile increased independence for Openreach with the corporate governance responsibilities and legal duties of the main BT Board."

4. As Ofcom noted at the time in rejecting BT's first set of proposals:

"We do not believe the changes BT set out go far enough to secure the strategic and operational autonomy within Openreach that we consider necessary to address the concerns in this document. We remain open to the potential for voluntary proposals and ideas on separation models that address the concerns set out above."

5. At each point in the process, the critical judgement for Ofcom is whether the proposed model of legal separation secures Ofcom's long-stated objective to achieve a sufficient degree of strategic and operational autonomy for Openreach so as to meet Ofcom's competition concerns: essentially, as a result of BT's vertically integrated structure, BT had the "ability and incentive to favour its downstream

¹ <http://www.btplc.com/UKDigitalFuture/Agreed/index.htm>

² February 2016 Initial Conclusions at 6.74.



business”.³ In February 2016, July 2016 and November 2016, Ofcom expressly rejected BT’s proposals as insufficient.

6. Ofcom in its February 2016 and July 2016 papers found that the functional separation achieved in 2005 had not addressed this concern sufficiently:⁴

“the underlying incentive for BT to discriminate against its competitors remains. Going forward, we concluded in February that BT can act on this incentive through the way strategic decisions are made about new investments by Openreach. Despite the measures we put in place in 2005, such decisions are still largely determined at the level of BT Group.” (emphasis added)

7. As explained below, Ofcom’s concern about investment strategy has not been addressed by BT’s notified new arrangements.

8. In the July 2016 paper, Ofcom rejected a voluntary notification by BT which did not involve legal separation for Openreach, and accordingly both the Openreach business and its assets would have remained within BT Plc. Ofcom concluded that these proposals “do not achieve the goal of more independent decision making by Openreach.”⁵

9. Instead, Ofcom put forward its own proposed model in the July 2016 consultation paper for legal separation. It included a proposal that “Openreach should own those assets that it already controls under the current Undertakings, subject to any costs that might arise.”⁶ The paper explained that the status of Openreach’s assets was “an important aspect of the new structure for Openreach”.⁷ As to why Ofcom proposed to transfer ownership of those assets, it explained:⁸

“Ownership of assets would make Openreach a more visibly independent business and ensure its ability to manage the strategy and operation of the network more independently. Given the aim of having an Openreach Board able to consider the interests of all its downstream customers, this board needs to be able to take effective investment and operational decisions that will enhance the services of its customers. The Openreach Board would also have duties to the overall success of the company, which would in part depend on its investment in and stewardship of Openreach assets.” (emphasis added)

10. Thus, Ofcom explained why such a transfer of assets directly served to remedy its competition concerns: by enabling Openreach to make investment decisions in the “interests of all its downstream customers”, rather than favouring BT.

11. In November 2016, Ofcom announced its decision to proceed with its proposal (i.e. approaching the European Commission), noting that:

“BT has so far failed to offer proposals that would adequately address our concerns. BT’s proposals still fall short in important areas. These include the transfer of people and assets...”

³ February 2016 Initial Conclusions at 6.22.

⁴ July 2016 Consultation, para 1.1.

⁵ July 2016 Consultation, para 7.31.

⁶ July 2016 Consultation, para 4.11.8.

⁷ July 2016 Consultation, para 4.77.

⁸ July 2016 Consultation, para 4.77.



12. Thus, in reaching this decision, Ofcom was apparently still committed to Openreach owning the assets used to deliver regulated services, in order to avoid the risk that through BT's direct ownership of those assets, BT would be able to undermine the strategic and operational autonomy of Openreach.
13. As noted above, in November 2016, Ofcom appeared to accept the necessity of asset ownership by Openreach (or some other arrangement or right that was sufficiently close in outcome to asset ownership, so as to deliver an equal degree of strategic and operational autonomy to Openreach - as if it were the owner of the asset).
14. On 17 March 2017, and without any prior warning, Ofcom reversed its position. Ofcom explained it had received a further offer of voluntary commitments from BT ("the March Notification"). That Notification provided for the establishment of Openreach Ltd as a wholly-owned subsidiary of BT plc. They nevertheless departed in various ways from Ofcom's proposal of July 2016. Most fundamentally, instead of a transfer of assets to Openreach, BT's Notification provided:⁹

"Contractual arrangement whereby Openreach has control and management rights over assets required to delivery key products, delivered through the BT and Openreach Limited agency and services agreement."

15. On the basis of the March Notification, Ofcom announced:¹⁰

"we have decided that BT's revised notification is sufficient to address our competition concerns and that it is therefore no longer necessary to proceed with formal notification to the European Commission. This document sets out our reasoning."

16. This purported to be a final decision. The only matter on which Ofcom consulted was its proposal to release BT from its Undertakings.¹¹ The reality is that, irrespective of what labels are applied to the contractual arrangements apparently in place between Openreach and BT relating to use of the network and other assets, there is a complete lack of visibility of the terms of that asset transfer. As such, significant questions remain in our minds as to precisely what degree of control, if any, Openreach has and what ongoing rights BT has in relation to these assets. If industry is to understand the boundaries within which the new Openreach is to operate, and be able to identify whether Ofcom's objectives have been achieved in accepting these new arrangements, then we need detail on what those arrangements entail.
17. The case law on this is clear: the duty to re-consult arises where "there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt":¹²

⁹ March 2017 consultation, Para 3.22.

¹⁰ March 2017 consultation, para 1,11.

¹¹ March 2017 consultation paper, para 4.25.

¹² For example: *Smith v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin) at 43 and numerous other cases.



18. In this case, the departure from Ofcom's earlier proposal, and its November 2016 decision, is plainly fundamental. The only reasoning given in this regard is set out at paragraph 3.26, which provides:

"While ultimate ownership of all assets would remain with BT, Openreach Limited will be empowered to control the underlying network used to provide Openreach products and services on behalf of BT, including investing in and maintaining that network in support of its overall strategy." (emphasis added)

19. This extremely brief reasoning does not engage at all with the highly unusual and complex arrangements set out by BT in its March Notification, which appear not to provide Openreach with strategic and operational autonomy. Those arrangements raise real concerns as to how the relationship between BT, Openreach and downstream competitors of BT would work in practice, particularly in light of the retention by BT Group of the ownership of the assets. Vodafone does not seek to address those points in any detail now: Ofcom purports to have taken a final decision to accept the notified arrangements are sufficient for it to abandon its plan to enforce a full legal separation upon Openreach. Instead, we set out some of the key features of these arrangements in order to highlight the kinds of issues which would have been usefully addressed by stakeholders, had Ofcom permitted the opportunity for consultation.

20. It is clear that both the risk and the reward of the use of the assets will lie with BT: BT will retain legal ownership of the assets, and will retain "all of the economic benefits and risks" of the assets and the trading which comprises the Openreach Line of Business.¹³

21. Under those arrangements Openreach apparently lacks commercial incentives to make efficient use of those assets or to innovate in order to develop downstream competition. It will act as BT's agent,¹⁴ invoicing customers on behalf of BT,¹⁵ receiving funds from BT to cover its expenses, but receiving no fee on its own behalf,¹⁶ and no ability to raise funds.¹⁷ It is expressly prohibited from acquiring any assets or liabilities for its own account.¹⁸ Indeed, it is an open question whether Openreach will in law fall within the definition of 'communications provider' in relation to the network that it notionally operates, given that it will do so as BT's agent and, therefore, under BT's control (through the terms of the agency agreement).¹⁹ This leads to the odd result that while Ofcom's purpose is ensure Openreach's strategic and operational autonomy from BT, that purpose is achieved through an arrangement where it is BT, not Openreach, who in law will operate that network and contract to provide the regulated services. There is nothing in the March 2017 decision to suggest Ofcom has grappled with these issues.

¹³ Commitments, clause 9.1.

¹⁴ Agency and Services Agreement, clauses 3, 5.

¹⁵ Commitments, clause 9.7.

¹⁶ Agency and Services Agreement, clause 5.3.

¹⁷ Agency and Services Agreement, clause 5.6

¹⁸ Agency and Services Agreement, clause 7.2.

¹⁹ Communications Act 2003 section 32(4)(b) provides that 'references, where one or more persons [i.e. Openreach] are employed or engaged to provide the network or service under the direction or control of another person [i.e. BT], to the person by whom an electronic communications network or electronic communications service is provided are confined to references to that other person.'



22. This outcome is merely an illustration of the underlying concern that the BT proposal that Ofcom has decided to accept, without consultation, contains at least the material risk of serious failure. The performance of Openreach, and the resolution of the competition problem which Ofcom has itself identified, has a direct impact on the ability of BT's downstream competitors to offer viable services, and upon consumer welfare. To adopt such a proposal without the benefit of a public consultation that would subject the detail of the proposal to public scrutiny is procedurally unfair, lacking in transparency and inconsistent with best regulatory practice.
23. The arrangements purport to give Openreach some responsibility for investment. It is, however, very difficult to see how that will work, particularly given that BT itself will retain ownership of the assets.
24. Clause 11 to the Commitments appears to envisage a passive role for Openreach, providing that it "will be open to receiving well-developed proposals from Communications Providers".²⁰ It can only decide to proceed "subject to an approved business case, obtaining capital as needed and any further authorisations as required by the Governance Protocol."²¹ Under the Governance Protocol, the Openreach Board has the duty to approve the Draft Medium Term Plan and Draft Annual Operating Plan, but in each case subject to the approval by the BT Group PLC Board.²² Openreach must set strategy as part of these plans "within the budget and strategic framework set by the BT Group plc Board, and to oversee its financial and operational performance against the targets contained in them".²³ If it seeks additional capital, it must request it from BT Group plc.²⁴
25. The practical effect is that BT Group plc retains a high degree of control over investment decisions – investments which are in any event made in BT Group's own assets. This is very far removed from the position of an independent legal entity making investment decisions in respect of its own assets in order to seek to drive its own commercial strategy and return, and without any regard to the interests of one particular downstream competitor. As a result, we question whether such arrangements will address the competition concerns that Ofcom itself has identified. In the arrangements that BT has set out, it has reserved to itself a great deal of power over strategy and investments in particular. It has set out nothing about how it will exercise those powers.
26. Vodafone, acting together with Sky and TalkTalk, has made strenuous representations as to the detriment that would arise if BT retained control of its assets.²⁵ None of the consultees, however, could possibly have anticipated the unorthodox and unsatisfactory arrangements which Ofcom has now accepted.
27. This issue affects a far wider range of stakeholders than Vodafone however: it includes all of BT's downstream competitors and the end users of the services at issue. The nature of the particular

²⁰ Commitments, clause 11.4.

²¹ Commitments, clause 11.8.

²² Governance Protocol, clause 2.2.

²³ Governance Protocol, clause 2.8, 3.4.

²⁴ Governance Protocol, clause 2.11.

²⁵ See the "Legal Separation" report.



arrangements that Ofcom appears to have condoned, and the fundamental way in which they depart from the basis of previous consultation, requires as a matter of fairness a further public consultation.

28. If Ofcom had re-consulted on this proposal, it would have had the benefit of the views of stakeholders as to the adequacy of these arrangements. One of the purposes of consultation is that it "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested".²⁶
29. It also gives rise to a breach of Ofcom's duty under s 3 of the Communications Act 2003 ("CA 03") to act on a basis that is transparent and on the basis of best regulatory practice. It is clear that best practice would be to consult those affected by Ofcom's decision prior to taking a final view. There was no obstacle to Ofcom doing so in this case.
30. Moreover, as a result of this failure, Ofcom has also breached its duty to conduct an impact assessment, pursuant to s 7 of the CA 03. When Vodafone raised this matter in correspondence on 16 March 2017, Ofcom replied on 23 March 2017:

"We do not consider that section 7 is engaged, as (apart from proposing to release BT from the Undertakings, on which we are consulting) Ofcom is not proposing to do something for the purpose of or in connection with its functions. Rather it has decided not to pursue the proposed imposition of regulatory obligations."

31. We believe this view is erroneous in law. Ofcom was proposing "to do something" in exercise of its functions: namely proceeding with a formal notification to the Commission to require the legal separation of Openreach. What it is now proposing to do is to lift the Undertakings and abandon its earlier proposal to impose a legal separation upon Openreach in which assets would be transferred to the telecom infrastructure division. No doubt the Commission will be notified of the change of decision. In order to comply with section 7 of the 2003 Act, an impact assessment in order to reach that conclusion is needed.
32. This matter is not raised in order to create mischief or delay any decision. The Commitments, Governance Protocol and Agency and Services Agreement create significant gaps in our understanding. For instance, there is no agreement between the two parties on transfer charges or valuations of assets to be transferred to the control of Openreach. This mirrors the current arrangement where BT Group decide on Openreach's cost base. This can happen in real terms: for instance Technology and Services Organisation is not operating in a competitive supply market and can load its fixed costs and overheads onto Openreach, rather than its other BT divisions and also in regulatory terms, where costs for regulated charges are attributed through a centrally run mechanism.
33. In addition, at the very critical junction of acceptance of a detailed proposal, there is no debate or informed discussion that has taken place. As a result, a simple review of the three BT governance documents throws up 3 pages of drafting queries, anomalies and questions which are set out in Annex 1 to this document.

²⁶ R(Moseley) v Haringey LBC [2014] UKSC 56 at 24.



BT's proposal

34. BT's proposed governance arrangements fall short of the standard for legal separation that Vodafone put to Ofcom in the Legal separation document. The most significant difference between this proposal and BT's offer is the lack of effective asset transfer. In addition, the customer consultation process lacks any sense of partnership or win-win. Ofcom is having to legislate for a stricter SoR process in the Wholesale Local Access Market Review (which suggests already that Ofcom does not have confidence in Openreach's ability to change). Additionally the strict financial straightjacket in which Openreach will prepare and work the AOP and MTP simply encode today's framework whilst introducing Openreach Board's requirement to sign off the plans in parallel with that of the BT Group CEO. It is worrying that Openreach is being set up to fail whilst at the same time Ofcom is welcoming these changes, as if they will overnight sweep away the problems from the past, when in fact they are codifying the problems from the past.
35. Whilst it might be argued that the legal separation proposed by BT and supported by Ofcom is a proportionate solution, the risk is that in reality it is an ineffective remedy – and therefore proportionality is a moot point. We understand that Ofcom considered that legal separation would be a proportionate response to the competition problems, when compared with structural separation. We recognise that proportionality is an important factor. However it then cannot be considered proportionate to dilute the remedy such that the benefits are hard to identify:
- a. a legally separate company that signs off a budget after receiving comments from BT Group.
 - b. The open-door process for accepting and reviewing credible proposals for investment is to be welcomed, and we look forward to seeing it working in practice, however the sign off process by BT Group, provides for BT Consumer to kill competitors plans and
 - c. Openreach Ltd's one substantively visible task of contracting with its staff is undermined by those employees being able to continue to participate in BT share offers and receive benefits including BT Consumer Broadband and TV products as part of their employment benefits.

4 BT's Commitments undermine Ofcom's fibre investment policy

36. As Ofcom rightly sets out, the Undertakings include a variety of time-expired and historic obligations. However, ignoring those is a simple matter and does not in itself create a need to release BT from the Undertakings. Other reasons to release BT from the Undertakings might be to reflect some of the updates in governance proposed as a result of the creation of Openreach Ltd, and indeed, it might be appropriate to change the legal basis of the Undertakings from the Enterprise Act to the Communications Act and therefore release BT from the Undertakings to carry out this administrative process.
37. However the Commitments proposed by BT include a significant shift in Openreach's scope that will have wide-ranging policy implications:
- a. Para 5.13 of the Undertakings set out that Openreach is limited in the extent of its control and operation of Physical Layer assets, save as permitted in section 5.52 of the Undertakings.



- b. Para 5.52 of the Undertakings permits Openreach to control and operate assets contained with the transmission layer in order to deliver FTTC services. Vodafone has previously shared views with Ofcom on this and the fact that this precludes Openreach from providing G.Fast services without further variation (and in effect a substantive policy consultation). Ofcom has stated that it disagrees with this view. However, it cannot disagree with the view that G.Fast services provided using hub sites that are not cabinets are not covered by the carve out in Para 5.52 of the Undertakings.
38. This is more than a mere technicality. G.Fast services undermine the investment case for Openreach or any third party Fibre to the Premise (FTTP) investment. BT's July 2016 Undertaking revision maintained this distinction, and yet we find that the March Commitments document appears to remove this text, permitting Openreach to offer G.Fast wherever it chooses.
39. On this basis we believe the Commitments are unlikely to deliver on Ofcom's stated objectives of a fibre future. Furthermore, allowing Openreach to operate Transmission layer assets in order to offer G.Fast across the network will not deliver on Ofcom's position that "*a good long term outcome would be to achieve full competition between three or more networks for around 40% of premises*".²⁷
40. In order to maximise the likelihood of Ofcom achieving its stated objective of a *fibre future* the Commitments should not provide BT with a wider opportunity to undermine Ofcom policy.
41. Ofcom's March 2017 consultation document does not fully explain these changes. The table on page 53 of the consultation describes the effect of para 5.52 of the Undertakings as:
- "Openreach **may control and operate** assets in transmission layer of BT's access network and backhaul network as needed for the purposes of providing active FTTC and FTTP products."*
- It then goes on to describe what happens if the Undertakings are released:
- "The Commitments require that the Openreach division of BT... **will provide**...those SMP products which are provided over BT's access network and backhaul network....and for Openreach Ltd to **control those assets**"*
42. Therefore, instead of being restricted in the supply of active electronics (save exceptions), BT has proposed that it will be fully responsible for providing services and controlling those assets. It is not clear whether the magnitude of this policy shift has been fully assessed. However, it is clear that there has been no public debate, despite Vodafone raising concerns about the ability of Openreach to provide G.Fast without modification to the Undertakings last year. Indeed, given that BT's revised Undertakings of July 2016 maintain the inclusion of para 5.12, 5.13 and 5.52, but are excluded in the Commitments, we can only assume that BT has realised the importance of removing this exclusion in order to further its G.Fast roll out.
43. For this reason we cannot support the release of the Undertakings, until the Commitments reflect the limitations on Openreach's G.Fast roll out as set out in the Undertakings.

²⁷ Para 1.4 of Strengthening Openreach's strategic and operational independence 26 July 2016



5 What will BT's proposals deliver?

44. Notwithstanding the need to address the significant policy issue set out in section 4 of this document, we cannot support the release of the Undertakings until there is clarity over the purpose of the new governance arrangements, how they will be monitored and over what time frame.
45. It is clear that the offer that BT has made cannot be judged by the words in the documents alone. The three documents are unwieldy, they repeat themselves and leave considerable gaps. Equally, reading them at face value reveals a loophole almost on every page. In and of themselves there is no clear expectation that outcomes will be different. On the other hand, as BT has established a legal entity, Openreach Ltd, with its own Board and reporting lines, the Board and management will want to demonstrate its independence and deliver change, we hope Openreach does so despite the numerous ways that BT Group can remain involved.
46. So let's give this a chance to work.
47. However all stakeholders need to be clear about what we are trying to achieve and what "good" looks like and how we will measure it - judging Openreach by the number of meetings it holds with Vodafone's CEO is a measure of the ability of two PAs to manage diaries, and nothing more. The measurements need to be more sophisticated than a line by line review of the rules or input metrics such as the number of meetings or consultations. A qualitative approach is needed in addition to specific quantitative metrics.
48. Therefore, before the Undertakings are released we believe it is necessary for Ofcom to set out clear expectations of what this will deliver, how it will be measured and over what timescales. Before Ofcom releases BT from the Undertakings Ofcom should set out:
- What "good" looks like
 - How it will be measured and reviewed
 - And the timescales that will apply.

What does "good" look like?

49. Ofcom set out in the July 2016 consultation document set out the challenge that Ofcom was attempting to address:

*"1.6 Openreach must become **more responsive** to the needs of the service providers, people and businesses that depend on its network. We said in February that it is necessary to **reform the relationship between Openreach and BT Group**, to give Openreach greater independence and ensure it **serves all of its customers equally**. This document sets out the details of our proposed reform.*

1.7 We expect a more responsive Openreach to deliver two sets of benefits:

- *It should result in a **more competitive market**. Effective competition will ensure that people and businesses have a choice of services from different providers, with quality and pricing that meets their needs*
- *It should **support continued investment in new networks and services**, in particular new ultrafast broadband networks. Investment decisions that are currently in the pipeline would be taken in*



the interest of all of Openreach's customers. New models of investment will become more likely, including models that share risk across a broader base of customers. "

This was repeated further into the document:

"3.3 A more independent Openreach that is responsive to the needs of all its customers could deliver a number of benefits:

3.3.1 maintaining the intensity of competition as new superfast and ultrafast broadband networks emerge;

3.3.2 supporting new models of investment and better targeted investments in communications networks and products; and

3.3.3 enabling further innovation and differentiation of communications services for consumers and businesses."

This provides absolutely clarity over what Ofcom is expecting to happen.

Maintaining the intensity of competition

50. The most intense level of competition we have seen in broadband and what is generally recognised as delivering good outcomes for consumers is a situation where over 90% of the country has been able to benefit from network-based competition from 3 or 4 providers using LLU and cable. This feels like the right benchmark. Ofcom has set a more measured target of 3 competing fibre networks in 40% of the country.

New investment models

51. Through the WLA MR and Charge Control, Ofcom proposed to provide Openreach with a regulatory holiday on its higher speed broadband products in order to incentivise investment. An idea opportunity for Openreach to either make excess returns and target price reductions in competitive areas or use returns to invest and as a result on its own or in partnership. Will Openreach use this opportunity to create business models and partnerships?

Innovation and differentiation in the market place

52. Ofcom has already put in train proposals to increase the regulatory oversight of Openreach's SoR process – rather than rely on any cultural changes as a result of Openreach separation. Lack of clarity in the working of the SoR process has stifled innovation, however. Openreach's approach to matters such as a mutually acceptable contract, quality of service parameters that are delivered and price changes that do not surprise the market are simple tests that would improve innovation and differentiation. Will Openreach move from building a voice network (copper based SIN349) or start to build broadband networks?

How will this be monitored?

53. Ofcom's March 2017 consultation document sets out where Ofcom will monitor the effectiveness of the commitments:

- Implementation
- Governance and
- Independence



54. These parameters describe a number of inputs – whether BT and/or Openreach have implemented various processes or otherwise. Whilst these specific metrics will provide a simple benchmark, they metrics will not provide an assessment of whether the Commitments have been a success (as described by Ofcom). A more rounded assessment based on Ofcom objectives is necessary and might include:

Ofcom objective	Today's benchmark	Future
maintaining the intensity of competition	3-4 competing cable and LLU based CPs in 90% of the country	3 competing fibre based networks in 40% of the population.
new models of investment	BT has the ability to incrementally invest and change plans based on stakeholder and competitor plans. Both creates risks for alternative network build and. lacks transparency for customers.	Clarity over investment plans, location, technology, improved financial transparency and ring fenced profits. Partner co-investment models. Fit for purpose DPA.
further innovation and differentiation	Resale of Openreach defined products, with limited innovation through the SoR process.	Improved QoS, better contractual terms, speedier products to market, ultrafast broadband offered in partnership with retailing CPs who have more control over the service experience of the end product.

55. Of course a lack of progress in certain areas might not be solely due to Openreach, but given Openreach has a significant level of control of the overall broadband ecosystem it has most of the levers in its control.

Timescales

56. Ofcom's July 2016 document stated that *fast reliable broadband services for everyone* and *the UK will move towards a fibre future* is the 10 year vision. If we are to get there, we have to start now. If significant progress in moving towards this goal has not been achieved in the next three years, we can be sure that we will not meet these goals.



Annex 1: A Detailed review of BT's Commitments, Governance Protocol and Agency and Services Agreement

The Commitments Document

Para 3.5 refers to para 3.2 but this is non-exhaustive: for instance, it does not include WLR or SMPF. Can we be confident that para 3.5 assets cover the right products even if they are not listed in para 3.2?

Para 3.6 suggests that Openreach Ethernet Products provided in the Central London Area will by default be provided outside of Openreach once the Commitments are enacted. This will drive costs for CPs who will need to replace the Business-to-Business gateways they have with Openreach with new gateways with another part of BT (presumably BTW&V). These costs should not fall to customers, but should be addressed by BT if BT initiates this change.

Para 4.1 makes clear that Openreach is not legally separate from the rest of BT, but that it is functionally separate from the rest of BT.

Para 5.1 uses the term "*equally*" to describe the right treatment of customers – what does this look like in practice?

Para 5.2 reverts to the use of "non-discrimination" rather "Equivalence of Inputs" as the test of behaviour.

Para 5.5 undermines the very purpose of legal separation as a solution to strategic discrimination in that it explicitly allows for strategic discrimination in favour of its own downstream business.

Paras 7.1 and 7.4 appears not to move any TSO employees, who are designing and operating systems on behalf of Openreach.

Para 8.2 suggests that Openreach employees will retain access to BT Share plans and will receive free BTBroadband and BTTV as part of their remuneration.

Paras 9.1 and 9.7(a) undermine the ability for strategic control to be exerted if the Openreach Board does not have financial control of the assets.

Para 9.8 (b) is very unclear. We would consider that any product provided by a Downstream Division in a regulated market would also be regulated (including charge controls).

It is not clear whether the process set out in section 11 (Openreach Customer Consultation Process) applies to just externally initiated investment ideas, or whether those generated internally would automatically be captured as well.

Para 14.1 sets out a wide range of people and functions that can be made aware of Openreach Commercial Policy. Unlike the Undertakings, where a prescribed list of people are permitted to have access to or influence Commercial Policy, this list is unlimited. Para 10.1 appears to provide some constraints. It is of course Openreach's responsibility to comply with its own Commitments, but it would be useful to understand how they work in practice.

Para 14.2 sets out that the relationship between BTTSO and Openreach is a 'typical customer/supplier' relationship. This of course is not true as TSO is also a supplier to BT's Downstream Divisions and manages



systems that span the whole company. TSO do not do this for Vodafone or any of BT's competitors. TSO are in a privileged position of being fully funded by BT Group and being able to decide where to allocate costs across its customers. Additionally, TSO employees have access to a considerable amount of Openreach Commercial Information and Policy, which can easily be incorporated into BT Downstream Division thinking by using the staff on the Downstream project.

Para 24.2 does not give Ofcom any time to consult on any amendments.

Para 24.3 sets out that Ofcom is constrained by the Commitment timetable. Does Ofcom want to fetter its discretion in this way?

Annex A: Definition

Access Network is defined, but *BT's Access Network* is not defined, whereas *BT's Backhaul Network* is defined. Should there be some consistency?

BT Board appears to be undefined in the document.

Commercial Information and *Commercial Policy* apply only to SMP products. Where a new product or service is being proposed it is quite possible it has not yet been designated as SMP and therefore not covered by these information and policy sharing restrictions.

Statement of Requirement Process is defined, however these Commitments do not prescribe its use.

Governance Protocol

Part A Para 1.1 sets out that the Openreach Board is responsible for setting the Openreach strategy, however it can only do this within the financial window set by BT Group Board (Part B section 2). Openreach's independence will be tested by these conflicting obligations.

Part A Para 2.11 appears to give the Openreach Board the duty to request capital to fund projects that benefit BT downstream at the expense of its own business – we cannot ever imagine that Openreach would do this for an external CP. Will this be transparent?

Part A Para 5.4: under what circumstances is it envisaged that the Openreach Board would not want all members of the Openreach Board to have a copy of approved Board Minutes?

Part A Section 6 creates explicit obligations on Openreach Board that compromises its independence.

Part A Para 7.14 Why doesn't Ofcom see the whole of the BT Compliance Body minutes rather than just an extract?

Part B Sections 2 and 3 set out the current process, with the Openreach Board additionally included to sign off the final MTP and AOP at the same time as the BT CEO and CFO. This does not reflect the scope of an empowered Board.

Part B Para 5.5 there should be no circumstances where the Openreach CEO needs to attend the BT Group Operating Committee. Such attendance should be recorded by the OBARCC.

The Access and Services Agreement

The ASA sets out that that Openreach Ltd has been incorporated, have the Articles of Association been published?



Para 3.3 gives BT Plc sole rights to change the products, assets and scope of Openreach. It does not appear to take account of customer requirements or views.

Clause 7 suggests that Openreach Ltd will hold a balance sheet with fewer assets than an average primary school PTA.

Schedule 1

'Regulatory change' is defined but not used.