

Mr Ed Leighton
Ofcom Riverside House
2a Southwark Bridge Road
London
SE1 9HA

7 May 2015

Dear Mr Leighton

Terms of Reference for Ofcom's Strategic Review

I am writing in response to the request for comments on the Terms of Reference for Ofcom's Strategic Review. Prospect is the trade union representing all managers and professionals in the communications industry, as well as in others.

We are a little surprised at the announcement of the Review, coming as it has just prior to a general election, since we think that this has led to a consequent loss of momentum in terms of what the Review will examine or how it will be conducted. In the context of a review where the timetable is already pressured, this looks to be problematic.

We also note that the announcement of the Review only just post-dates Ofcom's most recent triennial review of the state of the UK's infrastructure. The *Communications Infrastructure, 2014* report concluded that, in essence, 'much had been done, although much remained to do'. However, the prospective workstack identified by the report – in broadband in terms of tackling rural roll-out, city not-spots, availability of next generation access networks to SMEs and ultrafast broadband; and in terms of mobile, of extending network coverage (itself the subject of an agreement secured just weeks later between mobile network operators and the government) – does not seem sufficient to trigger a strategic review of competition issues within the communications infrastructure just three months later.

Nevertheless, Prospect is committed to engage in the process of the Strategic Review. We will see how the Review progresses and will respond appropriately at each stage but, at the outset, we envisage that we will be highlighting the following five points which we would like to see reflected in the production of Ofcom's initial discussion document:

(i) there is no evidence that the Undertakings entered into by BT in 2005 subsequent to the Telecoms Strategic Review are not working effectively in the interests of consumers and businesses. On their most recent formal review in 2009, Ofcom concluded that the Undertakings had delivered 'substantial benefits' to retail and wholesale consumers and that '[We] continue to remain of the view that the Undertakings are an appropriate comprehensive solution to the competition concerns that we set out in the TSR.' We would also make the point that the Undertakings are not a one-off commitment entered into some years ago, but an exercise in dealing with competition issues which continue to

live and breathe: if they were not doing their job to this day, it would be obvious since other operators would have been making extensive noises to that effect (and not just in response to the opportunity now afforded them to do so).

The broadband world has clearly moved on since 2009, but we note that Ofcom commented in the 2015 draft Annual Plan that the combination of its three-yearly market reviews, the Undertakings and functional separation had 'resulted in strong competition in the supply of broadband and telephone services, which has benefited consumers'. We also note the publication – almost contemporaneously with the announcement of the Strategic Review – of the requirement on BT to maintain a sufficient margin between wholesale and fibre prices within its VULA wholesale product for superfast broadband, even though its evidence was that BT was, already in fact, maintaining a sufficient margin within this market. We believe this to be a sufficient statement on the state of competition within the wholesaling of superfast broadband.

Furthermore, we note that *Communications Infrastructure, 2014* contained almost no reference to the existence of 'bottlenecks' in the infrastructure which competition policy might need to address – an issue with which the Strategic Review's terms of reference is quite strongly concerned.

(ii) substantial levels of competition already exist in the fixed-line market, as well as in the mobile one where three of the four operators are of comparable size and weight. In fixed, BT's market share of revenues has fallen from 66% in 2005 to 47% today; its share of total exchange lines in operation has all but halved, from 76% in 2005 to 39% today, while its share of call volumes now stands at about the same level, both as a result of unbundling; and its share of the broadband market is less than one-third. Here, it is faced by three major competitors each with a share of around 20%.

There is thus strong evidence to show that the reforms brought about by the 2005 TSR have significantly reduced BT's share of the fixed-line market and have injected substantial levels of competition into it. The fixed-line market no longer sees a dominant BT but does see real choice for consumers with a range of powerful competitors each with their own substantially-identifiable offer.

(iii) there is no evidence that 'quadplay' – which is not yet a market and may well not become one – needs regulating. We believe that a 'steady as you go' process here, one which tackles proven abuses in practice as opposed to supposing the likely existence of these and dealing with them on an *ex ante* basis, ought to be paramount if an incipient market is not to be damaged or destroyed.

(iv) a vertically-integrated BT, with a history as the operator required to deliver universal service, has brought benefits to the consumer in terms of delivering investment in fibre access well into the 'final third'; and in continuing to meet a universal service obligation which both the DCMS and the European Commission believe needs to be stepped up in terms of access speeds. The current model that we have has successfully delivered advances in communications services and in the take-up of these, and we ought not to put these at risk.

(v) we would wish to emphasise the point highlighted in the terms of reference that regulatory policy needs to ensure the delivery of the right incentives for private-sector investment which help to deliver network availability and quality of service. Ofcom will be aware that Prospect has, over time and consistently, argued that Ofcom's approach in the interpretation of its duties to advance the interests of consumers and citizens has

been too short-termist in approach and that, by encouraging cut-throat competition on the basis of price, investment in the industry has been jeopardised and, with it, the long-term interests of consumers. We advanced this most recently in the consultation on Openreach's quality of service, where we argued strongly, supported by evidence from our surveys on hours and stress amongst our managers and professionals in BT, that cut-backs in staffing below the level at which quality of service could be guaranteed was the natural outcome of a regulatory regime focused exclusively on price and successive cost reduction.

Consequently, it is good to see Ofcom consider – as its top priority – that its Review needs to examine whether its prevailing regulatory approach delivers the right incentives for investment and quality of service. We will be arguing that its current approach does not do this and we will thus be arguing for a change in approach which prioritises network investment and roll-out.

In our view, regulatory policy needs ultimately to be cognisant that, in the roll-out of superfast broadband rights across the nations and regions of the UK – creating essentially a nationwide infrastructure for what is now an essential service – there is only one operator which is placed to deliver that in practice. There will, conversely, always be operators who will wish to cherry pick the better-placed consumers without the requirement to deliver 'best effort' services to the whole of the UK community, or to do so on an open access basis. Where regulatory policy does recognise that the ability to establish superfast broadband as an essential service falls on BT alone, it follows that this is the issue that regulation needs to tackle, i.e. to deliver a network based on open access, on fair and non-discriminatory terms, in the knowledge that everything else may comfortably be left to the market and to competition.

We look forward to engaging with Ofcom both as this process gets underway, and as it continues its progress. We share the view that modern communications networks and services are essential to the ability of UK citizens to live and thrive; and we jointly share the goal of seeking to ensure that these are delivered in a timely and affordable fashion which also ensures adequate rewards for the companies who invest in them, and which delivers good work for those employed to deliver them.

Yours sincerely

A handwritten signature in blue ink that reads "D M Hudd".

Dai Hudd

Deputy General Secretary