



# Delivering a more independent Openreach

Statement on releasing the BT Undertakings pursuant  
to section 154 Enterprise Act 2002

Statement

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# About this document

On 10 March 2017, BT notified Ofcom of voluntary commitments to further reform Openreach. This means that Openreach will become a distinct company with its own staff, management, purpose and strategy.

We consider that the Commitments given by BT sufficiently address the competition concerns as set out in our Strategic Review of Digital Communications. In March 2017 we published a consultation proposing that BT should be released from the Undertakings that it offered to Ofcom in 2005 under which Openreach was originally created.

This statement confirms our decision to release BT from the Undertakings once the new Commitments are fully in place. This document also explains how we will measure compliance with the new arrangements and assess whether they deliver positive outcomes for consumers and businesses.

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## Section 1

# Executive summary

- 1.1 BT has agreed, through a set of Commitments, to Openreach becoming a distinct company with an independent Board of Directors, its own staff, management and strategy. The new company will have a duty to serve its customers equally.
- 1.2 This document explains our decision to release BT from its existing Undertakings once its new Commitments come into effect, and how the success of the new model for Openreach will be measured and monitored.
- 1.3 Since March, BT and Openreach have taken positive steps towards implementing the new arrangements. Completing the reforms will depend on a number of conditions, including the Government amending the Crown Guarantee for BT's Pension Scheme and transferring staff from BT to the new company.
- 1.4 Ofcom will closely monitor BT's and Openreach's compliance with the new Commitments, and the wider results for the whole industry, people and businesses. We will measure how far Openreach is improving its network to deliver decent broadband now and in the future, and helping to deliver better quality of service.

### How Ofcom will monitor outcomes

- Ofcom wants Openreach reform to deliver better phone and broadband services to people and businesses. A more independent Openreach talking to its customers will have the right incentives to invest in high quality networks to deliver real improvements in broadband services.
- We will measure, and report on, the availability of fibre broadband networks, including 'full-fibre' networks. We will also examine whether consumers and businesses across all parts of the UK are receiving decent speeds.
- We also want to see a step change in quality of service. We will report on repair and installation times, including whether engineers are turning up on time.
- We will closely monitor how BT meets its commitment to deliver the same benefits in Northern Ireland, where Openreach itself does not operate.

### How Ofcom will monitor compliance

- Ofcom is now establishing a dedicated Openreach Monitoring Unit, to monitor carefully whether the new arrangements are implemented successfully.
- The unit will assess whether the new governance rules are being observed, and whether Openreach is acting more independently of BT. This means making its own decisions and treating all its customers equally. It will consider whether BT and Openreach are living by both the letter and the spirit of the Commitments, and creating a successful culture that values Openreach's independence.
- Ofcom will report on this compliance six months after the Commitments come into effect, and then every year.

### The Commitments will replace, and enhance, the current BT Undertakings

- We have decided, after consultation, to release BT from its past Undertakings 30 days after BT confirms it has met certain conditions in its new Commitments.

## **Openreach will become a distinct company with greater independence and a duty to treat all customers equally**

- 1.5 Ofcom's Strategic Review of Digital Communications set out our strategy to bring about fast, reliable broadband services, a move towards a fibre future and decent broadband for everyone. Openreach will play a crucial role in delivering these improvements for millions of UK people and businesses who rely on its network.
- 1.6 Our review identified concerns that the current structure of Openreach left BT with an ability to discriminate against competitors. Openreach's integration within BT Group meant that new, strategic investment decisions were taken at a group level. This created a risk that decisions could favour the interests of BT's retail divisions over those of competing providers. Without intervention, this competition concern could undermine the incentive for companies to invest, and ultimately could influence the price, quality and availability of services received by people and businesses.
- 1.7 To resolve this, we said Openreach needed to have more independence in making strategic and operational decisions, taking equal account of all its customers' interests. To this end, we announced in November 2016 that we were preparing a notification to the European Commission for the legal separation of Openreach.
- 1.8 In March 2017 BT notified us of voluntary commitments to further reform Openreach. BT's Notification means that Openreach will become a distinct company, Openreach Limited, with its own independent Board of Directors, staff, management and strategy. The new company will have a duty to serve its customers equally.
- 1.9 The Commitments include reforms to how BT works in Northern Ireland, where Openreach does not operate. This will ensure that people and businesses in Northern Ireland benefit from the new model in the same way as the rest of the UK.
- 1.10 Following BT's Notification, we published a document explaining why we believe the new arrangements should address our competition concern, subject to the continued commitment of BT and Openreach to the new model. We also consulted on a proposal to release BT from the undertakings that it gave to Ofcom in 2005 under the Enterprise Act 2002. When they come into effect, the Commitments will replicate and enhance the Undertakings through the new model of legal separation.
- 1.11 Having carefully considered responses to our March 2017 Consultation, we have decided to implement our proposal to release BT from the Undertakings once the Commitments are fully in place.
- 1.12 This statement signals the beginning of a more independent Openreach, being responsive to its customers, supporting increased investment and delivering higher service quality. A more independent Openreach is one element of our broader strategy to deliver better broadband for people and businesses. The new arrangements for Openreach will combine with our work to promote competition, investment and setting quality of service standards. It is important that Openreach plays its part in achieving these aims, for the benefit of the whole industry.

## **We will measure how the new model delivers for people and businesses**

- 1.13 The ultimate aim of any changes to the structure of Openreach is better phone and broadband services for consumers and businesses. Combined with wider regulation, the new arrangements should create the right conditions for Openreach to work with its customers to deliver real improvements, in three important areas:

- 1.13.1 widespread availability of more fibre-based broadband networks to deliver fast, reliable broadband services, as a result of Openreach engaging effectively with its customers;
  - 1.13.2 decent broadband services for all UK consumers and businesses, at a speed that is sufficient to meet modern needs; and
  - 1.13.3 a step change in quality of service, to ensure Openreach’s performance meets the needs of all wholesale and retail customers.
- 1.14 Success will depend heavily on the commitment of BT Group and Openreach to the new model, and the behaviours they demonstrate. Overall, we believe the extent to which the new model is delivering these benefits for consumers and businesses will become clear within three years of its implementation.
- 1.15 We expect Openreach to be responsive to different commercial models of investment proposed by its customers, including co-investment and risk sharing. We also expect Openreach to be responsive to requests from BT’s competitors to build their own fibre networks using Openreach’s existing telegraph poles and underground ducts.
- 1.16 We will track whether the new arrangements are delivering the right results, by measuring and reporting regularly on a range of indicators. These will focus on how Openreach’s performance and behaviour are contributing to positive change. Although Openreach plays a major role in the market, some developments will be influenced by other factors. So we will monitor and report on metrics closely attributable to Openreach’s performance, as illustrated by the examples below.

**Figure 1: Indicative metrics to measure consumer outcomes**



Source: Connected Nations 2016, Comparing Service Quality 2017, Quality of Service for WLR, MPF and GEA 2017, Openreach website.

Note: Average speeds for the Openreach network will be published in our Connected Nations Update. BT did not consent to their publication at this time.

\*Asymmetric Digital Subscriber Line (ADSL) refers to technologies using Openreach’s copper network.

- 1.17 We will monitor Openreach's performance against the metrics above, in a series of wider reports. These will draw on data from external Ofcom publications, such as our Connected Nations research, and information from the Openreach Monitoring Unit. They will be published alongside the Openreach Monitoring Unit's annual compliance report.

### **Monitoring will be critical to ensure that BT and Openreach comply**

- 1.18 As well as improvements to broadband networks and services, we also need to monitor closely the conduct of, and interactions between, BT and Openreach.
- 1.19 One of the benefits of the Commitments is the transparency they provide on the relationship between Openreach and BT Group, in particular on strategic investment decisions. Strong, effective monitoring will be crucial to ensure that Openreach acts more independently, in the interests of all its customers. To deliver this, a dedicated Openreach Monitoring Unit within Ofcom will closely monitor the new model across three areas:
- 1.19.1 successful implementation of the arrangements by BT and Openreach;
  - 1.19.2 compliance with the new formal governance arrangements; and
  - 1.19.3 whether Openreach's and BT's conduct provides the greater independence necessary for Openreach from BT, both in making its own strategic decisions and treating all its customers equally.
- 1.20 This approach will form the basis of the Openreach Monitoring Unit's workplan. We will report our findings in a series of reports, initially six months after the Commitments come into effect, and annually thereafter. The monitoring reports will assess BT's and Openreach's compliance with the new arrangements, including any areas of concern.
- 1.21 The success of the new model will depend on the commitment of BT Group and Openreach to implementing it, and the behaviours they demonstrate. Openreach and BT must live by the 'spirit', as well as the 'letter', of the Commitments, developing a culture that values independent decision-making.
- 1.22 As well as monitoring compliance with the Commitments, Ofcom will continue to ensure BT and Openreach comply with their other regulatory obligations. We will continue to use our enforcement powers where we identify instances of non-compliance, which may include imposing financial penalties.

### **We expect consumers and businesses in Northern Ireland to benefit too**

- 1.23 Openreach does not operate in Northern Ireland, where network telecoms and wholesale services are instead managed by a single entity within BT, Northern Ireland Networks (BTNIN). This structure depends on sharing engineering resources between BT's own operations and the functions it performs on behalf of Openreach. It is generally working well, and BT's quality of service performance in BTNIN compares well with Openreach in Great Britain.
- 1.24 Despite the local differences in organisational structure, we expect Northern Ireland will benefit from the new model as much as the rest of UK. BTNIN acts, in effect, as the agent of Openreach, building networks and services based on those developed centrally. Under the new model, strategic investment decisions will reflect the needs of all UK consumers and businesses, not just those of BT Group. At the same time,

the detailed delivery of that network strategy will continue to be based on the local needs of people and businesses in Northern Ireland.

- 1.25 BT's Notification contains specific commitments (Commitment 18) that strengthen the current arrangements in Northern Ireland and mirror the key principles of the new model of Openreach legal separation. These Commitments are expanded by a separate protocol developed by BT that will govern the relationship between Northern Ireland Networks and BT Group<sup>1</sup>. The protocol addresses concerns raised by stakeholders in Northern Ireland, and will have the same status as the BT Commitments and the Governance Protocol.
- 1.26 We will closely monitor compliance with these commitments, and the Northern Ireland protocol, as part of our wider Openreach monitoring programme. Our focus will be to ensure that consumers and businesses in Northern Ireland benefit in the same way as the rest of the UK.

### **BT and Openreach are implementing the new arrangements, but work remains before the Commitments come into effect**

- 1.27 BT's Commitments are formally subject to four pre-conditions. Until these are met, the current model will remain in force. The conditions are:
- that the Crown Guarantee, which currently covers the liabilities of BT to the BT pension scheme, is modified or supplemented to maintain pension protections for members of the scheme who transfer to the newly incorporated Openreach Limited. This is a matter for Government to implement;
  - approval from the BTPS Trustees for Openreach Limited to become a participating employer in the BT pension scheme;
  - completion of the consultation processes under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), which are necessary for the transfer of employees; and
  - release of BT from the Undertakings, to be replaced by the new Commitments.
- 1.28 The Digital Economy Act 2017 introduced a power to enable Government to continue to guarantee BT pension scheme liabilities relating to members of the scheme who transfer to a separate Openreach. The Government is now in the process of drafting the secondary legislation needed to implement this, in consultation with BT, the BTPS Trustee and wider stakeholders.
- 1.29 We expect to see Openreach operating with greater independence and a focus on the equal treatment of its customers from the outset, even before the Commitments formally come into effect.
- 1.30 Since BT's Notification, BT and Openreach have taken several encouraging steps towards implementing the new arrangements. These include:
- 1.30.1 the appointment and induction of a majority independent Openreach Board, chaired by Mike McTighe;

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<sup>1</sup> [BT Northern Ireland Governance Protocol](#)



- 1.30.2 the creation and first meeting of the Openreach Board Audit, Risk and Compliance Committee (OBARCC), who are responsible for Openreach compliance; and
  - 1.30.3 consultation by Openreach on a new process for how it engages with its communications provider customers on plans for new network services and investments.
- 1.31 We welcome the positive steps taken by Openreach and BT towards reforming Openreach.
- 1.32 While these signs are encouraging, the real test for the new model will be whether it delivers the right results for consumers, especially increased network investment and higher service quality.

**If the new Openreach does not deliver, we can act**

- 1.33 The success of the new Openreach will depend both on compliance and results in the market. We expect that, within three years of implementation, it will become clear how well the new model is delivering for people and businesses. Monitoring and assessment will start immediately.
- 1.34 Ofcom's response to any potential compliance failures with BT's voluntary arrangements will depend on the nature and gravity of the breach in question. Should there be repeated or serious breaches of compliance, or should it become clear that legal separation is not working overall, we will reconsider our position on formal interventions to address our competition concern.
- 1.35 This could result in Ofcom notifying BT that the new arrangements under the Commitments are no longer addressing those concerns, and that we need to reconsider the imposition of a regulatory solution, which could include structural separation.

## Section 2

# Why BT's Commitments should address our competition concern

## Introduction

- 2.1 In our March Consultation, we explained why we consider that BT's Notification should sufficiently address our competition concerns.<sup>2</sup> We set out the following:
- 2.1.1 the competition concerns relating to BT's structure that we identified as part of the DCR and the measures we proposed to put in place to address them;
  - 2.1.2 the measures BT notified to us in July 2016, and our assessment of why and how they fell short of addressing our competition concerns; and
  - 2.1.3 the measures BT has notified to us now, and our assessment of why and how we consider they are sufficient to address our competition concerns, such that we no longer now propose to impose regulatory conditions.
- 2.2 In response to our Consultation, some stakeholders raised concerns over aspects of BT's Notification that in their view did not sufficiently address our competition concern. This section explains why we consider that BT's Notification should sufficiently address our competition concerns, with a focus on those points raised through stakeholder responses.

## Our concern with the current structure of Openreach

- 2.3 Through the Strategic Review of Digital Communications, we were concerned that the current structure of Openreach failed to remove BT's ability to discriminate against competitors.<sup>3</sup> Specifically, Openreach's vertical integration within BT Group meant that new, strategic investment decisions were taken at a group level. This creates a risk that decisions made in this way could favour the interests of BT's retail divisions over the interests of competing providers.
- 2.4 Without effective intervention, this competition concern could undermine the incentive and ability for industry players to participate in or inform new investments, and ultimately influence the price, quality and availability of services received by consumers and businesses. To resolve this issue, we identified the need for Openreach to have more independence in its strategic and operational decision making, taking equal account of all its customers' interests.
- 2.5 On 18 July 2016, BT submitted to Ofcom a voluntary notification (BT's July Notification) to re-organise and enhance the existing model of functional separation.<sup>4</sup> In our July 2016 Consultation, we did not consider that BT's July Notification sufficiently addressed our competition concerns.<sup>5</sup> In July 2016, we set out three

<sup>2</sup> [Section 3, Delivering a more independent Openreach, March 2016](#)

<sup>3</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0016/50416/dcr-statement.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0016/50416/dcr-statement.pdf)

<sup>4</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0015/20337/bt-proposal.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0015/20337/bt-proposal.pdf)

<sup>5</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0022/76243/strengthening-openreaches-strategic-and-operational-independence.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0022/76243/strengthening-openreaches-strategic-and-operational-independence.pdf)

broad features which, taken together, meant BT's July Notification did not go far enough. These were:

- 2.5.1 the status of Openreach as a division of BT plc, rather than as a separate legal entity, the consequent lack of any formal company directors on the Openreach committee, and no transfer of employees;
  - 2.5.2 the high degree of direct involvement and engagement of the BT Group Chief Executive and Chief Financial Officer in Openreach's management; and
  - 2.5.3 the ability of these executives to access confidential customer information during the confidential Openreach consultation process between Openreach and BT's competitors.<sup>6</sup>
- 2.6 We explained that, taken together, these raised a significant risk of continued, direct, but hard to identify BT Group influence over Openreach's decision making even within the bounds of its delegations. We considered that, as a result, the Openreach committee would not be suitably enabled to take or recommend more independent decisions in the interests of all its customers.<sup>7</sup>
- 2.7 Given BT's July Notification did not go far enough, we proposed a set of measures required to address our competition concerns in our July 2016 Consultation. We also explained our intention to proceed with a notification of our proposal to impose a regulatory solution on BT to the European Commission.

### **BT's Notification to Ofcom on 10 March 2017**

- 2.8 In November 2016, we announced our intention to notify the European Commission of our proposals for legal separation, having considered stakeholder responses to our July Consultation.<sup>8</sup> We were clear that we remained open to further voluntary proposals from BT that addressed these outstanding concerns, particularly with regard to the three main areas of concern outlined above.<sup>9</sup>
- 2.9 Discussions with BT continued and on 10 March 2017 BT notified to Ofcom pursuant to section 89C of the Communications Act 2003 a revised set of measures which it intends to implement to address our concerns.
- 2.10 BT's Notification consists of a package of documents comprising:
- 2.10.1 a notification under section 89C of the Communications Act 2003;
  - 2.10.2 a set of Commitments made by BT (and Openreach) to Ofcom. The Commitments are based on the existing Undertakings, but revised to reflect the principles established by the new model of legal separation that BT is committing to. The Commitments establish Openreach Limited as wholly-owned subsidiary of BT plc, with responsibility for the strategy, management and operation of Openreach and the employment of 32,000 employees; and

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<sup>6</sup> July 2016 Consultation, paragraph 7.31

<sup>7</sup> July 2016 Consultation, paragraph 7.32

<sup>8</sup> Update on plans to reform Openreach, November 2016, <https://www.ofcom.org.uk/consultations-and-statements/category-1/strengthening-openreaches-independence>

<sup>9</sup> July 2016 Consultation, paragraph 7.49. See also the November 2016 update.

- 2.10.3 a Governance Protocol that sets out the rules governing the new relationship between Openreach Limited and BT plc, and the purposes of, and delegations to, Openreach Limited. This includes the respective roles of the Openreach Board and Executive and the rules that define their interaction with BT Group.
- 2.11 BT plc and Openreach Limited will also enter into an Agency and Services Agreement that sets the contractual terms on which Openreach has access to and control of relevant assets, and the nature of its trading relationship with its customers. This document does not form part of the formal notification to us as it provides for the internal contractual mechanism for implementation of the Commitments.
- 2.12 Commitment 18 provides a set of obligations specific to Northern Ireland that seek to strengthen the current arrangements and mirror the key principles of the new model of Openreach legal separation. BT has provided further detail on how it will implement Commitment 18 through a separate Northern Ireland governance protocol, which is publicly available on BT's website.<sup>10</sup> We explain what Openreach reform means for the current arrangements in Northern Ireland in Section 6.

## Why BT's Notification should strengthen Openreach's independence

- 2.13 As set out above, the competition concern identified in the DCR relates to BT Group's ability to influence Openreach's strategic decisions about future network investments and operation in ways that favour its own retail operations. This concern arises due to the vertically integrated structure of BT combined with its position of significant market power (SMP). This competition concern creates the risk of investment that does not meet the needs of all Openreach's customers, reducing competition, and potentially leading to poorer outcomes for consumers and businesses that rely on the Openreach network.
- 2.14 In response to our Consultation, respondents broadly agreed that we should accept BT's Notification rather than proceed with a regulatory solution. However, several responses highlighted what they saw as potential risks with the new arrangements relating to our competition concern. Broadly there were two categories of risks:
- 2.14.1 that Openreach would not have sufficient independence, due to the potential ability of BT Group to exert inappropriate influence over its strategy and operations in specific areas; and
- 2.14.2 that continued ownership of network assets by BT plc would mean that the Openreach management would not be sufficiently incentivised to invest in those assets, or BT Group could exert influence over their use.
- 2.15 A number of responses also made comments on, or suggested potential changes to, the detailed obligations contained in the Commitments. However, these did not relate directly to the specific competition problem we have identified and therefore they are not considered as part of this statement.
- 2.16 The rest of this section sets out why we think that BT's Notification should sufficiently address our competition concerns and addresses the two potential risks raised by stakeholders. Close and pro-active monitoring of BT and Openreach's compliance with the new arrangements will be crucial to ensure that BT's Notification proves

<sup>10</sup> <http://www.btplc.com/UKDigitalFuture/Agreed/index.htm>

effective in addressing our concerns in practice. We set out our approach to monitoring compliance in more detail in Section 3.

## **How BT's Notification will strengthen Openreach's strategic and operational independence**

- 2.17 We consider that BT's Notification sufficiently addresses those areas in the July 2016 Notification that, taken together, gave BT Group the ability to influence Openreach's decision-making and operations. Specifically:
- 2.17.1 Openreach Limited is incorporated as a wholly-owned subsidiary of BT plc. A majority independent Board of Directors, with an independent Chair, is responsible for the strategy and management of Openreach Limited. The Articles of Association set out that one of the company's purposes is to act in the interests of all downstream customers equally, and that the Openreach directors must act accordingly.
  - 2.17.2 Openreach Limited has an executive that is appointed by, and which reports to, the majority independent Openreach Board except for in specific circumstances that are transparent to the OBARCC and Ofcom.
  - 2.17.3 The direct involvement of the BT Group CEO and CFO in Openreach Limited's management is restricted. For example, they cannot access confidential customer information during the confidential Openreach consultation process between Openreach and BT's competitors.
  - 2.17.4 Openreach Limited will be responsible for setting its own strategy to meet its purposes, within a financial envelope set by BT Group. In doing this, it will consider the interests and strategies of all its downstream customers, including BT. The Governance Protocol provides for transparency for Ofcom on the nature and substance of interactions between Openreach and BT Group on significant investment decisions.
  - 2.17.5 Openreach will consult with its customers on major future network investment decisions in accordance with a new process that will safeguard customer confidentiality.
  - 2.17.6 Openreach Limited will be responsible for the operation and management of the Openreach business, including the direct employment of those employees working on Openreach products, services and network.
  - 2.17.7 While ultimate ownership of all assets would remain with BT plc, 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.
- 2.18 Given the measures listed above, we consider that the new arrangements established by BT's Notification provide Openreach with significantly more independence to take its own decisions about the strategic direction and operation of the network.
- 2.19 We think that this structure should mean that Openreach acts with a clear focus on the needs of all its customers, not just those of BT Group. Its success will depend on the commitment of the Openreach Board, executive and wider organisation to the new model, ensuring that they act consistently with the spirit as well as the letter of the Commitments.

- 2.20 Our objective is to secure greater independence for Openreach and ensure it serves all of its customers equally. We consider that the new arrangements provide Openreach with the greatest degree of strategic and operational independence that is practically possible within a model of legal separation.

### **Ensuring any necessary interactions between BT and Openreach are transparent**

- 2.21 We have been clear throughout this process that our intervention needs to be effective but proportionate. The model proposed by BT inevitably balances the need for good corporate governance with the need for more independence. The Commitments therefore permit various forms of legitimate interaction between Openreach Limited and BT Group for these purposes.
- 2.22 We recognise that such interactions could raise potential risks that these channels may provide an avenue for BT Group to exert inappropriate influence on the operational and strategic decisions of the Openreach Board. To address this risk, there are a number of obligations included in both the Commitments and Governance Protocol that provide transparency to Ofcom on the interactions between Openreach and BT Group, including:
- 2.22.1 **CEO reporting:** The Openreach CEO has limited secondary accountability to the BT Group plc CEO, for specific purposes only. To provide transparency, the Openreach CEO will provide a report to the Openreach Board and OBARCC on a monthly basis setting out the nature and substance of these discussions (see Part B, Section 5).
  - 2.22.2 **Board membership:** BT will need to notify Ofcom if they plan to veto the appointment of the Openreach CEO by the Openreach Board, or remove any of Openreach Limited's directors (see Part B, Section 3).
  - 2.22.3 **Investment proposals:** BT is required to notify Ofcom of any circumstances where, following a proposal from Openreach, BT decides not to make an investment because it could be to the detriment of the BT as a whole (see Commitment 5.5).
- 2.23 In addition, the Commitments contain measures that provide transparency around the conduct of BT and BT Group employees in complying with the new arrangements. For example, Section 10 of the Commitments prevent BT Group employees from accessing confidential information and influencing commercial policy, with specific exemptions. Where these exemptions apply, BT must prepare a disclosure record detailing all BT employees who have received confidential customer information, which will be shared regularly with OBARCC and Ofcom (see Commitment 10.4).
- 2.24 Taken together, these obligations allow us to monitor closely interactions between Openreach Limited and BT Group, alongside providing us with clearer insight into and information about their respective conduct in relation to the new model. We consider these transparency requirements, alongside close monitoring of compliance, will be sufficient to guard against the risk that any necessary interactions between Openreach and BT Group might be used as an avenue for inappropriate influence.

## **Openreach's control of network assets**

### Our July 2016 proposals on control of network assets

- 2.25 In our July 2016 proposal we noted that an important aspect of the new structure for Openreach is the status of its assets, for example, its physical network infrastructure and associated electronics.<sup>11</sup> In considering the extent to which different classes of assets need to be owned by Openreach, we explained that our objective would not be asset transfer as an end in itself. Rather our goal is to ensure Openreach has sufficient access to, and control of, relevant assets to deliver on our wider objective of more strategic and operational independence, but avoiding going further than is necessary.
- 2.26 Our starting position was that any assets critical to the Openreach Board in discharging its duties should be owned and operated by Openreach. To achieve this, our proposed starting point was to transfer those assets Openreach controls today under the Undertakings.
- 2.27 However, we recognised that given the shared nature of the network, identifying and dividing assets might create costs or complexity, and that asset transfers into Openreach could also have implications for the financial position of BT Group and its ability to support and meet its liabilities, including the BT Pension Scheme.
- 2.28 Therefore we explained that we remained open to considering alternative mechanisms to secure Openreach access to assets that delivered similar outcomes in terms of operational control and investment incentives. We noted that such alternatives could be secured through contractual arrangements with BT Group, as witnessed for some products and services today.

### How Openreach control of network assets is secured under BT's Notification

- 2.29 The Commitments establish that Openreach Limited will manage and operate the access and backhaul network assets that comprise the Openreach Line of Business. These are defined as those assets required for the provision of products that are important to support current and future competition, which includes (among others) Physical Infrastructure Access (PIA), Virtual Unbundled Local Access (VULA) and relevant Ethernet services, as listed in Section 3.5 of the Commitments.<sup>12</sup>
- 2.30 Within this structure, Section 9 of the Commitments provides Openreach Limited with the ability to maintain, remove, replace and build assets on behalf of BT plc. It also gives Openreach Limited full responsibility over investment decisions relating to assets, subject to the requirements of the Governance Protocol.
- 2.31 As noted above, an Agency and Services Agreement (ASA) between BT plc and Openreach Limited, will provide the internal contractual mechanism for implementation of the Commitments related to assets.<sup>13</sup> The ASA sets the contractual terms on which Openreach Limited has access to, and control of, relevant assets, and the nature of its trading relationship with its customers. BT plc and Openreach Limited will enter into the ASA once the Commitments formally come into effect.
- 2.32 As the ASA provides a contractual arrangement whereby Openreach has control and management rights over the network assets required to deliver key products, we

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<sup>11</sup> July 2016 consultation, paragraphs 4.76-4.81

<sup>12</sup> Commitment 3.5, BT's Notification

<sup>13</sup> <http://www.btplc.com/UKDigitalFuture/Agreed/ASA-WorkingDraft30March2017.pdf>

consider that Openreach will be able to exercise effective control over these assets in a way that meets our objectives.

- 2.33 The Openreach Board has been established with a specific duty under the Articles of Association to consider equally the interests of its all downstream customers, alongside promoting the success of Openreach as a company. Given these duties, we also think that the Openreach Board should be sufficiently incentivised to invest in improving its networks and services to deliver on its customers' requirements. Without continued investment in the underlying network, Openreach is unlikely to be able to deliver for its wholesale customers.



## Section 3

# Monitoring compliance with BT's Commitments

## Ensuring that BT and Openreach comply with the spirit of the Commitments

- 3.1 As we set out in our Consultation, effective and robust monitoring will be crucial to ensuring that the new arrangement addresses our competition concerns and that Openreach acts independently in the interests of all customers. We explained that a new Openreach Monitoring Unit will be established to monitor three areas: implementation; governance arrangements; and independence and equal treatment of customers.
- 3.2 The work of the Openreach Monitoring Unit will be complemented and supported by the work of BT and Openreach's own internal compliance functions, i.e. OBARCC and the BT Compliance Body, which will be responsible for collecting information on compliance which can be made available to Ofcom, such as meeting minutes and records of interactions between BT and Openreach. These bodies will also be responsible for reviewing and responding to alleged breaches or complaints relating to the Commitments, and referring them to Ofcom if appropriate.
- 3.3 This section provides further information on the work the Openreach Monitoring Unit will undertake in monitoring compliance by BT and Openreach with the Commitments, and in making sure that Ofcom is satisfied that the new model is addressing our competition concerns and benefiting the wider market. It also sets out the steps we will take should we find instances of BT or Openreach failing to comply with the Commitments, and how this will interplay with our usual enforcement powers. Finally, it summarises stakeholders' comments regarding monitoring and outlines Ofcom's response.

### The Openreach Monitoring Unit

- 3.4 The Openreach Monitoring Unit will be a dedicated team within the Competition Group at Ofcom with oversight from the Director of Investigations and Enforcement. The team will take a robust and pro-active approach to monitoring compliance, and will consider whether BT and Openreach are acting consistently not just with the letter of the Commitments and Governance Protocol but also with the spirit of the arrangements.
- 3.5 As discussed in our Consultation, the Openreach Monitoring Unit will adopt an approach for monitoring the new model covering three areas: successful implementation by BT; compliance with the new formal governance arrangements; and assessing if Openreach's and BT's conduct delivers against the policy objectives, in terms of Openreach's independence from BT in strategic decision-making and the equal treatment of all customers. This approach will form the basis of the Openreach Monitoring Unit's workplan and will inform the themes of the first three Ofcom reports.
- 3.6 Our approach to measuring wider outcomes for industry, consumers and business is discussed in Section 4.

## Engagement with BT, Openreach and other stakeholders

- 3.7 As noted above, the work of the Openreach Monitoring Unit will be complemented and supported by the work of OBARCC and the BT Compliance Body. The Openreach Monitoring Unit will seek to build effective working relationships with OBARCC and the BT Compliance Body to foster an open and collaborative approach to monitoring compliance. Some of the work in building these relationships has already begun and learnings will be drawn from previous engagement with the Equality of Access Board (EAB), the body responsible for monitoring BT's compliance with the Undertakings.
- 3.8 Ongoing working level meetings will be held between the Openreach Monitoring Unit and the chairs of OBARCC and the BT Compliance Body. Additional meetings between senior managers, directors and at CEO level will occur from time to time to discuss the monitoring programme and provide feedback on areas that represent a risk.
- 3.9 We also recognise that engagement with other stakeholders, including customers of BT and Openreach, is critical to a successful compliance monitoring programme. Ofcom will encourage stakeholders to share their experiences of the new model with the Openreach Monitoring Unit and to raise any concerns in a timely manner.
- 3.10 Formal feedback from stakeholders will be sought by Ofcom at key points during the implementation of the new model and on an ongoing basis. These are likely to coincide with the publication of the monitoring reports, more detail on which can be found in the section below on the output of the Openreach Monitoring Unit.

## Ways of working

- 3.11 We are currently exploring new ways of working to ensure the success of our monitoring programme. For example, we intend on putting in place ways of working with BT and Openreach regarding the engagement that we will require to effectively monitor compliance with the Commitments and Governance Protocol, and the action we will take if we have concerns regarding compliance.
- 3.12 We expect that these ways of working will cover:
- 3.12.1 how BT and Openreach will cooperate with Ofcom in the exercise of monitoring compliance with the Commitments and Governance Protocol;
  - 3.12.2 a framework for how BT and Openreach will communicate with Ofcom, including providing Ofcom with assurances regarding access to key stakeholders for interview;
  - 3.12.3 Ofcom's expectations relating to disclosure of information by BT and Openreach to Ofcom, including, as necessary, the use of our statutory information gathering powers; and
  - 3.12.4 an approach to escalating instances of non-compliance.
- 3.13 We also intend on establishing with the OBARCC and BT Compliance Body a structured plan which will set out the information we expect to be produced by BT and Openreach, along with appropriate deadlines for the sending of that information to Ofcom.

## **The work of the Openreach Monitoring Unit**

- 3.14 The Openreach Monitoring Unit's work will fall into the following broad categories: ongoing compliance monitoring, the publication of the annual Ofcom Monitoring Report and, as and when needed, large scale audit and investigation exercises into issues of particular concern or interest.
- 3.15 These broad categories of work will all contribute to the three areas of monitoring discussed in more detail below.

### Area 1: Ensuring successful implementation of the new model

- 3.16 The Openreach Monitoring Unit will engage closely with BT and Openreach to ensure that suitable progress is being made throughout the implementation phase, and seek assurances that relevant steps have been taken at key milestones.
- 3.17 Some initial steps have already occurred such as the appointment of an independent Openreach board and the setting up of OBARCC.<sup>14</sup> Ofcom expects to be kept informed of BT and Openreach's progress against the outstanding requirements.

### Area 2: Ensuring compliance with the governance arrangements

- 3.18 The monitoring of compliance with the Commitments and the Governance Protocol will involve the analysis of a large amount of evidence gathered through the Openreach Monitoring Unit's work programme, as discussed above.
- 3.19 Some examples of the ongoing compliance work in relation to this area include: analysis of OBARCC and BT Compliance Body meeting minutes, reviewing summaries of CEO-CEO discussions and assessing Openreach's newly implemented Code of Conduct.
- 3.20 In some cases, we may identify issues of particular interest or concern – either from customer complaints or from our own monitoring work (including based on the work of OBARCC and/or the BT Compliance Body). In these circumstances, we may carry out a more in-depth assessment of the relevant issues, which might include staff interviews, analysis of documentation and/or on site work.

### Area 3: Ensuring Openreach acts independently and treats customers equally

- 3.21 The key purpose of our monitoring work is to ensure that the new model delivers independent decision-making by Openreach, to address our competition concern. We will need to establish whether the new Openreach is treating its customers equally and is responsive to their proposals for new network investments in a timely manner, that its strategic decisions are made in the interest of all its customers, and that these decisions are taken independently from BT.
- 3.22 We expect to see Openreach and BT living by the 'spirit' of the Commitments, developing a culture that values independent decision-making rather than focussing too strongly on detailed legalistic interpretations of the precise wording of individual Commitments.

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<sup>14</sup> See BT's response to our Consultation, [https://www.ofcom.org.uk/data/assets/pdf\\_file/0016/101833/BT.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0016/101833/BT.pdf) and Openreach's response to our Consultation, [https://www.ofcom.org.uk/data/assets/pdf\\_file/0021/101838/Openreach.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0021/101838/Openreach.pdf)

- 3.23 The monitoring of this area will draw on qualitative and quantitative information gathered through the Openreach Monitoring Unit's work programme as set out above. This will include information obtained through close engagement with stakeholders across the industry who Ofcom will encourage to provide feedback on their experience under the new arrangements.
- 3.24 An initial area of focus for the Openreach Monitoring Unit will be to help facilitate BT, Openreach and Openreach customers to engage with one another with a view to developing a common understanding of what the following central concepts mean in practice for the new model:
- 3.24.1 Openreach independence from BT Group; and
- 3.24.2 Equal treatment of customers.
- 3.25 This common understanding will assist in drawing out any areas of concern at an early stage between BT, Openreach and its customers. The Openreach Monitoring Unit will monitor how this has been applied in practice through its supervisory work – for example, by reviewing internal processes/documents, details of Openreach's customer consultations (confidential, public, committed), approved and rejected proposals, customers' views and other relevant information.
- 3.26 The ongoing compliance work used to assist the monitoring of this area is likely to include the reviewing of internal decision making processes to understand how the independence and equal treatment principles have been reflected in those processes, assessing how investment proposals made to Openreach by BT Group members and other customers have been considered by Openreach, reviewing vetoed decisions that come to Ofcom's attention and assessing how independence and equal treatment has been embedded within Openreach as part of its corporate structure, both in terms of the letter and the spirit of the Commitments.
- 3.27 The Openreach Monitoring Unit may from time to time carry out more in-depth assessments in this area if we consider that a more focused approach is needed because it represents a risk to Openreach's independence or the equal treatment of customers. This may include staff interviews, analysis of documentation and/or on site work.

### **Ofcom's approach to compliance concerns and enforcement**

- 3.28 Ofcom will take prompt action where we are concerned either BT or Openreach may be failing to comply with the Commitments or Governance Protocol. We foresee there being three key types of potential compliance failure:
- 3.28.1 a failure by BT or Openreach to provide information requested either voluntarily in accordance with the Commitments or under formal information gathering powers under the Communications Act 2003;
- 3.28.2 a failure by BT or Openreach to comply with the specific obligations set out in the Commitments or Governance Protocol; and
- 3.28.3 a failure by Openreach to act in accordance with the 'spirit' of the Commitments or Governance Protocol, i.e. failure to act independently or to treat customers equally.

- 3.29 The response of the Openreach Monitoring Unit will depend on the nature and gravity of the concern. Minor or one-off issues are likely to be resolved through engagement with OBARCC and/or the BT Compliance Body, via discussions and/or in writing.
- 3.30 We are likely to regard frequent patterns of compliance issues and/or those that present a material risk to the independence of Openreach or the equal treatment of customers as more serious. In these instances, our concerns will be escalated formally to senior executive or CEO level within BT and/or Openreach. We may also seek to initiate with BT and/or Openreach changes to certain processes if needed to resolve the issues of concern. This could include changes to the Commitments and/or Governance Protocol to provide for more robust solutions depending on the nature and seriousness of the issues.
- 3.31 As noted above, ultimately, if Ofcom believes that these arrangements are no longer addressing our competition concerns, we may consider moving to the imposition of a regulatory solution, which could include structural separation.
- 3.32 In addition, the action we will take in response to BT's or Openreach's potential non-compliance with the Commitments will sit alongside our statutory powers to take enforcement action for failure to comply with their specific regulatory obligations. It will remain a priority for Ofcom to monitor BT and Openreach's compliance with its regulatory obligations, in addition to the Commitments, and we will take appropriate action when we become aware of potential breaches of such regulatory obligations.
- 3.33 This includes the SMP conditions<sup>15</sup> that Ofcom has imposed on BT under section 45 of the Communications Act 2003. Where we identify there has been a breach of an SMP condition, our enforcement powers include the ability to impose a financial penalty of up to ten per cent of relevant turnover.<sup>16</sup> This was illustrated recently when Ofcom fined BT £42m for not paying appropriate compensation to other telecoms providers when they failed to deliver Ethernet services on time, which constituted a serious breach of its SMP conditions.<sup>17</sup>

### The output of the Openreach Monitoring Unit

- 3.34 The Openreach Monitoring Unit will produce a series of annual reports – six monthly in the first year – with the aim of describing the monitoring work that has been carried out. The reports will focus on the three areas of monitoring outlined above. They will describe the work of the Openreach Monitoring Unit over the relevant period and the areas of focus and concern which have arisen.
- 3.35 The focus of the first three reports will vary based on the timeframe of publication. A brief overview is set out below;
- 3.35.1 **Implementation report:** Once the Commitments come into effect, we will publish a 'day one' baseline report explaining the governance changes, the

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<sup>15</sup> We impose regulatory obligations on any business which we find to have SMP, to facilitate effective competition and to further the interests of consumers and businesses in relation to communications matters. The obligations that we impose are subject to a public consultation in our market reviews.

<sup>16</sup> Section 97 of the Communications Act 2003 provides that a penalty may be such amount not exceeding ten per cent of the notified person's turnover for relevant business for the relevant period as Ofcom determine to be appropriate and proportionate to the contravention for which it is imposed.

<sup>17</sup> See press release: <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2017/bt-to-be-fined-for-breaching-contracts>, Confirmation Decision: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0017/102167/cw-01170-11-15-bt-confirmation-decision.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0017/102167/cw-01170-11-15-bt-confirmation-decision.pdf)

monitoring framework and setting out the steps that BT and Openreach have taken in preparation for the Commitments coming into effect.

- 3.35.2 **First compliance monitoring report:** There will be an initial implementation report after six months, which will focus on BT and Openreach's approach to independence and equal treatment of customers, and how the new governance processes have been embedded within BT and Openreach.
- 3.35.3 **Subsequent compliance monitoring reports:** There will then be annual reports on compliance, assessing how BT and Openreach have complied, both in terms of the letter and the spirit, with their obligations under the Commitments and Governance Process.

3.36 Our annual compliance monitoring reports will complement and provide useful input for our reports on wider market outcomes, which will assess how the new arrangements are working for consumers and businesses, as discussed in Section 4 below.

### Summary of stakeholder concerns and Ofcom's response

3.37 Stakeholders provided a range of comments on our Consultation's proposals for monitoring compliance. These fell broadly into three categories, summarised as follows:

- 3.37.1 Ofcom should be more specific on its measures of success; and
- 3.37.2 Ofcom's monitoring of the new arrangement should be reactive, not proactive.

### Clarity on specific metrics and outcomes

- 3.38 A number of stakeholders raised the issue that Ofcom did not specify the criteria it would use to gauge the success of the model<sup>18</sup>.
- 3.39 The Openreach Monitoring Unit will assess all aspects of Openreach's compliance with the commitments and, together with the wider outcomes described in Section 4, assess the overall effectiveness of the model.
- 3.40 By way of example, our monitoring approach will include looking at the nature of investment and supply to Openreach customers, including co-investment and development of new products. It will also look at the volume and nature of complaints about Openreach from Openreach's wholesale customers to OBARCC and Ofcom.
- 3.41 As we discuss below, Ofcom's reports on the new arrangements will include updates on consumer and industry outcomes. One of the key measures of how well the arrangements are working will come from stakeholder feedback and their experiences in dealing with the new Openreach. As such, input from stakeholders on their experiences with the new Openreach will be a key factor in gauging the success of the new model.

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<sup>18</sup> For example, Vodafone, TalkTalk and Three.

### Proactive monitoring

- 3.42 Some stakeholders were concerned that Ofcom's approach would be reactive, waiting for issues to manifest as large-scale problems before launching a backward-looking investigation into previous conduct<sup>19</sup>. Some stakeholders also felt that compliance failures are unlikely to be large and obvious, therefore making them more difficult to spot.
- 3.43 The Openreach Monitoring Unit will be a dedicated team within Ofcom tasked with the continuous, proactive monitoring of BT and Openreach's activities in relation to the Commitments. The team will be requesting and analysing documents from both BT and Openreach on an ongoing basis, and as such will have the ability to identify potentially non-compliant conduct at an early stage.

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<sup>19</sup> For example, TalkTalk and the Federation of Communication Services.

## Section 4

# Assessing the benefits and effectiveness of the new model

- 4.1 The ultimate aim of any changes to the structure of Openreach is better outcomes for consumers and businesses. We want to see a more independent Openreach, that is responsive to the needs of all its customers, investing in high quality networks to deliver real improvements for consumers and businesses.
- 4.2 Given the nature of the Commitments, it will be vital that we keep the performance and success of the new model under close review, stepping in if required. Our role will include an assessment of how the Commitments are contributing to wider outcomes, both for industry and consumers.
- 4.3 In our Consultation, we explained that in addition to our ongoing Openreach monitoring programme, we would assess and report on the success of the new arrangements against two sets of wider outcomes<sup>20</sup>:
  - 4.3.1 Consumer outcomes: considering Openreach performance in the context of our wider regulatory interventions
  - 4.3.2 Industry outcomes: considering Openreach behaviours and its responsiveness to customers
- 4.4 Overall, respondents supported the aim of establishing a process to assess and report on the outcomes delivered by the new arrangements. However, respondents raised some specific points on our approach to assessing outcomes, namely:
  - 4.4.1 TalkTalk agreed that market outcomes should feature within our approach to monitoring the effectiveness of the new arrangements. In its view, this would include increasing levels of investment (including co-investment), more effective competition and an improvement in quality of service.
  - 4.4.2 BT and Openreach cautioned that it was important not to conflate the delivery of independence and equal treatment with delivery of wider market outcomes, which may not be in BT or Openreach's direct control. They acknowledged that an independent Openreach is one of several broader policy initiatives that aim to deliver positive market outcomes.
  - 4.4.3 BT, Openreach and Vodafone proposed that Ofcom should incorporate qualitative analysis into the assessment of how the new model supports independence, equal treatments and wider outcomes.
- 4.5 The rest of this section sets our approach to assessing outcomes for consumers, businesses and Openreach's communications provider customers, taking into account the points raised in stakeholder responses.
- 4.6 Overall, we agree with respondents that a focus on outcomes, as well as compliance, is essential to ensure the new arrangements address our competition concern and deliver benefits for consumers and businesses. We will hold BT and Openreach to

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<sup>20</sup> Section 7, Delivering a more independent Openreach



account for these outcomes, but in doing so will also take into account other factors, such as the willingness of others to invest.

- 4.7 We will monitor Openreach's performance against key metrics above over time in a series of wider outcomes reports. The reports will draw upon data from external Ofcom publications, such as our Connected Nations research, and information from the Openreach Monitoring Unit. They will be published alongside the Openreach Monitoring Unit's annual compliance report.

## Considering Openreach performance in the context of our wider regulatory interventions


- 4.8 A more independent Openreach is one element of our broader strategy to deliver better broadband outcomes for consumers and businesses. Three other key elements are:
- 4.8.1 continued competition and investment from all of the communications sector, not just Openreach, to deliver an environment of continuous improvement for UK people and businesses;
  - 4.8.2 continued regulatory action to promote competitive investment (e.g. our plan to open Openreach's network of underground ducts and telegraph poles to allow others to lay fibre networks) and protections against monopoly power (e.g. minimum quality of service requirements) and general consumer protections (e.g. automatic compensation); and
  - 4.8.3 public policy to secure the widest possible availability of services, including in areas that would otherwise not be commercially sustainable (e.g. the UK Government intends to introduce a broadband 'universal service obligation' that would give everyone a right to a decent broadband connection on reasonable request).
- 4.9 The new arrangements for Openreach will combine with our work on quality of service, access products and regulated pricing to encourage more investment and higher service qualities. We want to see a competitive market that continues to thrive, supporting improved broadband and service quality for consumers and businesses.
- 4.10 Openreach's focus on its communication provider customers, and therefore all people and businesses who ultimately use the Openreach network, is vital to supporting these improvements. This intervention is part of a broad range of initiatives to deliver the improvements right across the sector.

## Consumer outcomes and metrics


- 4.11 Alongside an extensive monitoring and compliance regime to assess whether BT and Openreach are meeting the Commitments, we will also measure how effective they are in supporting positive outcomes for consumers and businesses. Specifically, we will be assessing Openreach's performance in contributing to three important outcomes related to network investment and quality of service. These are:
- 4.11.1 widespread availability of more fibre based broadband networks to deliver fast, reliable broadband services as a result of Openreach engaging effectively with its customers;

- 4.11.2 decent broadband connectivity for all UK consumers and businesses at a speed that is sufficient to meet modern needs; and
  - 4.11.3 a step change in quality of service, to ensure Openreach’s performance meets the needs of all wholesale customers, consumers and businesses
- 4.12 The operation and performance of Openreach makes a significant contribution to wider outcomes, but they are not shaped by Openreach decisions alone. However it will be important for us to understand how the market is developing, as this will help us to assess whether the new arrangements are contributing to positive changes for consumers and businesses.
- 4.13 We have considered the most appropriate approach to defining performance metrics that relate to the outcomes that Openreach reform is intended to achieve. It might not be appropriate to define specific outcomes, such as a target number of homes passed, as the industry as a whole needs flexibility in how it responds to changes in consumer demand and market dynamics. However, we do believe that it is important consumers and business see tangible improvements in outcomes as a result of the new arrangements. For these reasons, we propose to monitor and report on outcome metrics that are closely attributable to Openreach’s performance, as illustrated by the indicative examples in Figure 2 below.


**Figure 2: Indicative metrics to measure consumer outcomes**

Widespread availability of fibre broadband		Status
 Metrics	Number of premises passed by Openreach Fibre To The Cabinet (FTTC)	<b>26.5m</b>
	Number of premises passed by Openreach G.Fast	<b>Pilot deployment</b>
	Number of premises passed by Openreach Fibre To The Premises (FTTP)	<b>345,000</b>
	Number of premises passed by BT’s competitors using Openreach’s ducts and poles	<b>0</b>

Decent broadband for all		Status
 Metrics	Proportion of premises unable to receive a download speed of at least 10Mbit/s	<b>5%</b>
	Proportion of SMEs unable to receive a download speed of at least 10Mbit/s	<b>8%</b>
	Average UK measured download speed	<b>37 Mbit/s</b>
	Average Openreach measured download speed	[><] <b>Mbit/s</b>
		ADSL* [><] Mbit/s
	FTTC [><] Mbit/s	
	FTTP [><] Mbit/s	

A step change in quality of service		Status
 Metrics	Proportion of Openreach installations on time	<b>93%</b>
	Openreach annual fault rates	<b>11%</b>
	Proportion of Openreach repairs within agreed time	<b>83%</b>
	Average first available Openreach appointment	<b>8 working days</b>
	Proportion of Openreach appointments missed	<b>2%</b>

Source: Connected Nations 2016, Comparing Service Quality 2017, Quality of Service for WLR, MPF and GEA 2017, Openreach website.

Note: Average speeds for the Openreach network will be published in our Connected Nations Update. BT did not consent to their publication at this time.

\*Asymmetric Digital Subscriber Line (ADSL) refers to technologies using Openreach’s copper network.

- 4.14 We will establish a baseline and then track and report on progress for each metric over time through our wider outcomes reports. This will include an assessment of how these metrics vary across the nations, as well as the UK as a whole.
- 4.15 Wider market outcomes, such as the price, choice and take-up of communications services, are not directly related to Openreach, but are affected by a range of our drivers such as commercial strategy and regulatory policy. To ensure that consumers and businesses see the benefits of all of our actions, including these new Openreach arrangements, we will continue to report separately on a wide range of market outcomes through our other external publications.

## Industry outcomes and metrics

- 4.16 Openreach's focus on its communication provider customers, and therefore all people and businesses who ultimately use the Openreach network, is vital to supporting improvements to broadband services. It is important that we establish whether the new Openreach is treating its wholesale customers equally and is responsive to their proposals for new network investments in a timely manner.
- 4.17 In practice, there are three sets of outcomes that will be important to assess whether Openreach is delivering in terms of its behaviours and responsiveness to customers. They are:
  - 4.17.1 **Network investment:** Openreach working effectively with customers to establish new commercial models and relationships to support continued investment and quality, including approaches such as co-investment and risk sharing where appropriate.
  - 4.17.2 **Customer engagement:** Openreach engaging with all its customers on major, strategic network investment programmes to deliver better services for consumers and businesses.
  - 4.17.3 **Product development:** Openreach responding promptly and effectively to its customers' needs when developing new wholesale products and services.
- 4.18 Monitoring of the delivery of these outcomes will be based on more industry focused metrics associated with Openreach's processes and behaviours. These metrics will focus on whether Openreach is more independent, treating its customers equally and responsive to their network proposals. Some examples of ways this could be assessed that are set out in the Figure 3 below.

**Figure 3: Example indicators to measure industry outcomes**

<b>Outcome</b>	<b>Indicator</b>
<i>Network investment</i>	Nature of engagement with industry strategic network investments
	Responsiveness to new investment ideas and / or different commercial models of investment proposed by customers
	Nature of and changes to Openreach capital and operating expenditure
<i>Customer engagement</i>	Number and nature of consultations between Openreach and its customers and the stages reached
	Number and severity of complaints made by providers against Openreach
	Feedback on the customer consultation process, including confidentiality
<i>Product development</i>	New products developed in response to customer requests
	Enhancements of existing products in response to customer requests

- 4.21 An important outcome will be the level and nature of network investment. There are different models for investing in new networks and we expect Openreach to be open to the full range of options. For example:
- 4.21.1 BT provides the capital for the investment and other operators rent wholesale access;
  - 4.21.2 BT provides the capital for the investment and other operators rent wholesale access under a form of minimum guarantee;
  - 4.21.3 BT and another operator jointly provide the capital for the investment;
  - 4.21.4 Another operator invests its own capital to deploy fibre networks using BTs ducts and poles.
- 4.22 This includes investment in backhaul networks, the dedicated fibre connections to large businesses, and fibre connections to BT exchanges and mobile base stations. Investment in this part of the network will be particularly important to support the next generation of '5G' mobile broadband services.
- 4.23 By its nature, the measurement of industry outcomes will be a more qualitative assessment. It will draw upon information gathered as part of the third area of our ongoing compliance monitoring that focuses on independence and equal treatment. Therefore, an important source of information on industry outcomes will be evidence from Openreach's customers on their experience of engaging with Openreach, and our monitoring of its greater independence and equal treatment of customers.
- 4.24 As we set out at paragraphs 3.34-3.36, our annual compliance monitoring reports will provide our assessment of Openreach and BT's compliance with the new arrangements. These will draw on a significant quantity of qualitative and quantitative information, which will provide some useful insight into how the model is working. As such, we will feed this information and analysis into our reports on the overall impact of the new Openreach on the wider market in terms of industry outcomes.

## Assessing and responding to the performance of the new model

- 4.25 Gauging the overall success of BT's Notification will depend on a broad assessment of implementation, compliance and benefits for consumers, businesses and Openreach's communication provider customers. Evidence that the model is not delivering to its potential could include repeated compliance issues, a failure for the expected behaviours to be embedded in Openreach and BT, or challenges in operating the model effectively.
- 4.26 In the event of repeated or serious breaches of compliance, or if it becomes clear that overall the model is not working, we will need to reconsider our position on formal interventions to address our competition concerns. This could result in Ofcom notifying BT that the new arrangements under the Commitments are no longer addressing those concerns such that we need to move to considering the imposition of a regulatory solution, which could include structural separation.
- 4.27 Ultimately, if our overall consumer outcome monitoring and reporting suggests that consumers and businesses are not receiving the level of broadband service necessary for a modern, digital society, we may need to revisit our wider regulatory strategy through a new digital communications review. Such a review might consider options for changes to the model of separation where this is the cause of concern, or identify alternative actions required to improve consumer and business outcomes.

## Section 5

# Releasing the BT Undertakings

## Introduction

### The 2005 Undertakings

- 5.1 In 2005 we identified a concern that BT's vertical integration and significant market power in individual product markets that gave it the incentive and ability to engage in discrimination against downstream competitors.<sup>21</sup>
- 5.2 In order to address this, the Undertakings established the following core principles:
- 5.2.1 **Functional separation:** BT was required to establish a functionally separate division to control and operate the physical network assets making up its access and backhaul networks. The Openreach division was established to discharge this obligation; and
- 5.2.2 **Equivalence of Inputs:** This is a strict form of non-discrimination obligation by which Openreach is required to provide the same products or services to all telecoms providers (including downstream divisions of BT) on the same timescales, terms and conditions (including price and service levels) by means of the same systems and processes.
- 5.3 The Undertakings coexist with regulation imposed under the European Common Regulatory Framework, through our market reviews. We impose obligations on BT where it has SMP to address the competition problems that arise from this market power.
- 5.4 Through these market reviews, we have found BT to have SMP in a range of markets. Although the remedies we impose vary from market to market, they typically include, amongst other things, network access obligations, EOI or other forms of non-discrimination obligations and price controls. These SMP conditions therefore duplicate, at least in part, some of the requirements in the Undertakings, in particular as regards the requirement to provide SMP products on an EOI basis in relevant markets.

## A key step towards a more independent Openreach

### Ofcom's proposal to release BT from the Undertakings

- 5.5 As explained above, in our Consultation, we proposed to release BT from the Undertakings 30 days after receiving notice from BT that the other conditions in the BT Notification have been satisfied.
- 5.6 In summary, the key reasons for our proposal to release BT from the Undertakings were:
- 5.6.1 our competition concerns have evolved and are now addressed by the BT Notification;

- 5.6.2 SMP regulation addresses our concerns arising from BT's market power on a market-by-market basis – for example EOI obligations are imposed on BT by way of SMP regulation where we have determined it is an appropriate remedy to address BT's SMP; and
  - 5.6.3 many provisions in the Undertakings are no longer needed on the basis that they relate to specific transitional obligations that no longer serve an ongoing function (e.g. completing milestones for the separation of systems) or to technologies that are no longer relevant or did not emerge in the form anticipated in 2005 (e.g. 21CN).
- 5.7 At Annex 5 of our Consultation we set out a schedule which detailed the provisions of the Undertakings (a) which we consider are replicated by the Commitments, (b) which can be reflected in SMP conditions, and (c) which are now obsolete or no longer needed.

### **Summary of responses to the Consultation and Ofcom's response**

- 5.8 A number of respondents to our Consultation expressed concerns about our proposal to release BT from the Undertakings.<sup>22</sup> Most of those respondents opposed our proposal for one or more of the following reasons:
- 5.8.1 concerns that the Commitments were not sufficient to address our competition concern;
  - 5.8.2 concerns that, unlike the Undertakings, the Commitments given by BT are voluntary, and Ofcom has no power to take BT to court in the event that BT breaches them; and
  - 5.8.3 concerns that we should have carried out a consultation exercise prior to deciding that the Commitments should sufficiently meet our competition concerns, and that this failure rendered our Consultation on our proposal to release BT from the Undertakings otiose.

### **The Commitments are sufficient to address our competition concerns**

- 5.9 We have explained in Section 3 of this Statement why we consider that the Commitments should address our competition concerns.
- 5.10 As explained in the Consultation (in particular, as set out in detail in Annex 5 to the Consultation) the Commitments also replicate certain provisions of the Undertakings, while other aspects of the Undertakings can either be addressed by SMP regulation, or are obsolete or no longer needed. In addition, there are certain aspects of the Undertakings as currently drafted which are inconsistent with the new model under the Commitments, such that were we to maintain the Undertakings alongside the Commitments, they would need to be varied to ensure consistency.
- 5.11 We note concerns regarding the voluntary nature of the Commitments compared to the Undertakings, which we discuss below. However, as we consider that the Commitments should address our competition concerns, and that key elements of the Undertakings which remain relevant are replicated in the Commitments or can be addressed by SMP regulation, we do not consider it to be necessary or appropriate to maintain the Undertakings alongside the Commitments and the *ex ante* regulatory

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<sup>22</sup> Vodafone, Verizon, UKCTA, Three, Internet Telephony Service Providers' Association (ITSPA), Federation of Communications Services, Communication Workers Union and Prospect.

framework. Such an approach would risk introducing unnecessary complexity and/or duplication into the regulation of Openreach, and would not be conducive to investment.

### The Commitments are voluntary and not legally binding

- 5.12 A number of stakeholders expressed concern that there was no legal mechanism to take enforcement action against non-compliance with the Commitments in the same way as the Undertakings.<sup>23</sup> One stakeholder also suggested that the threat of structural separation is not an effective 'enforcement remedy' in the short-medium term.
- 5.13 As we acknowledged in our Consultation, the Commitments given as part of BT's Notification under section 89C of the Communications Act 2003 are voluntary and not legally binding, in contrast to the Undertakings. However, we remain of the view that this does not alter our consideration of whether we should release the BT Undertakings.
- 5.14 In practice, Ofcom never exercised its statutory powers to make an application to Court to seek to enforce compliance with the Undertakings, nor did any other CPs exercise their own private rights to do so. We do not consider the absence of such a power will significantly undermine BT's and Openreach's incentives to comply with the Commitments. This is for the following reasons.
- 5.15 The Commitments set out a set of principles with which we expect BT and Openreach to comply. There are a number of mechanisms in place which provide for Ofcom robustly and closely to monitor compliance by BT and Openreach, as discussed in more detail in Section 3 above, which will enable Ofcom to step in as necessary.
- 5.16 As part of our monitoring approach, we will be looking not just at whether BT and Openreach comply with the formal governance arrangements and obligations under the Commitments and Governance Protocol, but also whether they are acting consistently with the spirit of the new model – the aim of which is to ensure Openreach acts independently in the interests of all its customers.
- 5.17 The Openreach Monitoring Unit will have a varied set of tools at its disposal to utilise where non-compliant conduct is suspected or discovered. These range from informal discussions with the relevant compliance bodies i.e. OBARCC and the BT Compliance Body, through to formal escalation to senior executive or CEO level within BT and/or Openreach. Ultimately, if Ofcom believes that the Commitments no longer address our competition concerns, we may consider that a different regulatory intervention is required. This is discussed further at paragraphs 4.25-4.27 above. We therefore consider that BT and Openreach should have sufficient incentives to comply with the Commitments.
- 5.18 In addition, Ofcom has enforcement powers where BT is in breach of SMP regulation<sup>24</sup>, and a statutory dispute resolution function in case of disputes relating to network access<sup>25</sup> and we can also exercise these powers as appropriate.

<sup>23</sup> Pursuant to section 167(6) of the Enterprise Act 2002, Ofcom can apply to the High Court for an injunction or other appropriate relief or remedy if BT fails to comply with the Undertakings.

<sup>24</sup> Section 94 *et seq* Communications Act 2003

<sup>25</sup> Sections 185-191 Communications Act 2003



### Ofcom should have consulted before deciding that the Commitments should meet its competition concern

- 5.19 In terms of stakeholder concerns regarding a perceived lack of consultation, or re-consultation, we note that Ofcom has already consulted at length on the relevant issues, and that we were transparent about the fact that we remained open to a voluntary arrangement with BT.
- 5.20 We shared our assessment of previous notifications and why these did not address our competition concerns. Stakeholders were given several opportunities to comment on these, both in consultation procedures and in meetings, and we have engaged with them in a transparent and consistent manner throughout the entire process.
- 5.21 We set out our preferred position in our July Consultation. As BT's Notification implements our preferred position in all material respects, we do not consider that we were required to consult further or re-consult prior to deciding that the Commitments sufficiently address our competition concern and that we therefore no longer intended to proceed with a formal notification to the European Commission.
- 5.22 We clearly set out in our Consultation our reasons for our proposal to release BT from the Undertakings and have carefully considered stakeholder responses, as explained above.

### **Conclusion**

- 5.23 For the reasons set out above we have not received any responses to our Consultation which have raised any new points which cause us to change our view that BT should be released from the Undertakings when the new arrangements under BT's Notification take effect.
- 5.24 We have therefore decided to proceed with that proposal.

### **Timing of release and status of the Undertakings in the meantime**

- 5.25 In terms of the timing of the release of BT from the Undertakings, having regard to the conditional nature of BT's Notification, we do not consider that it would be appropriate to release BT from the Undertakings prior to the satisfaction of the conditions in paragraphs 3(a)-(c) of BT's Notification. This would leave an interim period during which BT would not be obliged to comply with the Undertakings and nor would the Commitments have taken unconditional effect. In the event that the conditions in the BT Notification are not satisfied in the longer term, telecoms providers would be deprived of important protections that the Undertakings provide.
- 5.26 We have therefore decided to release BT from the Undertakings 30 days after receiving notice from BT that the conditions in paragraphs 3(a)-(c) of BT's Notification are satisfied. It is intended that in this short period BT will be able to take the necessary steps to implement the arrangements provided for in the BT Notification. Retaining the Undertakings pending the satisfaction of the conditions in BT's Notification will ensure that current obligations are maintained up until the point that the arrangements in that notification are fully implemented.
- 5.27 In the meantime, the Undertakings remain in effect. We note that BT has indicated in its response to our Consultation that it would like to work with us to ensure that early implementation of the arrangements under the Commitments is not inhibited by the Undertakings. Specifically, BT and Openreach would like to begin implementation of the following elements of the Commitments: the reporting line of the Openreach CEO

(which is to the CEO of BT Group under the Undertakings), Openreach branding, transitioning from the EAB to the new model of Openreach and BT Group compliance functions, system separation, and the working relationship for a small number of BT Wholesale employees that manage Wholesale Calls products.<sup>26</sup>

- 5.28 We are keen to ensure that BT and Openreach take all reasonable steps to advance the timely implementation of the new arrangements under the Commitments, in particular where the new arrangements replicate and update provisions of the Undertakings (e.g. the role of OBARCC which will replace the EAB). To the extent that certain elements of the steps outlined above may not be wholly consistent with the present wording of the Undertakings, we would not expect to initiate enforcement action against BT should it take those steps pending satisfaction of the pre-conditions for releasing the Undertakings.
- 5.29 However, in respect of BT's request to make amendments to the arrangements for employees in BT Wholesale, we are not persuaded that it is necessary for BT to make these changes pending the release of the Undertakings.

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<sup>26</sup> As set out in Annex A to the BT's response to our Consultation

## Section 6

# Ensuring Northern Ireland benefits from Openreach reform

- 6.1 The model of functional separation between BT and Openreach that currently exists in Great Britain does not exist in Northern Ireland and consequently Openreach does not exist there. This has been the case since Openreach was created. BT in Northern Ireland has acted as Openreach's agent, delivering the same products and services to CPs in Northern Ireland on an equivalent basis. Northern Ireland's access network and wholesale telecoms services are now managed by a single entity within BT - Northern Ireland Networks (BTNIN).
- 6.2 Throughout this process, we have considered how the competition issues identified and associated Openreach reform would affect consumers and businesses in Northern Ireland. Our main objective is to ensure that consumers and businesses in Northern Ireland benefit from the new Openreach model in the same way as the rest of the UK, while retaining the existing local structures and practices that have already delivered positive outcomes in areas such as quality of service.
- 6.3 This section sets out the implications of the new arrangements for Northern Ireland and explains:
- 6.3.1 Ensuring that consumers and businesses in Northern Ireland benefit from Openreach reform
  - 6.3.2 Monitoring the outcomes of the model in Northern Ireland

## **Ensuring that consumers and businesses in Northern Ireland benefit from strengthened Openreach independence**

### We want to preserve existing positive outcomes in Northern Ireland

- 6.4 Section 2 explains our competition concern as it relates to Openreach and BT Group. In summary, we were concerned about the continuing incentive and ability of BT to discriminate against its downstream customers on forward looking investment decisions due to its vertically integrated structure and position of significant market power. The degree of BT Group's influence over strategic decisions, including lack of consultation by Openreach with its downstream customers, created risks to both competition and investment.
- 6.5 We believe that the voluntary arrangement we have agreed with BT addresses these concerns because Openreach will have more independence to take its own decisions about the strategic direction and operation of the network, acting with a clear focus on the equal treatment of all its customers, not just the needs of BT Group.
- 6.6 In our July 2016 Consultation, we explained our understanding that BTNIN already has a significant degree of local independence from the rest of BT Group. While BTNIN's broader network strategy and wholesale product portfolio is defined by Openreach, local differences such as the mix of products or services made available in Northern Ireland reflect the interests of people and businesses there. We expect this approach to continue and for the additional benefits of independent decision-making within Openreach to have further positive impact.

- 6.7 We also noted good outcomes experienced by consumers and businesses in Northern Ireland, in particular relating to quality of service. In part these outcomes rely upon a certain level of integration that allows for sharing engineering resources between the upstream and downstream parts of BTNIN's business. While we observed some concerns related to consumer perceptions connected to this sharing arrangement, we did not see sufficient evidence to justify the disruption that would accompany the creation of a new Openreach.
- 6.8 Given performance of Northern Ireland networks to date, discussions with other stakeholders, and the existing degree of local independence in Northern Ireland, we decided that it would not be proportionate to change the current arrangements. However we set an expectation that BT Northern Ireland should seek to mirror the new model as far as possible and adopt similar principles and operating practices.

### Customers in Northern Ireland will benefit from strengthened independence

- 6.9 We are committed to ensuring Northern Ireland and the UK as a whole benefits from a more independent Openreach, in particular from greater independence in its strategic decision making and its focus on equal treatment of all customers. When considering how best to deliver this in Northern Ireland, it was important to consider separately what would be an effective and proportionate solution to any problems identified in Northern Ireland.
- 6.10 Our Consultation on removing the Undertakings noted that BT's Commitments to Ofcom include several voluntary measures for Northern Ireland that mirror the broader changes introduced as part of BT's Notification and strengthen the current arrangements in Northern Ireland overall. These included a commitment to treat all customers equally and to phase out BT affiliated branding on clothing and vehicles. BTNIN customers will also have the opportunity under the new arrangements to engage with Openreach and BTNIN to feed into the development of network strategy and products.

### The Commitments ensure that the core principles of the new model are mirrored in Northern Ireland

- 6.11 The Commitments contain a set of obligations specific to Northern Ireland that seek to strengthen the current arrangements and mirror the key principles of the new model of Openreach legal separation. Commitment 18 sets out how BT commits to run its operation in Northern Ireland in accordance with the following principles:
- 6.11.1 Virtual separation of Northern Ireland Networks from the rest of BT Group
  - 6.11.2 Providing SMP products to all customers on an equivalent basis
  - 6.11.3 Equal treatment of communications provider customers, including restrictions on access to confidential commercial information
  - 6.11.4 Transparency around key products and implementation plans for BT's access and backhaul networks in Northern Ireland
  - 6.11.5 Close engagement with Northern Ireland stakeholders
  - 6.11.6 Phasing out the use of 'BT' branding on BTNIN vehicles and clothing
- 6.12 Under the Commitments strategic and network investment decisions will reflect the needs of all UK consumers and businesses, and not just that of BT Group. Given that

BTNIN takes guidance on their network strategy from Openreach, they will benefit from the new products and services developed as a result of Openreach's investments. BTNIN will also be able to deploy products flexibly to suit local circumstances and in a way that benefits consumers in Northern Ireland, while retaining access to funding from across the BT Group, including Openreach.

- 6.13 Openreach independence is intended to benefit all of the UK and embedding the principles in BTNIN is a crucial step in delivering a culture of local and more independent decision-making in Northern Ireland. This includes, in particular, phasing out BT branding, and aligning BTNIN behaviours with those that will be expected of Openreach, such as more transparency and consultation with customers.
- 6.14 As part of this process, we spoke to several local stakeholders, including competing providers, BT and ACNI. In their responses to our Consultation, stakeholders were concerned that the Commitments lacked detail in relation to Northern Ireland, and were apprehensive about removing the Undertakings on this basis. In particular, ACNI called for more information on the relationship between BTNIN and BT Group. Since March, BTNIN has addressed this concern with its own Governance Protocol ('the NI Protocol'), which is available on its website.<sup>27</sup>

#### A new, separate, governance protocol provides detail on the relationship between BT Northern Ireland networks and the rest of BT Group

- 6.15 BT has engaged with Ofcom, ACNI and local stakeholders on the NI Protocol, which will have the same status as the Openreach Commitments and Governance Protocol.
- 6.16 The NI Protocol explains how BTNIN will operate in Northern Ireland in a way that is consistent with the intent of Commitment 18 of the BT Commitments. It includes:
- 6.16.1 clear delegation to BTNIN's Senior Management Team of investment decisions and conferring the role of ensuring observation of equivalence, equal treatment and confidentiality obligations;
  - 6.16.2 requiring that BTNIN consults with its customers on significant investments, applying the same procedural and confidentiality conditions as the wider Commitments and Governance Protocol;
  - 6.16.3 requiring that BTNIN ensures that customer confidential information is not disclosed outside BTNIN to the wider BT Group; and
  - 6.16.4 individual accountability of members of the Senior Management Team to observe confidentiality obligations, even if they move to another role within BT.
- 6.17 We welcome the NI Protocol as a positive step towards both strengthening the current arrangements in Northern Ireland while at the same time ensuring that consumers and businesses across the UK can benefit from Openreach reform. As with the wider Commitments, our focus will now be on ensuring that BT and BTNIN comply with these obligations and that they deliver good outcomes for consumers and businesses in Northern Ireland.

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<sup>27</sup> NI Protocol available at <http://www.btplc.com/UKDigitalFuture/Agreed/index.htm>

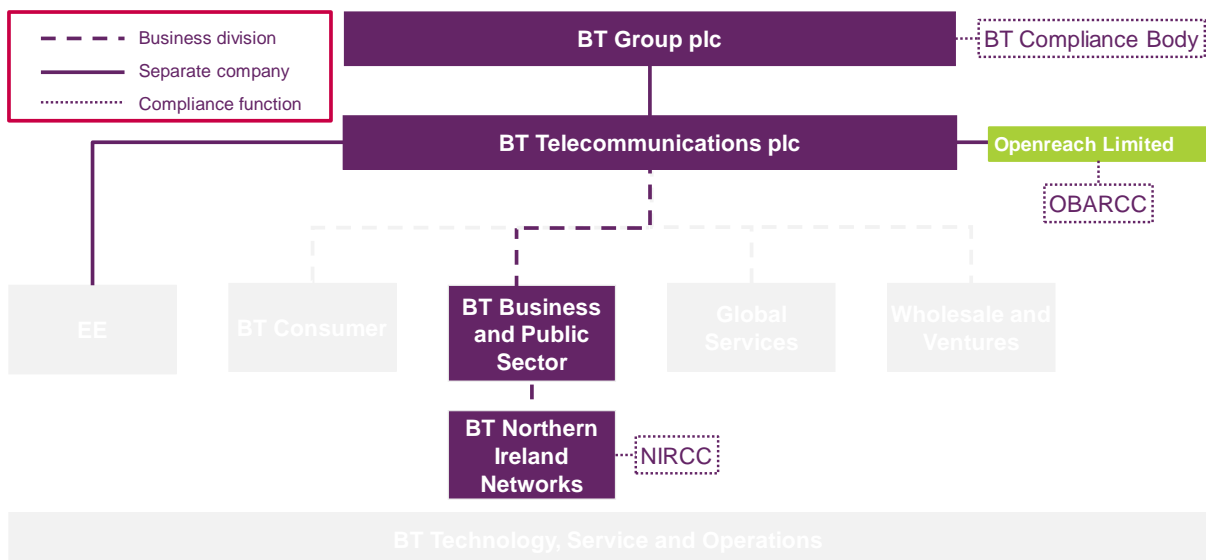
## Monitoring the outcomes of the model in Northern Ireland

- 6.18 As we set out in Section 3 above, effective and robust monitoring will be crucial to ensuring that the new arrangements address our competition concerns and that Openreach acts independently in the interests of all customers. This is also the case in relation to ensuring that the benefits of the new model flow to Northern Ireland and the positive consumer outcomes already present there are not negatively impacted.
- 6.19 The Openreach Monitoring Unit’s work in monitoring the new Openreach model will cover the three areas mentioned above: implementation; governance arrangements; and independence and equal treatment of customers. We will monitor BTNIN’s compliance with Commitment 18 as well as with the NI Protocol.
- 6.20 As noted in Section 4, we are also particularly concerned with monitoring outcomes. This is also true of Northern Ireland. We have set out examples of the metrics we will track to measure the benefits of the new arrangements in Section 4 and we will look at these outcomes on a nation-by-nation basis. We refer to these broadly as fibre broadband availability, connectivity and quality of service, and we will report on these in the same way as the rest of the UK.

### Strong working relationships and stakeholder input are crucial

- 6.21 The ability of the Openreach Monitoring Unit to closely monitor and report on compliance with Commitment 18 and the NI Protocol will depend on effective engagement with BTNIN, Openreach and BT Group. This includes delivery by BT of the compliance functions, processes and reports set out in Commitment 18 and the Protocol (see Figure 4). We will also draw upon information from competing providers in Northern Ireland on their experiences of the arrangements.

**Figure 4: Compliance functions related to the new model**



- 6.22 In addition to building an effective working relationship with OBARCC and the BT Compliance Body, the Openreach Monitoring Unit will seek to further strengthen our already existing relationship with the Northern Ireland Regulatory Compliance Committee (NIRCC). NIRCC has been in place since 2005 and provides transparency on how the Undertakings are delivered in Northern Ireland. Going forward, the NIRCC will monitor BTNIN’s compliance with the NI Protocol and continue holding biannual meetings with the BT Compliance Body, Ofcom and Northern Ireland communication providers and stakeholders.

- 6.23 We hope to foster an open and collaborative approach to monitoring compliance in Northern Ireland. To do so, we will set out our planned engagement with NIRCC as with OBARCC. We have outlined at paragraphs 3.11-3.13 above the types of agreements we intend to put in place in respect of our working relationship with OBARCC. Where such processes may need adjustment for BTNIN, the Openreach Monitoring Unit will discuss additions or alterations with BTNIN. This may be prudent, for example, in relation to specific elements of the framework for communication and specific methods of escalating instances of BTNIN non-compliance.
- 6.24 Ongoing working-level meetings will be held between the Openreach Monitoring Unit and the chair of the NIRCC. Meetings between senior managers, directors and CEO of Openreach and Ofcom will occur from time to time to discuss the monitoring programme and provide feedback on areas that represent a risk. We expect these meetings to address concerns that relate to BTNIN, and expect that such engagement will occur between BTNIN/NIRCC and the Openreach Monitoring Unit at a similarly senior level.
- 6.25 Information received from BT Group, Openreach and BTNIN will be looked at along with Northern Ireland stakeholder feedback and their experiences in dealing with BTNIN. As such, input from stakeholders on their experience of BTNIN's behaviour, particularly regarding the equal treatment of its customers and independence from BT, is needed to assess the success of the arrangements in Northern Ireland.

#### Ensuring BTNIN acts more independently and treats customers equally

- 6.26 The key purpose of our monitoring work in Northern Ireland is to ensure that the benefits of the new model are felt in Northern Ireland and in this context we intend to monitor internal decision making processes to understand how the independence and equal treatment principles have been reflected in BTNIN's processes.
- 6.27 The Openreach Monitoring Unit may from time to time carry out more in-depth assessments in this area if we consider that a more focused approach is needed because it represents a risk independence or the equal treatment of customers.
- 6.28 Section 3 gives an overview of the reports that are due to be published over the coming years and these reports will include findings on BTNIN's compliance with their Governance Protocol and how equal treatment of customers and the independence of Openreach are being realised in Northern Ireland.
- 6.29 As with Openreach and BT, we will take prompt and robust action in relation to any compliance failings by BTNIN. The process for this, including how we escalate any such concerns, will be broadly similar to those set out in paragraphs 3.28–3.33.

## Section 7

# Implementation of the new model

## BT's Notification is subject to four conditions before it formally comes into effect

- 7.1 BT's Notification is subject to four pre-conditions before it formally comes into effect. Until these conditions are met, the current model and Undertakings will remain in force. The conditions are:
- 7.1.1 that the Crown Guarantee, which currently covers the liabilities of BT to the BT Pension Scheme, is modified or supplemented to maintain pension protections for members of the scheme who transfer to the newly incorporated Openreach Limited. This is a matter for Government to implement;
  - 7.1.2 approval from the BTPS Trustees for Openreach Limited to become a participating employer in the BT pension scheme;
  - 7.1.3 completion of the consultation processes under TUPE which are necessary for the transfer of employees; and
  - 7.1.4 release of BT from the Undertakings, being replaced by the new Commitments
- 7.2 The first three conditions are necessary to support the transfer of all 32,000 employees to the newly incorporated Openreach. They are matters for Government, BT and the BTPS respectively.
- 7.3 The first condition to be met is the amendment of the Crown Guarantee, which currently covers the liabilities of BT to the BT pension scheme, is modified or supplemented to maintain pension protections for members of the scheme who transfer to the newly incorporated Openreach Limited. The Digital Economy Act introduced a power to enable Government to continue to guarantee the BTPS liabilities relating to members of the scheme who transfer to a separate Openreach. The Government is now in the process of drafting the secondary legislation needed to implement this, in consultation with BT, the BTPS Trustee and wider stakeholders.
- 7.4 The fourth condition relates to the release of the Undertakings. As explained in Section 5, we have decided to release BT from the Undertakings 30 days after the conditions attached to BT's Notification are satisfied. This will give BT time to take the necessary steps to implement the new arrangements. In the meantime, the Undertakings remain in effect.

## BT and Openreach have already begun to implement many aspects of the new arrangements

- 7.5 Since BT's Notification in March, BT and Openreach have taken several encouraging steps towards implementation of the new arrangements. These include:
- 7.5.1 the appointment and induction of an Openreach Chair and majority independent Board;



- 7.5.2 the creation and first meeting of OBARCC, who are responsible for Openreach compliance;
  - 7.5.3 the establishment of a remuneration committee for Openreach, chaired by an independent non-executive Director;
  - 7.5.4 the redesign of the Openreach brand to remove the reference to BT Group and the associated logo; and
  - 7.5.5 the 2017/18 Annual Operating Plan has been reviewed and commented on by the Openreach Board members.
- 7.6 We welcome the positive steps taken by Openreach and BT towards reforming Openreach. While these signs are encouraging, the real test for the new model will be whether it delivers positive outcomes for consumers, especially in terms of increased network investment and higher service quality.

## Review of SMP conditions

- 7.7 Pursuant to s.89C(4) of the Communications Act 2003, where Ofcom receive a notification under s.89C we must, as soon as reasonably practicable, consider the impact the transfer 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 proposed transfer.
- 7.8 In response to our Consultation, some stakeholders expressed concerns about how the Commitments would work with BT's SMP conditions. For example, Verizon wanted Ofcom to clarify how it would review SMP conditions in the light of the proposed arrangements; BT suggested that Ofcom should review the way it determines BT to hold SMP in certain markets as part of its current and ongoing market reviews in the light of the Commitments, and that deregulation may be appropriate and proportionate in some cases; and Three was concerned that BT might use the Commitments as leverage to push for a relaxation of SMP conditions in upcoming market reviews.
- 7.9 As we explained in our Consultation, we have previously determined that BT has SMP in a number of services markets as part of our Business Connectivity, Fixed Access, Wholesale Broadband Access and Narrowband market reviews.<sup>28</sup>
- 7.10 At the time that we conducted reviews of each of the relevant services markets, BT already operated Openreach as a functionally separate division of the BT Group, pursuant to the Undertakings. As such, the level of functional separation which existed at the time we undertook those market reviews formed an important part of the factual background, and was taken into account when Ofcom set the existing SMP conditions.
- 7.11 As we set out above, the changes which we have been seeking to make to the pre-existing functional separation of Openreach, and which we consider are sufficiently addressed by BT's Notification, relate primarily to the degree of independence in Openreach's strategic decision-making. The Commitments are (like the Undertakings before them) designed to operate alongside Ofcom's regulation of BT's SMP in individual product markets.

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<sup>28</sup> We detail the relevant markets at paragraph 5.2 of our Consultation

- 7.12 In this context, we consider the most appropriate and proportionate approach is to consider the effect, if any, of the new arrangements in BT's Notification on SMP regulation as part of those ongoing reviews.
- 7.13 We have recently consulted on our proposals for the current Wholesale Local Access<sup>29</sup> and Wholesale Broadband Access<sup>30</sup> market reviews and have explained in those consultations our provisional view on whether the arrangements set out in BT's Notification will have an impact on the SMP conditions we are proposing to set as part of those reviews.<sup>31</sup> We will take into account any responses to these consultations, including as to the impact of the arrangements under BT's Notification, as relevant when deciding on any SMP conditions in relation to the Wholesale Local Access and Wholesale Broadband Access markets.
- 7.14 We have also consulted on our proposals for the current Narrowband market review.<sup>32</sup> While we have not directly addressed the impact of BT's Notification in our Narrowband consultation (as it was published prior to receiving BT's Notification), we note that a number of respondents to our Consultation have raised points relating to BT's Notification. Again, we will take account of these responses as relevant when deciding on any SMP conditions in relation to the markets covered under our Narrowband market review, and will consult further on relevant issues if needed.
- 7.15 We intend to adopt a similar approach in connection with the forthcoming Business Connectivity Market Review.

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<sup>29</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0033/99636/Vol1-Market-review.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0033/99636/Vol1-Market-review.pdf)

<sup>30</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0013/103180/wba-consultation.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0013/103180/wba-consultation.pdf)

<sup>31</sup> See paragraphs 4.41-4.49 of the Wholesale Local Access market review consultation and paragraphs 6.13-6.19 of the Wholesale Broadband Access market review consultation

<sup>32</sup> <https://www.ofcom.org.uk/consultations-and-statements/category-1/narrowband-market-review>