

**TERMS OF REFERENCE OF OFCOM'S
STRATEGIC REVIEW OF DIGITAL COMMUNICATIONS
- SUBMISSION BY THE CONSUMER FORUM FOR COMMUNICATIONS**

WHO WE ARE

The Consumer Forum for Communications (CFC) is a grouping of some 80 organisations and individuals representing consumers and citizens with an interest in communications.

The organisations include Citizens Advice, Which?, the National Consumer Federation, the Voice of the Listener and Viewer, and many disability organisations, while the individuals include academics and consultants with a particular interest in communications consumers.

The CFC is hosted by Ofcom but is independent of the regulator with an independent Chair.

TIMING AND TRANSPARENCY

On 12 March 2015, Ofcom announced that it intends to conduct a wide-ranging Strategic Review of Digital Communications (SRDC) and published the proposed terms of reference for this review. The CFC welcomes this opportunity to comment on the terms of reference, but would wish first to make some more contextual points.

The CFC can see the strong case for such a review. The last review – which led to the Openreach settlement – was a decade ago and BT's network, now deploying an ever-increasing volume of fibre, is technically different, raising new issues of enduring bottlenecks. Also there are major changes in process regarding the provision of services over the Internet and consolidation in the communications industry.

However, we think the timing is odd. The review was announced just before the arrival of a new Ofcom Chief Executive and just before the commencement of purdah, the General Election, and a new team of Ministers at DCMS.

Also we are troubled by the lack of transparency. The review was not signalled in Ofcom's draft Annual Plan and it was not mentioned in a report of Ofcom's future activities to a CFC meeting just days before the announcement.

Paragraph 1.11 of the terms of reference offers an answer to the question "Why now?" It states:

"We have recognised for some time that there is likely to be merit in carrying out a new strategic review of digital communications. We set out in our May 2014 Fixed Access Market Review and in our Draft Annual Plan how the tenth anniversary of our first strategic review of telecoms might provide a sensible opportunity to undertake such a review."

In fact, the relevant comment in the draft Annual Plan (paragraph A1.4) stated:

“Next year is the tenth anniversary of the undertakings with BT. We anticipate this will provide a sensible opportunity to take stock of the undertaking’s effectiveness in light of general market developments.”

Any reasonable stakeholder would infer from this statement that Ofcom planned to open the review in 2016. Instead Ofcom appears to have switched from using the ten-year checkpoint to refer to the implementation of the Openreach undertakings, which involved a whole sequence of dates in 2006-2007, to the conclusion of the last strategic review on the earlier date of 22 September 2005.

The lack of signalling around an earlier review does not demonstrate the transparency that one has come to expect from Ofcom and is required by Section 3(3)(a) of the Communications Act 2004.

In our view, it would have been better if Ofcom had used its draft Annual Plan to signal its intention to hold such a review in 2015 and had then announced the actual terms of reference once its new CEO was in post and the new Government had taken office.

Ofcom could reaffirm its commitment to transparency by publishing all submissions on the SRDC terms of reference as they are received.

OUTCOMES OF THE REVIEW

The CFC is sure that all stakeholders will agree that the result of the SRDC should be good outcomes, but it is important to be clear from the beginning what those good outcomes would be and we are not sure that there is a consensus on this at this stage.

Paragraph 1.1 of the terms of reference states:

“This review will consider future issues relating to infrastructure and competition. Key to this will be how incentives for efficient investment and effective competition drive good outcomes. These outcomes include coverage, choice, price and quality of service for consumers, citizens and businesses.”

One could argue that coverage, choice, price and quality of service, while essential to a fully functioning market, are not sufficient and that these four parameters or metrics – while very important – are secondary rather than primary outcomes.

Primary outcomes would be as follows:

- take-up rather than simply coverage – it is not enough to have broadband networks of certain speeds available to certain percentages of customers if actual connection or subscription to such networks is not at a level judged desirable in all the circumstances
- exercise of choice rather than simple availability of choice – it is not enough for consumers to have a choice of providers if actual switching levels are not at a level judged to exercise real commercial pressure on such competitors
- value rather than simply price – one cannot judge the acceptability of price in cash terms alone but needs to have some measure of value for money
- satisfaction rather than simply quality of service – too many QoS figures are technical calculations, whereas what really matters – as reflected in Ofwat’s Price Review 2014 – is customer satisfaction of the service they are receiving

- accessibility rather than simply access – we need to ensure that those with disabilities, whether blind or hard of sight, whether deaf or hard of hearing, whether of limited mobility, have equality of access to communications services so that all the other outcomes can be a reality for such consumers.

SCOPE OF THE REVIEW

Paragraph 1.14 of the terms of reference attempts to define the scope of the review:

“This document initiates a new, overarching and evidence based review of digital communications, focusing on investment in and competitive access to infrastructure. This includes both underlying connectivity and communications services. Increasingly, digital communications encompasses a combination of fixed, wireless and mobile connectivity, and communications services provided over these networks. Our intention is not to include content services within the scope of this work, whilst noting the continued increase in take-up of bundled services.”

The CFC welcomes the importance that Ofcom places on investment in the SRDC. There is a danger that regulation can focus too much on the short term and a more strategic view is necessary to promote and encourage investment where longer-term returns are at stake. This emphasis on investment is in the medium-term interest of consumers and citizens, as it enhances availability and quality of digital networks and services and it matches government ambitions to put the UK 's digital infrastructure among the world's best.

As indicated in the previous section of this submission, however, the CFC is concerned that the SRDC should not simply be about supply issues like investment and infrastructure, but also take account of demand issues as reflected in actual consumer behaviours around such issues as take-up, exercise of choice, value and satisfaction.

A further area where the terms of references might need to be rethought a little is around content. We can understand Ofcom's wish to restrict the SRDC to carriage rather than content issues – or, as someone once put it, the pipes rather than the poetry.

However, as recognised by the final words of paragraph 1.14, in the era of bundled services carriage and content interact in the provision of competitive offerings to consumers. When consumers choose a package, they are interested in the content of the package and, in the case of television, the nature of the channels available. Clearly public service broadcasting should not be part of this review (in any event, there has recently been a PSB review), but premium services should probably be part of the SRDC since the provision of premium television could be seen as representing an enduring economic bottleneck.

FOCUS OF THE REVIEW

The Strategic Review of Telecommunications (SRT) conducted by Ofcom in 2004-2005 started with very minor reference to the possible separation of BT's wholesale and retail operations but the issue came to dominate totally the review.

Clearly the adequacy and appropriateness of the current Openreach settlement will be a major issue in the SRDC, but we would not want it dominate this review as it did the last. Any arrangement concerning the access network currently managed by Openreach will not of itself achieve all the outcomes that we are looking for from this review.

Ofcom appears to appreciate this, as it states in paragraph 1.4 of the terms of reference:

“Ten years ago, the original Telecoms Strategic Review focused on the question of separation of BT’s access network. Whilst this issue will feature in any consideration of future infrastructure, competition and investment, a strategic review focussed on the market structure in fixed telecommunications risks being overly backward looking. For this review to be genuinely strategic, it needs to take account of digital communications infrastructure and competition more broadly.”

However, already some of BT’s competitors seem, in our view, to be fixated on the separation issue and not taking a broader view.

LINKAGES WITH THE REVIEW

Paragraphs 1.38-1.40 of the terms of reference rightly point out that the SRDC needs to be linked to other relevant policy developments. It would be helpful if at an early stage – and certainly by the Summer 2015 discussion document – Ofcom would spell out what other policy developments are relevant and how they interface with the SRDC.

These developments are likely to include:

- the current debate around the EU Telecoms Framework process – see paragraphs 1.39-1.40 of the terms of reference
- decisions on the future frequency of market reviews – see section 3.2 of the Government’s “Digital Communications Infrastructure Strategy”
- the approach to the Virtual Unbundled Local Access (VULA) margin – see Ofcom’s statement of 19/3/15
- the requirements for BT’s regulatory financial reporting – see Ofcom’s statement of 30/3/15
- the regulatory approval processes for the proposed merger of BT & EE and O2 & Three.

It would be good to see an infographic showing the linkages between the relevant policy developments so that stakeholders are clearer about Ofcom’s narrative for the SRDC.

As regards the debate about whether Openreach should now be fully separated from BT, the current inquiry into the energy sector by the Competition & Markets Authority (CMA) might have some influence on thinking. While the nature of utility networks are very different, the CMA report might offer some thinking that could help to frame the debate about the future of the Openreach model.

Indeed there may be some matters that emerge from the SRDC that are appropriate for Government decision, but where Ofcom might wish to make recommendations or at least a reference to Ministers.

CONDUCT OF THE REVIEW

Ofcom is an evidence-based regulator and we trust that, in the early stages of the SRDC and certainly in the Summer 2015 discussion document, Ofcom will set out the evidence needed to make informed decisions regarding the review.

As regards the adequacy of the current Openreach model, we need to know:

- what has been Openreach's performance in meeting the letter and the spirit of the undertakings given to Ofcom?
- are there options for revising the nature of these undertakings and what would these be?
- has Ofcom done any impact analysis (in terms of costs, benefits and risks) of the practical alternatives?

As regards the adequacy of the Virtual Unbundled Local Access (VULA) model:

- what has been the take-up and usage of VULA?
- are there any practical alternatives to VULA?
- has Ofcom done any impact analysis (in terms of costs, benefits and risks) of the practical alternatives?

The SRDC will be a major exercise taking the best part of a year and the CFC will want to work closely with the Ofcom to ensure that consumer and citizen groups are able to make meaningful inputs into the exercise. Given the focus of the review on infrastructure, investment and bottlenecks, there is a danger that the review will be dominated by providers and investors – enormously important though they are - with too little input by consumers and citizens.

We are encouraged by the comment in paragraph 1.6 of the terms of reference:

“Stakeholder engagement across industry, consumer groups and policy makers will be necessary throughout the review. We will shortly be publishing our initial plans to ensure this happens.”

We hope that, as regards consumer and citizen groups, Ofcom will:

- regularly brief the Communications Consumer Panel and the Consumer Forum for Communications
- convene a briefing/discussion session specifically for such consumer and citizen groups
- publish plain English summaries of all Ofcom documents relating to the review

NEXT STEPS

The SRDC commenced on 12 March 2015 and, according to paragraph 1.45 of the terms of reference, the intention is that “any next steps” will be decided “by the end of 2015”. Other parts of the terms of reference and the Annual Plan for 2015/16 use the looser phraseology for the final document of “around the end of 2015”.

Obviously, at this stage, Ofcom cannot be too prescriptive about the timing of the SRDC. However, we recall that the TSR lasted from April 2004 to September 2005. As the final document in the review process put it (paragraph 3):

“The review has taken considerably longer than we expected. This is because telecoms regulation is notorious for ‘the devil being in the detail’ and therefore a strategic approach that did not also address the detailed implementation issues would have been of limited value. The interim findings of the review led us to analyse the markets with a view to making a reference to the Competition Commission under the Enterprise Act and subsequently to accept undertakings offered by BT in lieu of making such a reference.”

The SRDC is an important review and is bound to take some time, but we hope that it will not take as long as the last review and that, when Ofcom’s initial views are published in Summer 2015, a timetable for the completion of the review will be published and - as far as is sensible and practical - adhered to. The danger is that a prolonged review will create uncertainty and possibly delay new investments and that would not be a good outcome for consumers.

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