

# Memorandum of Understanding (MoU)

Between

Ofcom

and

Openreach

This Memorandum of Understanding (MoU) sets out the working arrangements agreed between the Commitments Monitoring Unit within Openreach Limited (the CMO), and the Openreach Monitoring Unit within Ofcom (the OMU).

The purpose of the OMU is to monitor and report on Openreach's implementation and compliance with the Commitments and Governance Protocol notified by British Telecommunications plc (BT) to Ofcom on 10 March 2017, including on the extent to which Openreach is acting independently of BT, treating customers equally and acting in the interests of all its customers (the "Monitoring Activities"). The monitoring process is intended to be rigorous and Ofcom expects Openreach to cooperate fully with the OMU to facilitate its Monitoring Activities. In particular, Ofcom expects that Openreach will

- provide all information requested for the purposes of the OMU's Monitoring Activities in a timely manner,
- allow the OMU full and open access to the business to conduct its Monitoring Activities. This will include open access to any relevant individuals at all levels of seniority within Openreach, as well as attendance by the OMU in an observational capacity at selected meetings of Openreach decision-making bodies, including the Board and its committees.

This MoU does not have legal effect and therefore the legal rights of Ofcom, Openreach Limited and any third parties are accordingly reserved. To the extent the text of this MoU is inconsistent with the Commitments, the Commitments shall prevail. Nothing in this MoU shall fetter Ofcom's statutory powers in respect of any matter.

## Background

1. On 10 March 2017 BT gave a notification to Ofcom (the Notification), pursuant to Section 89C Communications Act 2003. Pursuant to the Notification, BT will adopt a set of Commitments and a Governance Protocol, through which it will implement changes to the governance structure of the Openreach Line of Business (Openreach), in order to secure its greater strategic and operational independence from BT.
2. On 13 July 2017 Ofcom published its statement "Delivering a more independent Openreach", in which it set out the positive outcomes it expects to see for consumers and businesses as a result of the implementation of the Notification (the "DCR outcomes")
3. Pursuant to the Commitments and the Governance Protocol, Openreach has established:
  - a. the Openreach Board Audit Risk and Compliance Committee (OBARCC), whose terms of reference include having the responsibility, on behalf of the Openreach Board, for ensuring that Openreach is complying with the Commitments and the Governance Protocol, and
  - b. the Commitments Monitoring Office (CMO), with responsibility for monitoring and reporting to the OBARCC on Openreach's compliance with the Commitments and the Governance Protocol

4. Ofcom has established the Openreach Monitoring Unit (OMU) with responsibility, on behalf of Ofcom, to carry out the Monitoring Activities, in line with its general duties in carrying out its functions

#### **Purpose**

5. This MoU is designed to enable the OMU to effectively carry out the Monitoring Activities and sets out the working arrangements established between the CMO (on behalf of Openreach) and the OMU.
6. The MoU does not cover
  - a) how the OMU will monitor and report on BT's compliance with the Commitments which is covered under a separate MoU with the BT's Commitments Assurance Office (CAO),
  - b) the relationship between Openreach and Ofcom on other regulatory matters, unless and insofar as they affect the Commitments, and
  - c) how Ofcom will undertake its overall assessment of the DCR outcomes, save that information gathered under this MoU may be used by Ofcom as it sees fit when it undertakes that assessment.

#### **Guiding principles**

7. This MoU is agreed in order to clearly set out the collaboration required to deliver a successful monitoring and reporting regime
8. Through its Monitoring Activities, the OMU will develop a rounded, robust and comprehensive view of Openreach, to judge whether it is being run in a way that supports independent decision-making in the interests of all its customers, in line with the "letter" and "spirit" of the Commitments and the Governance Protocol. This will involve OMU engagement with Openreach at all levels of seniority and, subject to paragraph 10 below, relies on full and open access to the business for the purposes of carrying out its Monitoring Activities
9. The OMU's Monitoring Activities will assess whether the management of Openreach, as well as the behaviour of Openreach employees, are in line with the 'spirit' of the new model and its intended outcomes, as well as complying with the 'letter' of the Commitments and Governance Protocol
10. Any activity carried out by the OMU under the MoU, and any requests made by the OMU to the CMO to undertake activity under the MoU, will be proportionate and reasonable, and reasonably required to carry out its Monitoring Activities

#### **Role of the CMO**

11. The CMO's role is to support OBARCC by analysing and reporting regularly to OBARCC on the detailed status of Openreach's implementation and compliance with the Commitments and the Governance Protocol. It is responsible for
  - a. investigating complaints made by CPs, BT or Openreach employees, or issues raised by Ofcom, relating to allegations of breaches of the Commitments and/or the Governance Protocol,
  - b. presenting the findings related to alleged breaches of the Commitments and the Governance Protocol to the OBARCC;
  - c. producing an annual report for the OBARCC, covering Openreach's implementation and compliance with the Commitments and the Governance Protocol, and its handling of customer complaints and representations, and
  - d. ensuring, on behalf of Openreach, that all activity required by this MoU is carried out.

#### **Role of the OMU**

12. The OMU will, on behalf of Ofcom, monitor, gather evidence and report on matters relating to the Monitoring Activities, including:
  - a. the implementation of the legal separation between BT and Openreach,

- b Openreach's and the wider BT Group's compliance with the Commitments and the new Governance Protocol; and
  - c the extent to which Openreach is acting independently of BT, including the extent to which it is making its own decisions, treating customers equally and taking strategic decisions that are made in the interests of all its customers in line with the Commitments and the Governance Protocol. This will include the extent to which Openreach creates a successful culture that values Openreach's independence.
- 13 Any information gathered, or outputs produced under this MoU will also be used by Ofcom in its overall assessment of DCR outcomes

**Working together to facilitate monitoring of the commitments**

- 14 The OMU and CMO will work together in an open, transparent and collaborative way
- 15 The CMO will be Openreach's key interface with the OMU. The CMO will cooperate with any requests made by Ofcom for the CMO to undertake activities in accordance with clause 11 in the course of its Monitoring Activities. The CMO will collect evidence to be made available to Ofcom and will facilitate any activity being undertaken by the OMU in accordance with clause 12 as part of the OMU's Monitoring Activities.
16. The OMU and CMO have agreed the following ways of working relating to key activities carried out under the monitoring regime.

Information provision

- 17 The CMO shall provide to the OMU regular updates on implementation progress, and provide assurance that Openreach has taken all such steps required to fully implement the Commitments and the Governance Protocol. To the extent that there are any concerns relating to the progress of implementation, the CMO will inform the OMU without delay.
- 18 The CMO will be open and straightforward in its dealings with the OMU, and will share relevant information and issues of potential concern with the OMU on a proactive basis. The OMU will review and, as appropriate, verify information provided by the CMO. The CMO will fully participate in, or ensure Openreach's full participation, in any such verification activity
- 19 Each year the OMU will set out an annual work plan identifying the information the OMU requires as part of its Monitoring Activities. This will be prepared by the OMU and shared with the CMO, who will be provided with a reasonable opportunity to make representations before it is finalised by the OMU
- 20 The CMO will use its best endeavours to
- a. ensure that all information provided under the monitoring regime is accurate, complete and not misleading;
  - b. ensure information is provided in the form and manner requested by the OMU and in accordance with the deadlines set out in the work plan or, unless otherwise agreed, within a maximum of 15 calendar days of the request, and
  - c. ensure, on reasonable notice, that sufficient staff or other resources are made available to meet the requirements set out in the work plan, including but not limited to facilitating
    - i interviews of Openreach employees, including senior management and the Executive, by members of the OMU;
    - ii attendance by members of the OMU, for observational purposes, of selected meetings of Openreach decision making bodies, such as the Openreach Board, OBARCC and other Committees as these relate to or affect the Monitoring Activities (the OMU will select which meetings it wishes to observe), and
    - iii other onsite work or observation activity as required

- 21 To the extent the OMU requires information, or to undertake one or more of the activities set out at paragraph 20(c) above, outside that identified in the work plan, this will be discussed with the CMO in advance where possible. The CMO will use its best endeavours to facilitate such additional activity or information provision in a timely manner, in accordance with the deadline set, or unless otherwise agreed, within a maximum of 15 calendar days of the request.
22. As part of its Monitoring Activities, the OMU will gather information using both voluntary requests (in accordance with the OMU workplan) and, where the OMU deems it appropriate to do so, using statutory information gathering powers (including pursuant to section 135 Communications Act 2003). The CMO will provide information in accordance with paragraph 20 (a)-(c) above.
- 23 To the extent the OMU intends to rely on specific information provided by the CMO on a voluntary basis, for example in advance of key publications referring to or relying on such information, the OMU may require the CMO to confirm the accuracy and completeness of such information in the context of a statutory request (including under section 135 Communications Act 2003).

Dealing with complaints

- 24 Any complaints or representations made to the CMO alleging failure to comply with requirements of the Commitments and/or the Governance Protocol will be investigated by the CMO as part of its monitoring regime. When the CMO carries out such investigations, it will report the findings at a summary level to the OMU, and will provide full details of such investigations to the OMU on request. Should the OMU not be satisfied with the action taken by the CMO and/or Openreach relating to such complaints and representations, it may escalate the issue in accordance with paragraph 28, carry out its own investigation or refer it to other parts of Ofcom for further regulatory scrutiny if appropriate.
25. The OMU may identify a concern relating to Openreach's compliance with the Commitments and/or the Governance Protocol, or may receive complaints or representations from CPs or other stakeholders. In such circumstances the OMU may decide to investigate such a concern itself or, subject to confidentiality concerns, refer the complaint to the CMO for investigation.
- 26 Where the CMO carries out an investigation it will report progress and outcomes as part of its monthly meetings with the OMU or as soon as their investigation is completed (whichever is earlier). In the event that the OMU carries out the investigation, the CMO will facilitate the provision of information, onsite work or access to Openreach employees and executives required by the OMU in accordance with paragraph 20 above. The OMU will share the outcome of the investigation with the CMO as part of its monthly meetings (subject to confidentiality concerns).
- 27 The OMU will report on such complaints and representations as part of its annual compliance reports (subject to confidentiality concerns).

Escalation of issues

- 28 If the OMU becomes aware of a failure (or potential failure) by Openreach to comply with requirements of the Commitments and/or the Governance Protocol, it may take such steps as it deems appropriate in the relevant circumstances. For example, the OMU may take one or more of the following steps
  - a hold discussions with the CMO,
  - b undertake a more detailed investigation,
  - c attend the next scheduled OBARCC meeting to discuss that matter;
  - d escalate the matter to senior executives, non-executive directors, the CEO or Chairman within Openreach; and/or
  - e report such non-compliance in its annual monitoring reports.

- 29 To the extent the OMU identifies issues that could represent wider compliance failures (e.g. associated with General or SMP Conditions), it will refer this to other parts of Ofcom for resolution in accordance with its normal investigation and enforcement procedures.

Northern Ireland monitoring

- 30 The OBARCC will be responsible for the monitoring of compliance by Openreach Northern Ireland (OR NI) with the Commitments, Governance Protocol and the Northern Ireland Governance Protocol, as applicable. The CMO's role in relation to OR NI will include
- a. Analysing and reporting to the OBARCC on OR NI's compliance with Commitment 18, Governance Protocol and the Northern Ireland Governance Protocol, as applicable;
  - b. Working with the Northern Ireland Regulatory Compliance Committee (RCC) and Stakeholder Forum to report on OR NI compliance and to seek input from NI stakeholders;
  - c. Liaising with the CAO where OR NI activities relate to BT Plc activities;
  - d. Investigating complaints or representations relating to OR NI and liaising with the CAO to the extent these may impact on BT Plc's compliance with the Commitments and/or the Governance Protocol; and
  - e. Provide information relating to OR NI in a manner consistent with paragraph 17 to 23 above

Reporting / outputs

31. The CMO will produce an annual report for the OBARCC on Openreach's compliance with the Commitments and the Governance Protocol and its handling of customer complaints and representations. The CMO will.
- a. share a draft of the report with the OMU at least 5 working days in advance of submission to the OBARCC in order to (i) fact check the draft report and (ii) enable the OMU to comment before the report is submitted to the OBARCC by the CMO and take account of any comments made by the OMU; and
  - b. once endorsed by OBARCC, provide the final report to the OMU at least 3 working days in advance of publication
- 32 The OMU will publish regular reports into Openreach and the wider BT Group's compliance with the Commitments and the Governance Protocol, including
- a. an Implementation Report, describing the steps taken by Openreach and BT Group to implement the Commitments and the Governance Protocol, the monitoring activity carried out by the OMU to date and the extent to which Openreach has complied with the spirit of the Commitments in advance of implementation;
  - b. an initial Compliance Report, six months after the publication of the Implementation Report, and
  - c. Annual Compliance Reports, each year thereafter
33. The OMU's annual compliance monitoring reports will complement and provide input to Ofcom's assessment of DCR outcomes.

Regular meetings

- 34 The CMO and the OMU will, unless otherwise agreed, meet at least monthly to discuss.
- a. progress against the CMO's Commitments Validation Plan (CVP) and OMU's workplan;
  - b. any issues, complaints and breaches concerning the Commitments and the Governance Protocol identified in the period;
  - c. the outcome of any audits and reviews carried out by the CMO concerning the Commitments and Governance Protocol under the structure of the CVP, or by Ofcom under Ofcom's work plan;
  - d. the latest status of the CMO's Commitments Compliance Dashboard covering implementation, compliance and independence and equal treatment; and
  - e. any other issue arising in the period relevant to the Monitoring Activities or the DCR outcomes.

Other activity

35. To the extent the OMU and CMO carry out activity in relation to the Commitments and the Governance Protocol not explicitly mentioned above, the general principles set out in this MoU apply also to any such activity.
36. More widely, as part of its statutory duties, Ofcom will also assess whether the new arrangements deliver positive outcomes for competition and consumers (taking account of the monitoring outputs generated by the OMU). Ofcom will also continue to carry out other policy and enforcement activity, including that associated with SMP and General Conditions, in accordance with normal procedures.

**Review**

37. This MoU is in force from the date of signature and will remain in place for as long as the Commitments and Governance Protocol remain in force, unless agreed otherwise by Ofcom and Openreach. It will be reviewed annually by OMU and CMO and any resulting amendments will only be incorporated if both parties agree.

**Signed on behalf of Ofcom**



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**Name: Gaucho Rasmussen**

**Position: Director of Investigations and Enforcement**

**Date: 16 October 2018**

**Signed on behalf of Openreach**



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**Name: Jon Furmston**

**Position: Director of CMO**

**Date: 16 October 2018**