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## **Which? response to Ofcom consultation on Strengthening Openreach's strategic and operational independence**

### **Summary**

Which? agrees with Ofcom's proposal that Openreach should make strategic decisions in a manner that reflects the interests of all its customers, and we support Ofcom's overall objectives underpinning the proposals in the consultation document.

However, there is a risk that in a regulator choosing the model, and dictating how these outcomes should be achieved – from appointments to Openreach's Board to how Openreach should consult with its customers – that Ofcom is drawn into ever more detailed, and intrusive regulation, and takes on a role that a regulator is badly placed to fulfil. Rather than specifying the means of achieving these outcomes, Ofcom should instead focus on developing the measures of outcomes that it is seeking to achieve, creating strong incentives on the BT Group to achieve these, including the realistic prospect for the BT Group of full structural separation being re-visited.

Even if Ofcom implements its proposals, and adopts its favoured model, it needs to do much more work on measuring success, and tracking outcomes. Ofcom identifies the importance of outcomes for 'people and businesses' and notes that "these are the ultimate goal of our intervention"<sup>1</sup>. We agree with this goal, however Ofcom's proposals for identifying, measuring and tracking end consumer outcomes are not adequate, and represent a large gap in the consultation's proposals.

Ofcom's proposals also focus too much on input measures of success. This runs the risk of incentivising Openreach to focus on what the regulator is measuring rather than on the outcomes that end consumers are experiencing. Experience in other regulated sectors shows that regulators are, rightly, moving away from this type of detailed input monitoring. They are now giving regulated businesses more freedom to decide how they deliver, concentrating instead on how they engage with end consumers and incentivising them to focus instead on

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<sup>1</sup> Paragraphs 1.47 and 6.3



delivering good consumer outcomes<sup>2</sup>. We urge Ofcom to take a similar approach in this instance.

### **Ofcom's overall approach**

Ofcom says that its objective is to "create a governance and operational structure that gives the right incentives and sufficient authority for the Openreach Board to take decisions that are not influenced by the wider interests of BT Group". We suggest that it is not for a regulator to be creating or dictating governance and operational structures in the level of detail that Ofcom proposes to do as regulators are poorly placed to specify such matters. Furthermore, formal controls on governance and operational structures may not be effective in changing the culture of Openreach. Ofcom would do better to focus much more on the outcomes it wishes to see achieved, and concentrate on measuring those, and creating the incentives for BT Group to achieve them.

Ofcom's focus on the transparency and control it will have - for example, that the proposed model should ensure greater transparency for Ofcom on how and when decisions are taken appears to be misplaced. This suggests a level of micromanagement by Ofcom that is rarely successful when attempted by regulators and risks the end result being that BT Group and Openreach are much more concerned about the regulator than about its customers.

### **Appointments to the Openreach Board**

We agree with some aspects of Ofcom's proposal, including that Openreach should be a distinct company, that the Articles of Association of Openreach should make clear that a core purpose for the company is to act in the interests of all downstream customers equally, and the Openreach Directors will have duties to act accordingly.

However, some aspects of Ofcom's proposal – such as that Ofcom would be consulted on the potential candidates for the Openreach Board during any appointment process, and appointments would not go ahead without Ofcom's approval - effectively put Ofcom in the role of a shareholder, and shift the responsibility and risk of such decisions away from shareholders to the regulator. This means that the regulator becomes 'invested' in these decisions in a way that is potentially highly undesirable, and even may lead to a form of capture of the regulator, in that there is a conflict in a regulator evaluating the outcome of a design which it has been responsible for creating.

### **Greater consultation with customers on investment plans**

Ofcom's proposal on confidentiality of customer plans and information, and the proposal to restrict these being shared with BT Group, appears to be a sensible recommendation. The three elements of Ofcom's proposed approach to consultation with customers: a requirement

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<sup>2</sup> With UKRN, Which? is working to identify approaches to incentivise regulated firms to focus on delivering good consumer outcomes rather than regulatory targets, through the use of consumer challenge groups to improve engagement with consumers and incentives on the business where this engagement delivers the outcomes consumers want and value.



to formally consult; a confidential engagement phase; and that downstream divisions of BT Group use the same process; also seem appropriate.

However, there is a risk that these defined processes do not get to the heart of incentives to make Openreach responsive to its customers. All of the steps that Ofcom sets out could be carried out and yet the outcomes could still be no different from what they are today. In our view, while the steps Ofcom sets out could be helpful, the critical aspect is a focus on the outcome that is achieved.

### **Measuring the success of Ofcom's proposals**

Ofcom identifies three sets of metrics it intends to use to identify whether its proposals are successful: the behaviours of Openreach; the outcomes delivered to intermediate customers (i.e. retailers purchasing from Openreach to provide services to end users); and end consumer outcomes. Below, we outline our response to each of these metrics.

#### *1. Behaviours of Openreach*

The first of these three – the behaviours of Openreach – are input measures. For example, Ofcom states that one of the most important measures of success is 'our ability to assess whether Openreach Board decisions are taken in an independent manner'<sup>3</sup>. However, this measure is not related to outcomes either at the intermediate customer level or the end consumer level. If the right outcomes are delivered there seems to be little reason for the regulator to measure how the company got there.

Similarly, the proposal to measure "whether Openreach has the necessary commercial and technical resource required to deliver its priorities in the interests of all its customers" appears to be overly intrusive and unnecessary. If Openreach is incentivised to deliver good consumer outcomes and Ofcom focuses on measuring this, then it is a matter for the company to secure the appropriate resources to deliver them, not the regulator.

The focus on these detailed input metrics runs the risk that Ofcom will incentivise Openreach to focus more on what Ofcom wants (i.e. meeting the regulator's metrics) rather than on what its consumers want (i.e. good outcomes that are likely to change over time). This risks diluting the incentives on the business to engage meaningfully with its customers – both intermediate and end customers – to properly understand what good consumer outcomes look like and strive to deliver them. It also creates a burdensome measurement regime, incurring costs for both Openreach and Ofcom that may not deliver real benefits to consumers. Finally it runs the risk of Ofcom becoming captured, since an organisation that approves input measures may find it difficult to criticise outcomes that result from those inputs.

#### *2. Intermediate consumer outcomes*

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<sup>3</sup> Paragraph 6.5



The creation of a second set of metrics – around the outcomes delivered to intermediate customers – appears appropriate. Openreach has sole control of the delivery of good outcomes to these customers so it is right to incentivise the business to:

- have processes in place to effectively engage with these customers to identify what they consider good outcomes look like, and
- deliver those outcomes to the satisfaction of intermediate customers

However whilst this may be the aim of the proposed approach, Ofcom should better articulate the outcomes that intermediate consumers would value. For example an ambition to maintain “the intensity of competition as new superfast and ultrafast broadband networks emerge” is welcome, but Ofcom should set out the outcome that it expects intermediate consumers to experience.

Ofcom should also identify ways to incentivise Openreach to engage in an on-going process with intermediate customers to continually update and refresh its understanding of the outcomes they want, especially as these are likely to change over time. The proposals to require consultation with intermediate customers could be expanded to achieve this, with appropriate incentives put in place, along the lines of Which?’s proposals for Consumer Challenge Groups in regulated sectors.

### *3. End consumer outcomes*

The biggest gap in the consultation document is the insufficient focus on end consumer outcomes. This may be because Ofcom considers “these outcomes [to end consumers and businesses] are not solely under the control of Openreach”. We do not think that this is a sufficient reason not to focus primarily on end consumer outcomes.

If Openreach is incentivised to contribute to the end consumer outcomes then it is a matter for the business to find ways to contribute effectively to those outcomes. By measuring progress towards end consumer outcomes, alongside outcomes delivered to intermediate consumers - over which Openreach has control - Ofcom can assess how well Openreach is performing in delivering its ultimate goal.

This could be achieved through a variety of means. First, Ofcom should engage with consumers to ensure that the outcomes it is proposing to measure are those that consumers want and value. Ofcom should transparently publish the research and engagement that has led it to identify the outcomes it will use. Second, the outcomes should be specific and measurable. For example, it is not clear how Ofcom would measure “continued choice in who provides consumer and business broadband, and by extension, an increasing range of over the top services”. Finally, we support Ofcom’s proposals to publish progress against its consumer outcomes measures as transparency will enable Ofcom and consumer bodies like Which? to hold Openreach to account for progress.



## **Conclusion**

Overall, Which? supports Ofcom's aim to make Openreach act in the interests of all its customers. We also agree that that Openreach should be a distinct company, and that the Articles of Association of Openreach which make clear that a core purpose for the company is to act in the interests of all downstream customers equally, with Openreach Directors who will have duties to act accordingly. We agree with the overall aim to "create a governance and operational structure that gives the right incentives and sufficient authority for the Openreach Board to take decisions that are not influenced by the wider interests of BT Group". However, we are concerned that Ofcom's current approach focuses too strongly on how and what Openreach should do in order to achieve this, rather than on outlining how outcomes and success of this will be measured. More detail must now be provided on the outcomes that Ofcom is looking for from Openreach, and to ensure that Openreach is allowed to use its own initiative to achieve these outcomes.

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