



Delivering a more independent Openreach

Update on BT's voluntary notification under s.89C
Communications Act 2003 and consultation on releasing the
BT Undertakings pursuant to section 154 Enterprise Act 2002

Consultation

Publication date:	17 March 2017
Closing Date for Responses:	14 April 2017

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 BT's March Notification sufficiently addresses the competition concerns as set out in our Strategic Review of Digital Communications.

This document explains why we consider that BT's March Notification sufficiently meets our competition concerns, how we will monitor compliance with the new arrangements and ultimately assess whether they deliver positive outcomes for consumers and businesses.

Subject to consultation, we propose that BT should be released from the Undertakings that it offered to Ofcom in 2005 under which Openreach was originally created. This document sets out our proposals for BT's release from the Undertakings. The consultation will close on 14 April 2017. Please send your responses via our web form.

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Section 1

Executive summary

- 1.1 The Digital Communications Review set out our strategy to deliver fast, reliable broadband services, a move towards a fibre future and continued protections for vulnerable consumers. A key element of our strategy is effective competition and effective regulatory interventions to drive incentives to invest, increase quality, provide more choice and deliver lower prices for consumers and businesses.
- 1.2 Given its position in the market, Openreach will continue to play a key role in delivering these improved outcomes for many consumers and businesses. In February 2016, we set out our concern that today's model of functional separation failed sufficiently to remove BT's ability to discriminate against competitors: the model of functional separation remained subject to the limits inherent in the BT Group corporate structure.
- 1.3 While the existing model constrained BT's ability to act on any incentive to discriminate in providing existing wholesale services, a concern arose that Openreach's vertical integration within BT Group meant new, strategic investment decisions are taken at a group level. For example, BT Group made the initial strategic decision to invest in ultrafast broadband and then adopted a particular technology before consulting Openreach's customers. There is a risk that decisions made in this way may favour the interests of BT's downstream retail divisions over the interests of competing downstream providers.
- 1.4 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.
- 1.5 Without effective intervention to address this competition concern, this could create risks for consumers and businesses. It could undermine the incentive for industry players to invest, and ultimately influence the price, quality and availability of services received by consumers and businesses.

BT's voluntary notification sufficiently meets our competition concerns given significant movement since its July 2016 notification

- 1.6 On 18 July 2016, BT submitted to Ofcom a voluntary notification to re-organise and enhance the existing model of functional separation. In our 26 July 2016 consultation, we did not consider that this notification sufficiently addressed our competition concerns. Here we highlighted three broad features which, taken together, meant the notification did not go far enough. These were:
 - 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;
 - the high degree of direct involvement and engagement of the BT Group Chief Executive and Chief Financial Officer in Openreach's management; and
 - the ability of these executives to access confidential customer information during the confidential Openreach consultation process between Openreach and BT's competitors.

- 1.7 On 10 March 2017, BT notified us of voluntary commitments under Section 89C of the Communications Act 2003 to further reform Openreach, building on its July 2016 notification.
- 1.8 Overall, BT's latest notification has moved significantly compared to its previous position in July 2016. Figure 1 below summarises how BT's position has developed across the key elements of its notification.

Figure 1: Comparison of BT's July 2016 and March 2017 notifications

Issue	July 2016 notification	Current BT notification
Incorporation	Openreach continues as a business unit of BT plc	Openreach separately incorporated, with its own formal, majority independent Board of directors with duties to treat all customers equally
CEO appointment and reporting	Openreach CEO appointed by, and reporting to, BT Group plc CEO	Openreach Board appoints Openreach CEO (with BT Group only having a transparent final veto), with reporting to BT Group limited to ensuring best practice governance (including legal obligations)
Strategic and operating plans	BT Group CEO and CFO review Openreach strategy and operating plans before the Openreach Board	BT Group CEO and CFO review Openreach strategy and operating plans the same time as the Openreach Board
People	No transfer of employees	Transfer of 32,000 employees into Openreach Limited (subject to Crown Guarantee, Trustee consent and employee consultation)
Trading	Trading to remain part of BT plc	Openreach Limited to operate customer relationships on behalf of BT plc.
Assets	No transfer of or contractual arrangements for Openreach control of assets	Contractual arrangement whereby Openreach has control and management rights over required assets
Customer consultation	Disclosure of confidential Openreach customer information to the BT Group CEO and CFO without customer consent	No disclosure of Openreach confidential customer information to the BT Group CEO and CFO without customer consent
Confidentiality and commercial policy	A list of BT Group employees who can access confidential information and influence Openreach commercial policy	BT Group employees cannot access confidential information and influence commercial policy as a rule, with specific exemptions, with transparency to Ofcom

- 1.9 BT's revised notification is subject to four pre-conditions. Until these conditions are met, the current model and Undertakings will remain in force. The conditions are:
- the amendment of the Crown Guarantee, which currently covers the BT pension scheme, to continue pension protections for the employees of the newly incorporated Openreach Limited. This is a matter for Government;

- approval from the BT Pension Scheme Trustees for Openreach Limited to become a participating employer in the BT pension scheme;
 - completion of the consultation processes under TUPE which are necessary for the transfer of employees; and
 - release of BT from the Undertakings, being replaced by the new commitments.
- 1.10 The changes in BT's revised notification have now addressed those three features of BT's July 2016 notification that did not go far enough to deliver the degree of independence required to address our competition concerns.
- 1.11 Taken together, we believe BT's notification should address competition concerns set out in the DCR subject to BT's continued commitment to these arrangements. After careful consideration, we have decided that BT's revised notification is sufficient to address our competition concerns and that it is therefore no longer necessary to proceed with a formal notification to the European Commission. This document sets out our reasoning.
- 1.12 We have taken the view throughout this process that a voluntary settlement is likely to deliver benefits to consumers and businesses more quickly than imposing formal regulation. Concluding a voluntary settlement now also reduces the level of uncertainty and associated investment risk facing industry at a key point in the move to more fibre delivery.
- 1.13 As a result, for so long as we consider the new arrangements continue to meet our competition concerns, we will not proceed with the imposition of a regulatory solution.
- 1.14 We have also considered how the new arrangements will work for consumers and businesses in Northern Ireland and explain this further in Section 3.

Proposal to release BT from the Undertakings

- 1.15 In light of BT's notification, we have considered whether the Undertakings continue to be appropriate. We consider that BT should now be released from these Undertakings. Once in force, the Commitments will effectively replicate those requirements in the Undertakings that remain relevant, and build on them through the provision of additional independence on strategic and operational decision making and running of the Openreach business that we have sought.
- 1.16 Subject to consultation, releasing BT from the Undertakings will also be contingent on BT notifying Ofcom that the first three of its pre-conditions have been met. Until that point, the Undertakings will remain in force. We propose to release BT 30 days after BT notifying us of these conditions being met.

Ongoing monitoring of the Commitments will be key

- 1.17 Effective and robust monitoring will be critical to ensure that BT and Openreach Limited comply with the arrangements set out in BT's March Notification and that Openreach acts more independently in the interests of all customers
- 1.18 Ofcom will take a detailed and pro-active approach to monitoring the compliance by BT and Openreach with the Commitments and Governance Protocol. This will ensure BT and Openreach remain focused on delivering the benefits of the new model. It will also allow us to ensure we continue to be satisfied that the model is addressing our

competition concerns and benefiting the wider market. Given the importance of this task to the overall model, we expect monitoring of compliance to be undertaken by a new Openreach Monitoring Unit.

- 1.19 The new model strikes a balance between greater independence for Openreach while maintaining appropriate corporate governance within the BT Group, consistent with its position as a public listed company. The Commitments set out clearly what Openreach’s Board and Executive will have responsibility for, including strategy and performance. It also permits necessary interaction between Openreach and BT Group to meet the latter’s legal and regulatory duties.
- 1.20 BT’s Commitments also include additional reporting and transparency requirements to enable effective and pro-active monitoring of the new model. Such transparency and monitoring is fundamental to ensure that necessary interactions between Openreach and BT Group cannot be used as an avenue for inappropriate influence from BT Group. In addition to direct Ofcom monitoring, both Openreach and BT Group will also have compliance bodies for this purpose.
- 1.21 We will adopt a three-tier system for monitoring the new model, covering implementation by BT, compliance with the new formal governance arrangements, and considering how the new model supports good outcomes for communications providers, consumers and businesses. Our approach is discussed in more detail in Section 6.
- 1.22 We will produce a series of annual reports – six monthly in the first year - detailing our monitoring and reporting work. These reports will assess BT’s and Openreach’s compliance with the Commitments and the Governance Protocol, including any concerns arising from any material failures by BT or Openreach to comply with the obligations under the Commitments. As displayed in
- 1.23 Figure 2 below, this will include an assessment of the experience of Openreach customers when requesting new products and services from Openreach, for example through the new customer consultation process, and the overall outcomes associated with Openreach decisions.

Figure 2: Areas of monitoring

Monitoring area	Objective	Key metrics/methods
1. Implementation	Ensure all aspects of new arrangement are timely implemented	<ul style="list-style-type: none"> • Notifications from BT on completion of milestones
2. Governance arrangements	Ensure BT and Openreach comply with new governance arrangements	<ul style="list-style-type: none"> • Interactions between CEOs • Duties of the Openreach Board, Executive and CEO • Processes to draft, review and approve annual plans AOP/MTP • Customers’ engagement processes • Board appointments • Openreach financial reporting
3. Independence and equal customers’ treatment	Ensure the new model delivers against broader policy objectives: Openreach acts independently and	<ul style="list-style-type: none"> • Number of consultations with customers and the stages reached (confidential, public, committed); • New products and services proposed;

Monitoring area	Objective	Key metrics/methods
	treats customers equally	<ul style="list-style-type: none"> • New investment ideas and / or commercial models for investment • Number of approved and rejected proposals and relative rationale; • Final agreed AOP / MTP and BT and Openreach financial reporting including investment levels, CAPEX and OPEX • Openreach customers' views

Wider outcomes for consumers, businesses and communications providers

- 1.24 We expect that BT's notification should prove an effective and long-term solution to address our competition concerns. The success of the notification will depend on the commitment of BT Group and Openreach to this model, and the behaviours they demonstrate. Given the nature of the notification, it will be vital that we keep the model's performance and success under close review and scrutiny, stepping in if required, while also allowing it to be embedded.
- 1.25 A more independent Openreach is one element of our broader strategy to deliver better broadband outcomes for consumers and businesses. Four other key elements are:
- continued end-to-end competition and investment from players across the communications sector, including Openreach;
 - continued regulatory action to promote competitive investment, quality and efficient pricing. Such actions include enhancing duct and pole access, regulated pricing in the wholesale local access market review and minimum service levels;
 - public policy to secure the widest possible availability of services, for example supporting Government's broadband USO policy or applying mobile coverage obligations in spectrum licences; and
 - general consumer protections, for example automatic compensation when things go wrong.
- 1.26 We want to see a competitive market that continues to thrive, supporting improved broadband and service quality for consumers and businesses. Crucial to this is a responsive and effective Openreach. Drawing on our monitoring work, we will consider how far the new Openreach successfully:
- responds promptly and effectively to its customers' needs, for example in developing new wholesale products and services;
 - leads engagement with industry on major, strategic network investment programmes to deliver better services for consumers and businesses; and
 - considers and engages with its customers on new commercial models and relationships to support continued investment and quality, including approaches such as co-investment and risk sharing.

- 1.27 Together with our wider regulatory strategy and actions, these reforms to Openreach will support delivery of better services, more reliably and at reasonable cost to consumers and businesses. To understand how the wider DCR regulatory strategy and these reforms are contributing to such outcomes, we will report on a wide range of outcomes for consumers and businesses such as service quality, broadband speeds, prices, availability and investment. This will sit alongside and draw upon the detailed Openreach monitoring, as well as other regular Ofcom publications.
- 1.28 More details on how we will report on consumer outcomes are provided in Section 7.

Success of this intervention and action we will take if it appears to be failing

- 1.29 Some of the outcomes supported by these changes to Openreach, and our wider regulatory strategy, may take longer to deliver, such as large-scale investments where there is a longer lead time on major new infrastructure delivery. At the same time, other improvements, including customer engagement and consultation, should be demonstrated more quickly. We believe the extent to which the new model is delivering for consumers and businesses will become clear within three years of its implementation. Monitoring and assessment will start immediately.
- 1.30 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. Signals that the model is not delivering to its potential could include repeated breaches on compliance, a failure for the expected behaviours to be embedded in Openreach and BT, or challenges in operating the model effectively.
- 1.31 Ofcom's response to any potential compliance failures with BT's voluntary arrangements will depend on the nature, gravity and frequency of the breach in question.
- Where issues are minor, the model allows for variations and we will engage with BT to seek improvements; we may also recommend in our periodic reports how the separated entities can improve their compliance.
 - In the event of repeated or serious breaches of compliance, or if it becomes clear that overall this model of legal separation 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.
- 1.32 In addition to these responses related to the Commitments and Governance Protocol, we also have clear and direct complementary powers to enforce breaches of regulatory conditions that we have imposed to address competition concerns - for example relating to quality of service - in markets where BT has significant market power. These include imposing financial penalties and directing BT to take action to ensure any such breaches are appropriately remedied.

Section 2

Introduction

2.1 The rest of this document covers the following:

- Section 3: BT's Notification to Ofcom
- Section 4: Consultation on releasing the BT Undertakings
- Section 5: Review of existing SMP conditions in light of BT's Notification
- Section 6: Monitoring compliance with BT's Notification
- Section 7: Assessing the benefits and effectiveness of the model

2.2 We are inviting comments on the proposed release of the BT Undertakings and the deadline for providing comments is 14 April 2017.

Section 3

BT's Notification to Ofcom

- 3.1 In this section we set out:
- 3.1.1 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;
 - 3.1.2 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
 - 3.1.3 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.

The competition concerns we identified as part of our DCR

- 3.2 As part of our Strategic Review of Digital Communications (DCR), we reviewed the operation of Openreach, which BT had set up as a functionally separate division pursuant to the 2005 Undertakings which BT offered and Ofcom accepted under section 154 of the Enterprise Act 2002 in lieu of a market investigation reference to the then Competition Commission (the Undertakings).

The Undertakings

- 3.3 The Undertakings were given to address our concern in 2005 that there were enduring bottlenecks in fixed telecoms networks and structural factors in terms of vertical integration and significant market power in individual product markets that gave BT the incentive and ability to engage in vertical discrimination¹.
- 3.4 In order to address this, the Undertakings established the following core principles:
- 3.4.1 **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
 - 3.4.2 **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.
- 3.5 The Undertakings coexist with regulation imposed under the European Common Regulatory Framework, through our market reviews. We impose obligations on BT where it has significant market power ('SMP') to address the competition problems that arise from this market power.
- 3.6 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-

¹ https://www.ofcom.org.uk/data/assets/pdf_file/0023/47075/consolidated_undertakings24.pdf

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.

Our Initial DCR Conclusions on Openreach

- 3.7 In our DCR initial conclusions, we identified a concern that the current model of functional separation was failing sufficiently to remove BT's ability to discriminate against competitors and that risks to competition therefore remained².
- 3.8 Although the Undertakings introduced a degree of independence for Openreach, the model of functional separation remained subject to the limits inherent in the BT Group corporate structure. Without further separation between BT Group and Openreach, BT's underlying incentive to discriminate under certain circumstances would remain.
- 3.9 In particular, while the existing obligations achieved good overall outcomes in relation to constraining BT's ability to act on any incentive to discriminate in the provision of existing access services at the wholesale level, a concern arose that, as a result of Openreach's vertical integration within BT Group, strategic decisions on investment are taken at a group level. Respondents to our review considered that Openreach's wholesale customers do not have the same opportunity as those within BT to influence decisions regarding the network. For example, our understanding is that BT Group made the initial strategic decision to invest in ultrafast broadband and then adopted a particular technology without consulting Openreach's customers.
- 3.10 Respondents alleged that such decisions will consequently favour the interests of BT's downstream retail divisions over the interests of competing downstream providers. Respondents argued that this demonstrates the lack of purpose or efficacy of the Undertakings to address strategic discrimination.
- 3.11 We agreed that these concerns were serious and needed to be addressed.

BT's July 2016 Notification

- 3.12 On 18 July 2016, BT submitted to Ofcom the organisational steps that it intended to implement to enhance the functional separation of Openreach (the "July Notification"). BT told us that the July Notification was intended to address the competition concerns we raised in relation to Openreach governance and independence in the DCR.

Our July 2016 Consultation

- 3.13 We did not consider that the July Notification sufficiently addressed our competition concerns and so on 26 July 2016, we consulted on our own proposed model for strengthening Openreach's strategic and operational independence.
- 3.14 In summary, we considered that the July Notification was deficient because a number of elements, taken together, meant that BT Group retained a high degree of control over Openreach. In particular:

² <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/digital-comms-review/conclusions-strategic-review-digital-Communications>

- Openreach would remain a functionally separate, unincorporated division of BT plc;
- Openreach would be governed by a sub-committee of the BT plc board, with BT Group, including in particular the BT Group Chief Executive Officer (CEO) retaining significant influence over its appointment and removal;
- the BT Group CEO and Chief Financial Officer (CFO) maintained a high degree of direct involvement and engagement of in Openreach's management, including having the ability to access confidential customer information during the confidential Openreach consultation process between Openreach and BT's competitors;
- all of Openreach's employees would remain employees of BT plc, and as such would conduct Openreach's trading in BT plc's name;
- all assets used by Openreach would remain under BT plc's ownership.

3.15 We instead proposed the following set of measures in the July consultation, to address our competition concerns:

- **Openreach as a distinct company.** We proposed that Openreach should be separately incorporated, becoming a company in its own right. It would have its own purpose, set out in its Articles of Association; and its own governance arrangements, including a board of directors.
- **Openreach's purpose and directors' duties.** The new Articles of Association should make clear 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.
- **The Openreach Board.** The Openreach Board would have a majority of non-executive directors, including the Chair. These would be appointed and removed by BT. Crucially, these non-executive directors would not be affiliated in any way to BT Group, and Ofcom would be consulted on each appointment and removal.
- **The Openreach Executive.** The Openreach CEO would be appointed by, and accountable to, the Openreach Board. The CEO would be responsible for other executive appointments. There would be no direct lines of reporting from Openreach executives to BT Group executives or functions, except where this was specifically agreed with Ofcom.
- **Greater consultation with customers on investment plans.** Openreach would be obliged to consult formally with all downstream customers on large-scale investments. There would be a new 'confidential' phase where customers could discuss ideas – for example, joint ventures with Openreach – without this information being disclosed to BT Group.
- **Greater independent financial control within an agreed budget.** BT Group would set a 'financial envelope' (a set spending capacity). Within this envelope, Openreach would have delegated authority to develop and manage its own strategic and annual operating plans. Openreach would also be able to make recommendations to the BT Group Board for increased spending.

- **Openreach employees.** Our strong preference was that people who work for Openreach would be employees of the new company, rather than employees of BT Group. This would prevent any real or perceived conflict of interest, and allow Openreach to develop its own distinct organisational culture. We recognised that these employee arrangements would present some issues, particularly in relation to pensions, but we said we believed these could be appropriately addressed.
- **Openreach assets.** Our starting position was that Openreach should own those assets it already controls, namely the underlying infrastructure (such as underground ducts and telegraph poles) associated with the current Openreach network. We recognised, however, that some asset transfers may trigger material costs, including in relation to pensions. In those circumstances, we said we were open to proposals that would mitigate such costs by means of agreements between Openreach and BT.
- **Increased resources and capability to support effective governance of Openreach.** Openreach would have greater resources, giving it the technical and commercial capability to develop strategy and manage its operational delivery without relying on BT Group.
- **Openreach to have its own brand, independent of BT.** Openreach would have its own brand, not affiliated with BT Group, to help embed the organisational culture of an independent company enabled by the other changes set out above.
- **Regulatory compliance ensured by the Openreach Board.** The new model would no longer require the Equivalence of Access Board (EAB), which is the current mechanism for ensuring compliance. Its responsibilities would instead become a duty of the Openreach Board, discharged by a sub-committee of non-executive members.

3.16 While BT's July Notification reflected some of these measures, as set out above, it fell short in several key respects.

BT's Notification to Ofcom on 10 March 2017

3.17 We received a large number of responses to our July consultation, and in November 2016 we announced that having reviewed these, we were proceeding with a formal notification to the European Commission for approval to impose a regulatory solution to increase Openreach's independence³. We explained as part of that announcement that while we continued to discuss with BT potential changes to its July Notification, BT had so far failed to offer proposals that would adequately address our concerns.

3.18 However, we noted that we remained open to further voluntary proposals from BT that addressed these outstanding concerns. Therefore, 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 (the "March Notification").

3.19 For the reasons we set out below, we consider that the measures contained in BT's March Notification sufficiently address our competition concerns and can be implemented more quickly than any formal regulatory imposed measures. As a

³ <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2016/update-on-plans-to-reform-openreach>

result, we consider that agreeing to them is in the best interests of citizens and consumers in the UK, instead of pursuing a mandated regulatory solution.

- 3.20 The March Notification consists of a package of documents comprising:
- 3.20.1 a Notification under section 89C of the Communications Act 2003,
 - 3.20.2 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. This includes a Commitment that BT plc and Openreach Limited will enter into an Agency and Services Agreement contract (see below) to deliver this; and
 - 3.20.3 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.
- 3.21 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, which has been discussed with Ofcom, does not form part of the formal notification to us as it provides for the internal contractual mechanism for implementation of the Commitments. However, it will be made publicly available.

Movement in BT’s position from the July Notification

- 3.22 BT’s March Notification confirms significant movement from BT’s July Notification. These movements are set out below.

Figure 3: Comparison of BT’s July 2017 and March 2017 Notifications

Issue	July 2016 voluntary notification	Current BT voluntary notification
Incorporation	<ul style="list-style-type: none"> • Openreach continues as a business unit of BT plc. • Openreach ‘Board’ is a sub-committee of the BT plc Board, with a majority of independent “directors”. • Openreach does not have its own corporate constitution (including articles of association), instead operating under the articles of BT plc. 	<ul style="list-style-type: none"> • Openreach Limited is incorporated as a wholly-owned subsidiary of BT plc. Openreach Limited operates as BT plc’s agent to run the Openreach line of business. • Formal Board of Directors, with a majority of independent Directors, who have a duty to treat customers equally under Openreach Limited’s articles of association.
Openreach CEO appointment and reporting	<ul style="list-style-type: none"> • Openreach CEO would be appointed by, and have a direct reporting line to, the BT Group CEO. 	<ul style="list-style-type: none"> • Openreach Board appoints the Openreach CEO, in consultation with BT, which holds a veto. Ofcom is notified prior to appointment. • Openreach CEO reports day-to-day to the Openreach Chair. Secondary reporting to the BT CEO is limited to ensuring best

Issue	July 2016 voluntary notification	Current BT voluntary notification
		practice governance (including legal obligations), with transparency to the Openreach Board and Ofcom.
Strategic and operating plans	<ul style="list-style-type: none"> • BT Group CEO and CFO review Openreach medium-term and annual operating plans before the Openreach Board. 	<ul style="list-style-type: none"> • BT Group CEO and CFO review Openreach's medium-term and annual operating at the same time as the Openreach Board.
People	<ul style="list-style-type: none"> • No transfer of employees to Openreach – all Openreach staff continue to be employed by BT plc. 	<ul style="list-style-type: none"> • TUPE transfer of 32,000 employees into Openreach Limited, subject to legislative provision to maintain the scope of the Crown Guarantee, BT Pension Scheme Trustee consent and employee consultation.
Trading i.e. customer relationships and services	<ul style="list-style-type: none"> • Trading to remain part of BT plc 	<ul style="list-style-type: none"> • Agency and Services Agreement provides contractually for Openreach Limited to control, operate and manage customer relationships and activities on behalf of BT plc.
Assets	<ul style="list-style-type: none"> • No transfer or contractual arrangement for assets. • Openreach line of business controls assets based on commitments in the current Undertakings. 	<ul style="list-style-type: none"> • Contractual arrangement whereby Openreach has control and management rights over assets required to deliver key products, delivered through the BT and Openreach Limited agency and services agreement.
Customer consultation	<ul style="list-style-type: none"> • Openreach can disclose confidential customer information to the BT Group CEO and CFO without consent. 	<ul style="list-style-type: none"> • Openreach cannot disclose confidential customer information to the BT Group CEO and CFO without consent.
Confidentiality and commercial policy	<ul style="list-style-type: none"> • Continued application of the long list of BT Group employees set out in the Undertakings who are given access to confidential information and influence over Openreach commercial policy. 	<ul style="list-style-type: none"> • BT Group employees prohibited from accessing confidential information and influencing commercial policy as a rule, with specific exemptions transparent to Ofcom.

Implementation of the new arrangements

3.23 The Commitments are conditional on four key elements:

- 3.23.1 the amendment of the Crown Guarantee, which currently covers the BT pension scheme, to continue pension protections for the employees of the newly incorporated Openreach Limited. This is a matter for Government;
- 3.23.2 approval from the BT Pension Scheme Trustees for Openreach Limited to become a participating employer in the BT pension scheme;
- 3.23.3 completion of the consultation processes under TUPE which are necessary for the transfer of employees; and

3.23.4 release of BT from the Undertakings, being replaced by the new commitments.

3.24 We address the last of these in further detail in Section 4 below.

BT's revised notification sufficiently addresses our competition concerns

3.25 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 SMP.

3.26 Overall, we consider that the new arrangements established by the March Notification provide Openreach with significantly 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. In particular, we consider that the March Notification addresses those areas in which the July Notification was deficient. Specifically:

- Openreach Limited is incorporated as a wholly-owned subsidiary of BT plc.
- Openreach Limited has an executive that is appointed by, and reports to, the majority independent Openreach Board except for in specific circumstances that are transparent.
- The direct involvement of the BT Group CEO and CFO in Openreach Limited's management is significantly restricted. For example, they cannot access confidential customer information during the confidential Openreach consultation process between Openreach and BT's competitors.
- 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 and the overall BT Group strategy.
- Openreach will consult with its customers on major future network investment decisions, including confidentially where this is appropriate.
- 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.
- 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.

3.27 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.

- 3.28 While such interaction does 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, there are a number of transparency requirements included in the model which should guard against this risk. These also feed into the wider monitoring framework and are set out in more detail in Section 6.
- 3.29 We have taken the view throughout this process that a voluntary settlement is likely to deliver benefits to consumers and businesses more quickly than imposing formal regulation. Concluding a voluntary settlement now also reduces the level of uncertainty and associated investment risk facing industry at a key point in the move to fibre delivery.
- 3.30 On the basis that the March Notification sufficiently meets our competition concerns and that reaching a voluntary solution now is in the best interests of consumers and businesses, we have decided not now to proceed with the imposition of a formal regulatory solution.

We have considered how the new arrangements will work for consumers and businesses in Northern Ireland

- 3.31 The model of functional separation between BT and Openreach that currently exists in Great Britain does not exist in Northern Ireland. Instead network telecoms services are managed by a single entity within BT, Northern Ireland Networks. As such, BT's March Notification does not apply in Northern Ireland.
- 3.32 We expect Northern Ireland to benefit in the same way as the rest of the UK from the new Openreach model, where investment decisions will reflect the needs of all UK consumers and businesses, and not just that of BT Group. This approach also preserves the significant degree of local independence that Northern Ireland Networks has from the rest of BT Group, ensuring that decisions continue to be made based on the interests of people and businesses in Northern Ireland.
- 3.33 In addition, BT's Commitments to Ofcom include several voluntary measures that mirror the broader changes introduced as part of BT's March Notification and strengthen the current arrangements in Northern Ireland overall. For example, these include a commitment to treat all customers equally and to phase out BT affiliated branding on clothing and vehicles.

Addressing our competition concerns will benefit consumers and businesses across the UK

- 3.34 As set out above, under the new arrangements established by BT's voluntary notification, Openreach will have significantly more independence. We expect Openreach to focus on the equal treatment of all its customers, not just the needs of BT. This will benefit UK consumers and businesses by fostering greater competition and enabling investment and innovation, which can in turn lead to lower prices, better quality, higher availability, and a greater choice of services.

Increased competition can lead to lower prices, better quality, and greater choice of services

- 3.35 We expect a more independent Openreach to foster greater competition at the retail level. This increased competition should lead to good consumer outcomes. For instance, competition can incentivise firms to cut production costs and price products

more attractively than rivals. It can also incentivise firms to produce better quality products or invest in new products that offer different functionality. Thus, increased competition can lead to lower prices, better quality, and greater choice of services for consumers and businesses.

- 3.36 For example, firms at the retail level may try to differentiate the services they offer to their retail customers by providing better quality of service than rival firms. This could lead to consumers receiving better customer service when they contact their provider to discuss problems with their broadband.
- 3.37 We expect a more independent Openreach to foster greater competition at the retail level, because it will take decisions on its network which are better suited to all its customers. This includes:
- 3.37.1 Access-based competition. Increasing Openreach's independence will lead to a more level playing field between BT's downstream divisions and other downstream providers who rely on Openreach's access services. A more independent Openreach can be expected to provide access services that are better tailored to other providers' needs. Those providers can then better serve their retail customers and compete more effectively with BT's downstream divisions.
- 3.37.2 Infrastructure-based competition. Increased competition at the retail level may also impact other vertically integrated firms that have their own networks. It can incentivise them to cut costs, improve quality, or invest in new products to allow their downstream divisions to compete more effectively at the retail level.
- 3.38 In addition, better opportunities for access-based competitors may increase infrastructure-based competition in future. If strong competitors emerge at the retail level, these firms could invest in their own networks in future.

Better investment and innovation outcomes will meet the needs of consumers and businesses

- 3.39 We expect a more independent Openreach to lead to better investment outcomes and more innovation. In particular, we expect Openreach to consult its wholesale customers more effectively and to offer better opportunities to work together with them to determine network investment. This can improve investment outcomes, for instance by supporting further roll-out of super-fast broadband networks. That would improve availability, enabling more consumers to experience the benefits of faster broadband.
- 3.40 Further, better coordination between Openreach and its wholesale customers can lead to the faster development and launch of new retail services. For example, this might include new services that meet the increasing needs of consumers and businesses to access data from their mobile phones outside of the home or office.
- 3.41 We expect a more independent Openreach to improve investment and innovation, because it will take investment decisions in the interests of all its customers and improve its consultation with its wholesale customers.
- 3.41.1 Through more effective consultation, Openreach will be better able to take account of the needs of all its customers. As a result, its investments would better reflect their needs, instead of preferentially considering the interests

of BT. This diminishes the risk of poor investment outcomes and should lead to downstream firms benefiting from a more relevant choice of access services.

- 3.41.2 Better consultation can also improve the business case for network upgrades. The customer bases of BT's downstream divisions and of other downstream providers may differ in terms of their demand profiles, forecast take-up of services, and willingness to pay. For example, aggregating demand forecasts for faster broadband across the customer bases of all wholesale providers could make the business case for investing in FTTP more attractive.
- 3.41.3 Increasing Openreach's independence may also spur new models of investment. This includes models that share risk across a broader base of customers and shorten payback periods. We envisage that a more independent Openreach would be a more attractive partner for potential co-investors. Providers should have greater confidence that they can share information with Openreach, without it being shared with BT's retail divisions. As a result, there would be better opportunities for Openreach to negotiate and contract with other downstream providers.

Communications services are increasingly important to consumers and businesses and will require significant investment

- 3.42 In our view, the positive impacts on competition, investment and innovation will be particularly important over the next decade. This reflects the growing importance of communications services and the likely need for significant network investment in the coming years.
- Communications services are increasingly important to society and the economy. Consumers use communications services for purposes ranging from ecommerce to internet banking and spend an increasing amount of time online. Further, the Office for National Statistics (ONS) estimates that in 2015 the value added by the UK communications industry was over £31.7 billion – or 0.8 per cent of the UK's Gross Value Added.⁴
 - We are likely facing a key cross-over moment in access network technologies in the short to medium term. Significant investments will be needed to move from the existing copper-based network to one which can better meet the growing demands for speed and quality.
- 3.43 Under the new arrangements, we expect Openreach to focus on the equal treatment of all its customers when the timing, design, and geography of upgrades to its network. A more independent Openreach will take such decisions in the interests of the wider communications sector and ultimately to the benefit of the UK's consumers and businesses.

⁴ See [UK Non-Financial Business Economy \(Annual Business Survey\)](#)

Section 4

Consultation on releasing the BT Undertakings

Ofcom's proposal to release BT from the Undertakings

- 4.1 As part of the BT March Notification, the implementation of the arrangements set out in the Commitments, Governance Protocol, and Agency and Services Agreement is conditional on the release of BT from the Undertakings by Ofcom.
- 4.2 Under section 154(7) of the Enterprise Act 2002, Ofcom must, as soon as reasonably practicable, consider any representations it receives in relation to releasing undertakings. Under section 162 of the Enterprise Act 2002, Ofcom has a duty to consider from time to time whether, by reason of any change of circumstances, an undertaking is no longer appropriate such that the party to it can be released from its obligations.
- 4.3 This section explains the reasons for our proposal to release BT from the Undertakings 30 days after receiving notice from BT that the other conditions in its March Notification have been satisfied.
- 4.4 A formal notice pursuant to section 154 of and Schedule 10 to the Enterprise Act 2002 setting out this proposal can be found at Annex 4.

Overview of the BT Undertakings

- 4.5 As noted above, in 2005, in lieu of a market investigation reference to the Competition Commission, BT gave the Undertakings to Ofcom under Part 4 of the Enterprise Act 2002.⁵ The Undertakings apply on a cross-market basis – i.e. the obligations imposed on BT apply to all products provided by Openreach (in contrast to SMP regulation applies on a market by market basis).⁶
- 4.6 As noted in section 3, the Undertakings are based on the following core obligations:
 - 4.6.1 **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
 - 4.6.2 **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

⁵ Undertakings given to Ofcom by BT pursuant to the Enterprise Act 2002, Section 11, https://www.ofcom.org.uk/_data/assets/pdf_file/0023/47075/consolidated_undertakings24.pdf. See e.g. Ofcom, Consultation on Undertakings in lieu of a reference under Part 4 of the Enterprise Act 2002, Annex L, Impacts on competition of the evolution of next generation networks.

⁶ Relevant documentation on the Strategic Review of Telecommunications and the Undertakings are available via Ofcom's website: <http://webarchive.nationalarchives.gov.uk/20160702162827/http://stakeholders.ofcom.org.uk/telecoms/policy/bt-undertakings/>

timescales, terms and conditions (including price and service levels) by means of the same systems and processes.

- 4.7 There are also a range of obligations in the Undertakings to support those core obligations. These include requirements relating to:
- operational separation between Openreach and the rest of BT, requiring certain employees to work specifically for Openreach;
 - the incentive remuneration of Openreach employees, which must solely be related to Openreach objectives;
 - separate financial reporting for Openreach;
 - the physical separation of the Openreach Headquarter Management Team from BT downstream divisions;
 - the progressive physical separation of computer systems;
 - restrictions on the sharing of confidential information outside Openreach; and
 - the establishment of an internal body, the Equality Access Board (EAB), to monitor compliance with the Undertakings.
- 4.8 The Undertakings also contain provisions regarding strategic decision-making and consultation, specifically in relation to BT's original next-generation core network investment plans.⁷ However, these provisions apply specifically to those major investments envisaged in 2005, namely upgrades of its core and backhaul networks to use converged technologies to carry voice, video and data services, then referred to as the 21st Century Network (or 21CN)⁸, which was not ultimately developed by BT.
- 4.9 Over time, the Undertakings have been subject to a number of variations and exemptions designed to ensure that the obligations kept pace with technological development or that specific events could take place. A good example is the variation agreed with BT in June 2009 to allow Openreach to control and operate electronic equipment necessary to provide super-fast broadband services using Fibre-to-the-Cabinet (FTTC) technology.⁹ Prior to the FTTC Variation, the Undertakings did not permit Openreach to control and operate such equipment.

Proposal to release the BT Undertakings

- 4.10 We have considered whether to release the Undertakings in light of the arrangements set out in BT's March Notification. For the reasons set out below we propose that BT should be released from the Undertakings.

⁷ Core networks are the 'backbone' of the wider network, consisting of very long, high capacity connections between the operators' backhaul networks and to other networks.

⁸ See e.g. Ofcom, Consultation on Undertakings in lieu of a reference under Part 4 of the Enterprise Act 2002, Annex L, Impacts on competition of the evolution of next generation networks.

⁹

<http://webarchive.nationalarchives.gov.uk/20160702162827/http://stakeholders.ofcom.org.uk/consultations/fttc/statement/>

- 4.11 In Annex 5 we have set out a detailed schedule which sets out which provisions of the Undertakings we consider are replicated by the Commitments, which are can be reflected by SMP conditions, and which provisions are now obsolete or no longer needed.

Our competition concerns have evolved and are now addressed by BT's notification

- 4.12 The Undertakings contain a detailed set of rules designed to meet the competition concerns identified by Ofcom in the 2005 Strategic Review of Telecommunications. That review (known as the TSR) concluded that in fixed telecoms there were a number of "enduring economic bottlenecks" in network assets - demonstrated by case studies of problematic behaviour on the part of BT - and that in order for competition to be effective, BT needed to make access available to its network on the same terms as it made it available to itself.¹⁰ Ofcom's view was that there were reasonable grounds to suspect that competition was being restricted in the markets for the supply of wholesale 'access' and 'backhaul' network services in the telecommunications sector in the UK and in the directly related downstream retail markets.
- 4.13 Ten years later in the DCR we are concerned that the model of functional separation established by the Undertakings fails to remove sufficiently BT's ability to discriminate against competitors. As set out in Section 3, our view is that the arrangements that BT has voluntarily notified under section 89C of the Communications Act 2003 are sufficient to address our competition concerns.
- 4.14 In particular, Openreach Limited will be incorporated as a legally separate company, with a majority independent Board of directors charged with responsibility for running Openreach in the interests of all of its customers. The Openreach Board will be responsible for setting the strategy for Openreach, within a framework of financial control by BT, and strict governance procedures and confidentiality requirements will be in place to ensure greater independence for Openreach Limited. Moreover, the Agency and Services Agreement will prescribe the basis upon which Openreach Limited controls the assets and conducts trading on behalf of the Openreach business.
- 4.15 As set out in Annex 5, the Commitments offered by BT, supported by the Governance Protocol, replicate many of the obligations of the Undertakings that continue to be relevant to address our competition concerns.

SMP regulation addresses our concerns arising from BT's market power on a market-by-market basis

- 4.16 Sitting alongside the Undertakings, BT is also currently subject to obligations imposed by way of SMP conditions set by Ofcom in market reviews conducted under Communications Act 2003 powers. These powers, which implement the European Common Regulatory Framework for electronic communications oblige Ofcom to undertake periodic reviews of markets, to assess whether any operator holds SMP and then to impose appropriate *ex ante* remedies. Whereas the Undertakings entered into force at an early stage of this regulatory framework, Ofcom has now conducted numerous market reviews in various markets in which Openreach is the

¹⁰ During the Telecoms Strategic Review, Ofcom referred to enduring economic bottlenecks as "*not just parts of the network where BT has significant market power (SMP), but those areas where effective, infra-structure based competition is unlikely to emerge in the medium term.*" §1.17 Ofcom's Phase 2 consultation document.

division of BT supplying the relevant products. Where we have identified BT has SMP we have imposed appropriate regulatory conditions to ensure network access for third parties consistent with our statutory obligations.

- 4.17 The core requirement of the Undertakings to apply EOI, for example, is now imposed on BT by way of SMP regulation wherever we have determined that this is an appropriate remedy to address BT's wholesale market power. We do not consider it is necessary to duplicate these requirements through the Undertakings.
- 4.18 As markets and products evolve, SMP conditions will remain the principal vehicle by which appropriate regulatory conditions will be imposed on BT to address its market power.

Many provisions of the Undertakings are now obsolete or reflect transitional obligations

- 4.19 The Undertakings imposed the obligation of functional separation on BT for the first time. As such, there are many provisions that contain specific transitional obligations (e.g. milestones for the separation of systems) that no longer serve an ongoing function.
- 4.20 Moreover, certain provisions relate to technologies that are no longer relevant or which did not emerge in the form anticipated in 2005. For example, there were a number of provisions set out in Section 11 of the Undertakings which related to the possible development and implementation of BT's 21CN NGN. As noted above, BT subsequently decided not to proceed with the roll-out of the 21CN. In that regard, these provisions are no longer required and, to the extent that we have concerns regarding new products or technologies, the market review framework provides us with the necessary powers to impose appropriate regulatory requirements on BT.

Voluntary nature of BT's March Notification

- 4.21 A difference between the Undertakings and BT's March Notification is that the BT Undertakings are legally binding commitments and, if BT fails to comply with them, Ofcom can apply to the High Court for an injunction or other appropriate relief or remedy.¹¹ By contrast the Commitments BT has given as part of its notification under section 89C are voluntary.
- 4.22 However, we do not consider that this alters our view that we should release the BT Undertakings. As discussed further in Section 6, there are a number of mechanisms built into the arrangements being put in place under the BT March Notification which provide for Ofcom to closely monitor compliance by BT and Openreach with the arrangements so that Ofcom could step in as necessary. The Openreach Board will establish an Openreach Board Audit, Risk and Compliance Committee (OBARCC) which will have responsibility for monitoring compliance by Openreach Limited with the arrangements. BT will have its own compliance body. The arrangements provide for regular reporting to Ofcom, and we retain the ability to request information from BT and Openreach Limited in accordance with the Commitments.
- 4.23 Ofcom has enforcement powers where BT is in breach of SMP regulation,¹² and a statutory dispute resolution function in the case of disputes relating to the provision of

¹¹ Section 167(6) of the Enterprise Act 2002

¹² At section 94 *et seq* Communications Act 2003

network access.¹³ As discussed further in Section 7, ultimately, in the event of repeated or serious breaches of compliance, or if it becomes clear that the model is not working, we will need to reconsider our position on formal interventions to address our competition concerns.

Timing of proposed release

- 4.24 We have considered the timing of our proposed release of BT from the Undertakings, having regard to the conditional nature of BT's March 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 its March 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 BT's March Notification are not satisfied in the longer term, communications providers would be deprived of important protections that the Undertakings provide.
- 4.25 Our proposal is therefore to release BT from the Undertakings 30 days after receiving notice from BT that the conditions in paragraphs 3(a)-(c) of BT's March 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 its Notification. Retaining the Undertakings pending the satisfaction of the conditions in BT's March Notification will ensure that current obligations are maintained up until the point that the arrangements in that notification are fully implemented.

Consultation question:

Do you agree with our proposal to release BT from the Undertakings 30 days after receiving notice from BT that the conditions in paragraphs 3(a)-(c) of its March Notification are satisfied?

¹³ At ss185-191 Communications Act 2003.

Section 5

Review of existing SMP conditions in light of BT's Notification

- 5.1 Pursuant to s.89C(4) of the Communications Act 2003, where Ofcom receive a notification under s.89C they 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.
- 5.2 We have previously determined that BT has SMP in the following relevant services markets:
- In the Business Connectivity Market Review 2016-2019¹⁴
 - Contemporary interface symmetric broadband origination (CISBO) services¹⁵ in the London Periphery and the Rest of the UK (excluding the Central London Area and Hull Area), at all bandwidths
 - Low bandwidth traditional interface symmetric broadband origination (TISBO) in the UK, excluding the Hull Area, at bandwidths up to and including 8Mbit/s
 - In the Fixed access market review 2014-2017¹⁶
 - Supply of copper loop-based and fibre-based wholesale local access (WLA) at a fixed location in the UK, excluding the Hull Area
 - Wholesale fixed analogue exchange lines in the UK, excluding the Hull Area¹⁷
 - Wholesale ISDN30 exchange line services in the UK, excluding the Hull Area¹⁸
 - Wholesale ISDN2 exchange line services in the UK, excluding the Hull Area¹⁹
 - In the Wholesale broadband access markets review 2014-2017²⁰
 - Wholesale broadband access (WBA) services in Market A²¹

¹⁴ <https://www.ofcom.org.uk/consultations-and-statements/category-1/business-connectivity-market-review-2015>

¹⁵ This includes Ethernet and WDM services

¹⁶ <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/narrowband-broadband-fixed/fixed-access-market-reviews-2014/statement>

¹⁷ Note that this market is currently being reviewed as part of our Narrowband Market Review 2017, see: <https://www.ofcom.org.uk/consultations-and-statements/category-1/narrowband-market-review>

¹⁸ Note that this market is currently being reviewed as part of our Narrowband Market Review 2017, see above

¹⁹ Note that this market is currently being reviewed as part of our Narrowband Market Review 2017, see above

²⁰ <https://www.ofcom.org.uk/consultations-and-statements/category-1/review-wba-markets>

²¹ Market A comprises exchange areas in the UK (excluding the Hull Area) where there were no more than two POs present or forecast to be present

- In the Narrowband Market Review 2013-2016²²
 - Wholesale call origination on a fixed narrowband network in the UK outside the Hull Area²³
 - Wholesale call termination services which are provided by BT to another communications provider for the termination of calls to UK geographic numbers in the area served by BT²⁴

5.3 At the time that we conducted reviews of each of the above 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.

5.4 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 latest notification, relate primarily to the degree of independence in Openreach's strategic decision-making. The Commitments included in the March Notification are (like the Undertakings before them) designed to operate alongside Ofcom's regulation of BT's SMP in individual product markets.

5.5 We have an ongoing programme of market reviews. We consider the most appropriate and proportionate approach in this regard is to consider the effect, if any, of the new arrangements in the March Notification as part of those ongoing reviews. The first of these market reviews will be the Wholesale Local Access and Wholesale Broadband Access market reviews, being consulted upon shortly.

²² <https://www.ofcom.org.uk/consultations-and-statements/category-2/nmr-13>

²³ Note that this market is currently being reviewed as part of our Narrowband Market Review 2017, see above

²⁴ Note that this market is currently being reviewed as part of our Narrowband Market Review 2017, see above

Section 6

Monitoring compliance with BT's Notification

- 6.1 Effective and robust monitoring will be critical to ensure that BT and Openreach Limited comply with the arrangements set out in BT's March Notification and that Openreach acts more independently in the interests of all customers
- 6.2 Ofcom will take a detailed and pro-active approach to monitoring the compliance by BT and Openreach with the Commitments and Governance Protocol. This will ensure BT and Openreach remain focused on delivering the benefits of the new model. It will also allow us to ensure we continue to be satisfied that the model is addressing our competition concerns and benefiting the wider market. Given the importance of this task to the overall model, we expect monitoring of compliance to be undertaken by a new Openreach Monitoring Unit.
- 6.3 The new model strikes a balance between greater independence for Openreach while maintaining appropriate corporate governance within the BT Group, consistent with its position as a public listed company. The Commitments set out clearly what Openreach's Board and Executive will have responsibility for, including strategy and performance. It also permits necessary interaction between Openreach and BT Group to meet the latter's legal and regulatory duties.
- 6.4 BT's commitments also include additional reporting and transparency requirements to enable effective and active monitoring of the new model. Such transparency and monitoring is fundamental to ensure that necessary interactions between Openreach and BT Group cannot be used as an avenue for inappropriate influence from BT Group. In addition to direct Ofcom monitoring, both Openreach and BT Group will also have compliance bodies for this purpose.
- 6.5 We will adopt a three-tier system for monitoring the new model, covering implementation by BT, compliance with the new formal governance arrangements, and considering how the new model supports good outcome for communications providers and consumers.
- 6.6 We will produce a series of annual reports – six monthly in the first year - detailing our monitoring and reporting work. These reports will assess BT's and Openreach's compliance with the Commitments and the Governance Protocol, including any concerns arising from any material failures by BT or Openreach to comply with the obligations under the Commitments. As displayed in Figure 4 below, this will include an assessment of the experience of Openreach customers when requesting new products and services from Openreach, for example through the new customer consultation process, and the overall outcomes associated with Openreach decisions.

Figure 4: Areas of monitoring

Monitoring area	Objective	Key metrics/methods
1. Implementation	Ensure all aspects of new arrangement are timely implemented	<ul style="list-style-type: none">• Notifications from BT on completion of milestones

Monitoring area	Objective	Key metrics/methods
2. Governance arrangements	Ensure BT and Openreach comply with new governance arrangements	<ul style="list-style-type: none"> • Interactions between CEOs • Duties of the Openreach Board, Executive and CEO • Processes to draft, review and approve annual plans AOP/MTP • Customers' engagement processes • Board appointments • Openreach financial reporting
3. Independence and equal customers' treatment	Ensure the new model delivers against broader policy objectives: Openreach acts independently and treats customers equally	<ul style="list-style-type: none"> • Number of consultations with customers and stages reached (confidential, public, committed); • New products and services proposed; • New investment ideas and / or commercial models for investment; • Number of approved and rejected proposals and relative rationale; • Final agreed AOP / MTP and BT and Openreach financial reporting including investment levels, CAPEX and OPEX; • Openreach customers' views

6.7 In the remainder of this section we describe in more detail:

6.7.1 The transparency obligations imposed by the Commitments on BT and Openreach;

6.7.2 the three elements Ofcom will monitor (implementation; compliance; and independence and equal treatment); and

6.7.3 How Ofcom might respond to any concerns identified in relation to BT's and/or Openreach's failure to comply with the obligations under the Commitments and the Governance Protocol.

6.8 Section 7 discusses how we will consider the wider communication provider, consumer and business outcomes associated with this model and our wider regulatory strategy. It also sets out the actions we will consider taking in the event that the new model appears to be failing to achieve its intended outcomes.

BT and Openreach transparency obligations

6.9 We have agreed a series of transparency obligations to provide suitable transparency in interactions between BT and Openreach Limited. These will provide us with clear insight into Openreach Limited's and BT's conduct and allow us to monitor closely their interactions. This transparency is aided by the corporate boundaries between BT and Openreach Limited: interactions that are more formalised and cross these boundaries (e.g. planning, performance reporting, or reporting for legal, fiduciary or regulatory obligations) are easier to monitor than interactions within a single organisation.

6.10 To enable reporting and monitoring, both companies will have their own internal compliance functions, i.e. the Openreach Board Audit, Risk and Compliance

Committee (OBARCC) and the BT Compliance Body. These will be responsible for collecting information which can be made available to Ofcom, such as meeting minutes, interactions between the different entities, review alleged breaches or complaints relating to the commitments.

Role of the OBARCC

- 6.11 The March Notification requires the OBARCC to be established as a committee of the Openreach Board with responsibility for reviewing compliance by Openreach with the Commitments and the Governance Protocol.²⁵ The OBARCC will consist of the three independent non-executive directors and the Openreach Chairman.²⁶
- 6.12 The main role of the OBARCC will be to review compliance by Openreach Limited with the Commitments and the Governance Protocol, including reviewing any complaints or alleged breaches.²⁷ Openreach Limited will make sure the OBARCC has the appropriate resources to conduct its reviews.
- 6.13 Complaints to the OBARCC can be raised by BT and Openreach employees as well as Openreach's customers and Ofcom. Openreach Limited is also required to notify the OBARCC if it has identified a breach. The OBARCC will determine whether a breach has occurred and whether it is trivial or not trivial. It will inform Ofcom of any such breach and suggest remedial action to the Openreach Board.
- 6.14 The OBARCC will report regularly to the Openreach Board on compliance by Openreach with the Commitments and the Governance Protocol. In addition, the OBARCC will send the minutes of each of its meetings to Ofcom, making sure they are a fair, true and accurate summary of each meeting. The OBARCC will provide Ofcom with a detailed annual report of its findings about compliance, breach investigations and its handlings of customer complaints and representations. A summary of this report will also be published by the OBARCC annually. BT envisages that the OBARCC will replace the EAB in respect of its current duties to monitor regulatory obligations that relate to Openreach. As the new model aims to achieve greater transparency on the interactions between the newly incorporated Openreach Limited and BT Group, the Governance Protocol includes two new additional requirements which we consider important to monitor compliance:
- OBARCC will have timely access to information held by BT that it may require to fulfil its role, regardless of where that information is held within BT. This will allow OBARCC to run compliance checks that relate to BT's conduct with respect to Openreach. If, for instance, there is a concern that BT senior managers are not observing the independence provisions and are seeking to influence Openreach's conduct and policy, OBARCC can access the relevant material and correspondence to investigate the alleged breach; and
 - OBARCC will be responsible for implementing an information retention policy to keep information relating to its activities under the Commitments for a period of at least six years. This will make sure that this information is available to OBARCC if a related breach arises, and that it will also be available to Ofcom in order to assist our assessment of compliance with the Commitments.

²⁵ Paragraph 9.2 of the Commitments.

²⁶ Part A, paragraph 7.1 of the Governance Protocol

²⁷ Part A, Section 7 of the Governance Protocol, in particular paragraphs 7.1-7.12

The role of the BT Compliance Body

- 6.15 The BT Compliance Body is responsible for monitoring compliance of BT with the Commitments and Governance Protocol.²⁸ The Governance Protocol sets out the duties of the BT Compliance Body.²⁹
- 6.16 Ofcom will receive the minutes of each meeting of the BT Compliance Body. BT is required to inform the BT Compliance Body if it identifies a breach of the Commitments or the Governance Protocol, and the BT Compliance Body is then required to inform Ofcom of any identified breach and/or OBARCC if the breach relates to Openreach. The details of these breaches will also be included in the Openreach compliance report compiled by OBARCC.
- 6.17 Although BT's Notification does not apply in Northern Ireland, Northern Ireland Networks will be subject to compliance monitoring by BT to ensure it operates in a way that is consistent with key elements of the Commitments. This will include the publication of an annual compliance report.

Ofcom's ability to request relevant information

- 6.18 In addition to these transparency mechanisms, Ofcom will be able to verify BT's and Openreach's compliance with the Commitments. To do so, we will have access to all relevant information in a timely manner. The Commitments require that, should Ofcom make a proportionate request for information about Openreach or BT which is reasonably necessary for Ofcom to monitor the compliance, BT shall provide such information to Ofcom within a reasonable period having regard to the seriousness and urgency of the request being received.³⁰ Such information may include, documents, minutes of any discussions between the respective CEOs of the separated entities and minutes of Board or Committee meetings. Ofcom also expects to be able to ask individuals to provide relevant information.

Our monitoring will focus on three areas: implementation, compliance with governance, and equal treatment of customers

- 6.19 Ofcom's monitoring will focus on the following three key areas:
- The implementation of the legal separation between BT and Openreach;
 - BT's and Openreach's compliance with the formal governance requirements under the Governance Protocol; and
 - BT's and Openreach compliance with the substance of these, including securing more independence of decision making within the bounds of the governance protocol, equal treatment of customers; and responsiveness to customers.

²⁸ Paragraph 9.4 of the Commitments.

²⁹ Part A, Section 7 of the Governance Protocol, in particular paragraphs 7.13-7.15.

³⁰ See Commitment 20

Monitoring Area 1: Implementation of the notification

- 6.20 BT has committed to keep Ofcom informed of its progress towards implementing legal separation and will notify us when each of the following steps have been implemented³¹:
- Incorporation of Openreach Limited;
 - Appointment of an independent Openreach Limited board of directors, the majority whom will be non-executive directors;
 - BT's management and operation of Openreach in accordance with the Commitments and the Governance Protocol;
 - Openreach Limited's adoption of the Commitments and Governance Protocol; and
 - BT's and Openreach Limited's adoption of an Agency and Services Agreement.
- 6.21 We will liaise regularly with BT throughout the implementation phase so that we understand in detail BT's progress to completion of the above steps. Progress on implementation will also be part of our planned periodic publication on the new Openreach model.
- 6.22 BT must also complete the key elements listed at paragraph 3.22.³² These conditions are required for the Commitments to take effect and we will monitor BT's progress in delivering these closely.

Monitoring Area 2: Compliance with formal governance requirements

- 6.23 The Commitments and Governance Protocol impose a number of formal governance obligations on BT and Openreach, including:
- Setting rules for the interaction between the respective CEOs of Openreach and BT Group;
 - Establishing the duties of the Openreach Board, Executive and CEO, including setting up a specific process to draft, review and approve the Annual Operating Plan (AOP) and Medium Term Plan (MTP),³³
 - Setting up the process for Openreach and its Executive to engage with Openreach's customers, consult with them according to the three-phased consultation process and evaluate their proposals for new products and technologies or enhancements of existing products;³⁴

³¹ Paragraph 2.6 of the Commitments.

³² The Commitments are conditional on four key elements: the amendment of the Crown Guarantee, approval from the BT Pension Scheme Trustees for Openreach Limited to become a participating employer in the BT pension scheme, completion of the consultation processes under TUPE which are necessary for the transfer of employees, release of BT from the Undertakings

³³ The duties of the Openreach Board are set out in Part A, Section 2 of the Governance Protocol, the duties of the Openreach Executive are set out in Part B, Section 1 of the Governance Protocol, and the Openreach AOP and MTP are set out in Part B, Section 2 of the Governance Protocol.

³⁴ Part B, Section 4 and Part D of the Governance Protocol.

- An obligation on BT to notify Ofcom of the individuals it intends to appoint to the Openreach Board. This notification will provide details showing that these individuals meet the independence criteria. Most importantly, BT will need to notify us if they plan to veto the appointment of the Openreach CEO by the Openreach Board, or remove any of Openreach Limited's directors;³⁵
- A requirement for BT to reconcile Openreach's revenue, operating cost and return or profit before tax (and other such items as may be agreed between BT and Ofcom) with information about Openreach shown in BT's annual report and accounts.³⁶

6.24 We will monitor BT's and Openreach's compliance with these formal governance requirements on an ongoing basis. We will want to satisfy ourselves that the obligations are complied with in full. For example, Ofcom will want to make sure that all communications between the two CEOs are properly and comprehensively minuted in a timely fashion. If we observed a number of persistent breaches in a specific area, that may indicate that there is a problem with the relevant process itself and that a change to that process may be required in order to ensure a satisfactory outcome.

6.25 We will be working particularly closely with the OBARCC and the BT Compliance Body in monitoring BT's and Openreach's compliance with the formal governance obligations. We will also monitor that Openreach's financial information, including investments, are reported in a transparent and comprehensive manner.

Monitoring Area 3: Ensuring that Openreach is more independent and treats its customers equally

6.26 The key purpose of our monitoring work is to ensure that the new model delivers against the broader policy objectives set out in the DCR. 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.³⁷

6.27 Central to the new arrangements is that Openreach Limited should act independently of BT and in the interest of all its customers. Some individual elements of Openreach's strategy may have a significant impact on its customers.

6.28 We will use a variety of qualitative and quantitative methods for this monitoring work, which may include customer interviews, targeted information gathering, case studies and assessing complaints.

6.29 Equal treatment of its customers should be at the heart of what Openreach does. Factors that may be relevant to such monitoring include:

- The number of consultations between Openreach and its customers and the stages reached (confidential, public, committed);

³⁵ Part A, Section 3 of the Governance Protocol.

³⁶ Paragraphs 20.3-20.8 of the Commitments.

³⁷ Sections 5 and 6 of the Commitments

- The content of these consultations, including the new products and services proposed, the enhancements of existing products, new investment ideas and / or commercial models for investment;
 - The number of approved and rejected proposals and the relative rationale for approval / rejection;
 - Final agreed AOP / MTP and BT and Openreach financial reporting including investment levels, CAPEX and OPEX;
 - Openreach customers' views;
 - Other information relating to investments, such as the geographic roll-out.
- 6.30 In addition, BT has agreed to notify us of certain important decisions, and in some cases the rationale for the decisions that relate to its products and investments. These decisions include, for example:
- Retaining any unregulated product as a part of Openreach business;
 - A finding that BT will not make an investment because this would be to the detriment of BT as a whole.
- 6.31 This information will assist us in identifying potential issues in the model or aspects of the new processes that may not result effective in addressing our concerns.
- 6.32 Our starting point on unregulated products is that when a certain product or group of products become unregulated, they should move out of Openreach. However, if for practicability reasons the products remain within Openreach, they must be subject to the equal treatment provisions in the Commitments, and we will be made aware of that.
- 6.33 Similarly, we want Openreach to consider investment decisions based on its own business case and not that of BT Group. While we recognise that it is appropriate for BT as a group to decide not to invest based on a group business perspective, we will be told when it vetoes decisions (for this reason) that Openreach would otherwise have taken to invest.
- 6.34 We expect monitoring of compliance to be undertaken by a new Openreach Monitoring Unit. We also plan to produce a series of annual reports – six monthly in the first year - detailing our monitoring work. These reports will assess BT's and Openreach's compliance with the Commitments and the Governance Protocol, including any concerns arising from any material failures by BT or Openreach to comply with the obligations under the Commitments.

Potential Ofcom response to compliance concerns

- 6.35 Ofcom's response to any potential compliance failures will depend on the nature, gravity and frequency of the breach in question. The range of responses include:
- Seeking to resolve the concern through dialogue with Openreach and/or BT;
 - Raising our concerns in writing directly with the BT and/or Openreach Board;

- Reporting on the compliance concern in the annual compliance report, which may include recommendations for rectifying the compliance concern;
- Proposing changes to the Commitments and/or the Governance Protocol to provide for more robust solutions.

6.36 Ultimately, repeated or serious breaches of compliance could result in Ofcom notifying BT that the new arrangements under the Commitments are no longer addressing our competition concerns such that we need to move to considering the imposition of a regulatory solution, which could include structural separation.

Section 7

Assessing the benefits and effectiveness of the model

Industry customers: considering Openreach behaviours and its responsiveness to customers

- 7.1 The ultimate aim of any changes to the structure of Openreach is better outcomes for consumers and businesses. To achieve this, an important requirement for the new model is that it delivers positive outcomes for Openreach's customers, who rely on access to the Openreach network to compete in downstream markets.
- 7.2 As set out in Section 6, 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. In practice, there are a number of behaviours and outcomes we think important in assessing the overall model. Some examples include:
 - 7.2.1 Openreach's performance in terms of customer requests for wholesale supply, delivered through the Statement of Requirements process
 - 7.2.2 the degree and nature of Openreach-led engagement with industry on major, strategic network investments; and
 - 7.2.3 Openreach's responsiveness to different commercial models of investment proposed by its customers, including co-investment and risk sharing arrangements.
- 7.3 An important source of information on industry outcomes will be evidence from customers on their experience of engaging with Openreach, and our monitoring of its greater independence and equal treatment of customers.

Consumer outcomes: considering Openreach performance in the context of our wider regulatory interventions

- 7.4 BT's notification is designed to be an effective and long-term solution to address our competition concerns. We will have an extensive monitoring and compliance regime to assess whether Openreach is meeting the Commitments and measure how effective they are. We are also clear that the success of the notification will depend on the commitment of BT Group and Openreach to this model, and the behaviours they demonstrate. Given the nature of the notification, it will be vital that we keep the models performance and success under close review and scrutiny, stepping in if required, while also allowing it to be embedded.
- 7.5 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:
 - 7.5.1 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;

- 7.5.2 continued regulatory action to promote competitive investment (e.g. our plan to open up 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
- 7.5.3 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).
- 7.6 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.
- 7.7 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.

An annual report on consumer outcomes

- 7.8 To ensure that consumers and businesses see the benefits of all of our and others' actions, including these new Openreach arrangements, we will continue to report on a wide range of outcomes for consumers and businesses. This will sit alongside and draw on the detailed Openreach monitoring as well as other regular Ofcom publications. The report will cover themes such as:
- service quality received by people and businesses, including broadband fault rates, installation and repair times;
 - broadband speeds and reliability;
 - the price of different telecoms packages;
 - complaints made by consumers against telecoms providers;
 - complaints made by communications providers against Openreach;
 - customer satisfaction;
 - levels of investment in the network; and
 - changes in the availability of broadband networks, including advanced technologies such as fibre availability.
- 7.9 Within this wider report, we will provide a high-level view on how BT's Commitments are contributing to these wider outcomes. This will combine with our ongoing work and annual reporting on monitoring the Commitments. It will also summarise outcomes experienced by communications providers. Taken together, the Commitments monitoring, wholesale outcomes and consumer outcomes will provide an assessment of the success of the new model in the wider regulatory context. This

will be supplemented by and draw upon our regular updates in our Connected Nations report, annual Quality of Service report and other Ofcom research.

Assessing the model's success in the wider context

- 7.10 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. Signals that the model is not delivering to its potential could include repeated breaches on compliance, a failure for the expected behaviours to be embedded in Openreach and BT, or challenges in operating the model effectively.
- 7.11 Ofcom's response to any potential compliance failures with BT's voluntary arrangements will depend on the nature, gravity and frequency of the breach in question. The range of responses include seeking to resolve concern through dialogue with BT, provide recommendations in our periodic reports as to how the separated entities can improve their compliance, raising our concerns in writing to BT and propose changes to the Commitments.
- 7.12 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.
- 7.13 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 as above, or identify alternative actions required to improve consumer and business outcomes.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom would like to receive views and comments on the issues raised in this document, **by 5pm on 14 April 2017**.
- A1.2 We strongly prefer to receive responses via the online form at <https://www.ofcom.org.uk/consultations-and-statements/category-3/delivering-a-more-independent-openreach>. We also provide a cover sheet (<https://www.ofcom.org.uk/consultations-and-statements/consultation-response-coversheet>) for responses sent by email or post; please fill this in, as it helps us to maintain your confidentiality, and speeds up our work. You do not need to do this if you respond using the online form.
- A1.3 If your response is a large file, or has supporting charts, tables or other data, please email it to Openreach2017@ofcom.org.uk, as an attachment in Microsoft Word format, together with the cover sheet (<https://www.ofcom.org.uk/consultations-and-statements/consultation-response-coversheet>). This email address is for this consultation only.
- A1.4 Responses may alternatively be posted to the address below, marked with the title of the consultation.
- Fergal Farragher
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- A1.5 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt if your response is submitted via the online web form, but not otherwise.
- A1.6 You do not have to answer all the questions in the consultation if you do not have a view; a short response on just one point is fine. We also welcome joint responses.
- A1.7 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The questions are listed at Annex X. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.

Confidentiality

- A1.8 Consultations are more effective if we publish the responses before the consultation period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents' views, we usually publish all responses on our website, www.ofcom.org.uk, as soon as we receive them.

- A1.9 If you think your response should be kept confidential, please specify which part(s) this applies to, and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.
- A1.10 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.11 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further at <http://www.ofcom.org.uk/terms-of-use/>

Next steps

- A1.12 Following this consultation period, Ofcom plans to publish a statement in May 2017.
- A1.13 If you wish, you can register to receive mail updates alerting you to new Ofcom publications; for more details please see <http://www.ofcom.org.uk/email-updates/>

Ofcom's consultation processes

- A1.14 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 2.
- A1.15 If you have any comments or suggestions on how we manage our consultations, please call our consultation helpdesk on 020 7981 3003 or email us at consult@ofcom.org.uk. We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.

If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact Steve Gettings, Ofcom's consultation champion:

Steve Gettings
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Email steve.gettings@ofcom.org.uk

Annex 2

Ofcom's consultation principles

Ofcom has seven principles that it follows for every public written consultation:

Before the consultation

- A2.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

During the consultation

- A2.2 We will be clear about whom we are consulting, why, on what questions and for how long.
- A2.3 We will make the consultation document as short and simple as possible, with a summary of no more than two pages. We will try to make it as easy as possible for people to give us a written response. If the consultation is complicated, we may provide a short Plain English / Cymraeg Clir guide, to help smaller organisations or individuals who would not otherwise be able to spare the time to share their views.
- A2.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.
- A2.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.
- A2.6 If we are not able to follow any of these seven principles, we will explain why.

After the consultation

- A2.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish all the responses on our website as soon as we receive them. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 3

Consultation question

- A3.1 This document explains the reasons for our proposal to release BT from the Undertakings 30 days after receiving notice from BT that the other conditions in its March Notification have been satisfied.

Do you agree with our proposal to release BT from the Undertakings 30 days after receiving notice from BT that the conditions in paragraphs 3(a)-(c) of its March Notification are satisfied?

Annex 4

Notice of proposed release of Undertakings pursuant to section 154 of and Schedule 10 to the Enterprise Act 2002

NOTIFICATION OF PROPOSED RELEASE OF THE UNDERTAKINGS OFFERED BY BRITISH TELECOMMUNICATIONS PLC AND ACCEPTED BY OFCOM UNDER SECTION 154 OF THE ENTERPRISE ACT 2002

Background

- A4.1 In 2004/05 Ofcom conducted a Strategic Review of Telecommunications. That review concluded that in fixed telecoms there were a number of enduring economic bottlenecks in network assets and that in order for competition to be effective, BT needed to make access available to its network on the same terms as it made it available to itself. Ofcom's view was that there were reasonable grounds to suspect that competition was being restricted in the markets for the supply of wholesale access and backhaul network services in the telecommunications sector in the UK and in the directly related downstream retail markets.
- A4.2 BT offered certain undertakings to Ofcom pursuant to Part 4 of the Enterprise Act 2002 (the "2002 Act") (the "Undertakings") and Ofcom accepted those Undertakings in lieu of making a reference to the Competition Commission. The Undertakings took effect on 22 September 2005. Pursuant to the Undertakings, BT established Openreach as a functionally separate line of business within BT.
- A4.3 In February 2016, Ofcom published its initial conclusions from its Strategic Review of Digital Communications (the "Strategic Review"). The Strategic Review set out Ofcom's approach to regulating communications markets for the next decade.
- A4.4 In the Strategic Review Ofcom identified a competition concern that the model of functional separation established by the Undertakings fails to remove sufficiently BT's ability to discriminate against competitors that rely on access to its network. A key proposal in the Strategic Review therefore concerned measures to reform the governance of Openreach and to strengthen its independence.
- A4.5 On 18 July 2016 BT made a notification to Ofcom pursuant to section 89C of the Communications Act 2003 (the "2003 Act") of its intention to implement changes to the governance structure of Openreach (the "July 2016 Notification").
- A4.6 On 26 July 2016 Ofcom published for comment a proposal to strengthen Openreach's strategic and operational independence. That document set out Ofcom's view that the July 2016 Notification did not fully address its competition concerns. Ofcom consulted on a preferred model of separation for Openreach.
- A4.7 On 29 November 2016 Ofcom announced that it was proceeding with a formal notification under the 2003 Act to require the legal separation of Openreach from BT.

- A4.8 On 10 March 2017 BT notified Ofcom, pursuant to Section 89C(3)(b) of the 2003 Act, of its intention to vary the plan set out in the July 2016 Notification, in order to effect greater functional separation of Openreach (the “March 2017 Notification”).
- A4.9 The arrangements set out in the March 2017 Notification will come into effect following the satisfaction of a number of conditions, including the release of BT from the Undertakings. BT has requested that Ofcom release it from the Undertakings pursuant to section 154(6)(c) of the 2002 Act.
- A4.10 Ofcom considers that the arrangements set out in the March 2017 Notification, if put into effect, would provide an effective and long-term solution to address its competition concerns identified in the Strategic Review and the concerns it originally identified in 2004/5 as part of its Strategic Review of Telecommunications to the extent they remain, and has provisionally determined that the continued application of the Undertakings will therefore no longer be necessary.

Proposal to release BT from the Undertakings

- A4.11 For the reasons set out in the document accompanying this notice, Ofcom is proposing to release BT from the Undertakings.
- A4.12 Ofcom is proposing that BT be released from the Undertakings 30 days after receipt of notice in writing from BT that the conditions sets out in paragraphs 3(a), (b) and (c) of the March 2017 Notification have been met.
- A4.13 A copy of this notice has been served on BT in accordance with paragraph 8 of Schedule 10 to the 2002 Act.

Making representations

- A4.14 Representations may be made to Ofcom about the proposals set out in this notice and the consultation document accompanying it by no later than 14 April 2017.
- A4.15 For the purpose of interpreting this notice:
- 4.15.1 except in so far as the context otherwise requires, words or expressions have the meaning assigned to them in paragraph 16 below, and otherwise any word or expression has the same meaning as it has in the 2003 Act;
 - 4.15.2 headings and titles shall be disregarded;
 - 4.15.3 expressions cognate with those referred to in this notice shall be construed accordingly; and
 - 4.15.4 the Interpretation Act 1978 (c. 30) shall apply as if this Notification were an Act of Parliament.
- A4.16 In this Notification:
- 4.16.1 “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006;

- 4.16.2 **"Ofcom"** means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002;
- 4.16.3 **"United Kingdom"** has the meaning given to it in the Interpretation Act 1978 (1978 c30).

Signed

A handwritten signature in blue ink that reads "S. Unger". The signature is written in a cursive style with a large initial 'S' and a long horizontal stroke at the end.

Steve Unger

Group Director of Strategy, International, Technology and Economists

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

17 March 2017

Annex 5

Summary table showing how sections of the Undertakings will be reflected under the new arrangements

Relevant provision in the Undertakings ³⁸		What happens if the Undertakings are released
1	Scope	The scope of the Commitments is explained in the recitals to the Commitments (see Recital B).
2	Definitions	Appropriate definitions are included in the Commitments.
Equivalence of inputs (EOI)		
3.1.1-3.1.3	Requirement on BT to apply EOI to a defined set of products according to a timetable/future defined products.	<p>Transitional elements which are obsolete/time-expired will fall away.</p> <p>EOI obligations have been imposed on BT on a market-by-market basis via SMP conditions where appropriate.</p> <p>Under the Commitments, where required to do so by SMP regulation, Openreach will provide SMP products on an EOI basis, and it will be subject to a general obligation (which also applies where BT provides non-SMP products) to treat all customers equally in the exercise of its functions, including customer consultation, strategy and investment decisions and a requirement to follow processes which are objective and non-discriminatory (see Commitment 5).</p>
3.1.4	Requirement to agree with Ofcom inputs for any future NGN based WLR product.	Requirement for EOI for future NGN based WLR product could be reflected in SMP conditions imposed on BT in the relevant market where appropriate.
3.2	Transitional provisions relating to EOI.	These transitional provisions are time-expired.
3.3	Provides for BT and Ofcom to agree a timetable when applying EOI to other products.	<p>Appropriate obligations can be reflected in SMP conditions imposed on BT in relevant markets.</p> <p>Under the Commitments, where required to do so by SMP regulation, Openreach will provide SMP products on an EOI basis, and it will be subject to a general obligation (which also applies where BT provides non-SMP products) to treat all customers</p>

³⁸ Note that in the Undertakings, the relevant separate division of BT which is now known as Openreach is referred to as the 'Access Services' division or 'AS'

Relevant provision in the Undertakings³⁸		What happens if the Undertakings are released
		equally in the exercise of its functions, including customer consultation, strategy and investment decisions and a requirement to follow processes which are objective and non-discriminatory (see Commitment 5).
3.4-3.6	Transitional provisions relating to various systems.	These transitional provisions are time-expired.
3.7	Requirement to apply EOI to migration processes for products that BT is required to provide on an EOI basis.	Where EOI applies to a product by virtue of SMP regulation it will also apply to ancillary services, such as migration products, that are directly related to and necessary for the supply of the SMP product. Appropriate obligations therefore can be reflected in SMP conditions imposed on BT in relation to migration processes in relevant markets.
3.8	Requirement to comply with performance targets for migration processes as required by Ofcom.	Appropriate obligations can be reflected in the SMP conditions imposed on BT in relevant markets.
Transparency		
4.1	BT required to comply with transparency requirements relating to PPCs, CPS and Datastream	Appropriate obligations can be reflected in the SMP conditions imposed on BT in relevant markets.
4.2	Obligation relating to handling of costs for future TILLAP / TILLBP services.	Appropriate obligations can be reflected in the SMP conditions imposed on BT in relevant markets.
Establishment of Openreach and services offered by it		
5.1 – 5.2	Obligation to establish Openreach within 4 months and act in accordance with the obligations in the Undertakings.	Transitional elements which are obsolete/time-expired will fall away. Under the Commitments, BT will continue to operate the Openreach division as a functionally separate division of BT and will incorporate Openreach Limited as a wholly owned subsidiary of BT and will engage Openreach Limited to operate and manage the Openreach division of BT in accordance with the Commitments (see Commitments 2 and 4).
5.3 – 5.5, 5.7 – 5.8	Obligations on Openreach to provide certain specified SMP products. ³⁹	Requirements on BT to provide certain forms of network access can be reflected in SMP conditions imposed on BT in relevant markets.

³⁹ Those products included WLR; Wholesale ISDN2 Line Rental; Wholesale ISDN30 Line Rental; Wholesale Extension Service and relevant handover products; SMPF and associated services; MPF and associated services; Backhaul Extension Service and relevant handover products, and successor products; Wholesale Extension Service Access Products; Wholesale Extension Service Backhaul Products; Wholesale End-to-End Ethernet Services; and SLU and relevant associated services. In addition, these included TILLAP and TILLBP new network access SMP products provided using BT's NGN based on MSAN access and other new SMP products provided using BT's physical layer and/or transmission layer of its access or backhaul network.

Relevant provision in the Undertakings ³⁸		What happens if the Undertakings are released
		The Commitments require that the Openreach division of BT (which will be managed and operated by Openreach Limited) will provide on behalf of BT plc those SMP products which are provided over BT's access network and backhaul network and which are important in supporting future downstream competition (see Commitment 3). These currently include Dark Fibre Access, MPF, Physical Infrastructure Access, certain Ethernet Services, certain WDM services and VULA.
5.6	Obligation relating to the commercial replicability of TILLAP / TILLBP services for PPC.	Appropriate obligations can be reflected in the SMP conditions imposed on BT in relevant markets.
5.9	People and non-network capabilities relating to fixed line number portability to be included within Openreach.	Number portability is regulated under the General Conditions. See the discussion about sections 5.3 – 5.5. of the Undertakings above regarding the scope of Openreach under the new arrangements.
5.10, 5.16-5.18	Requirements for Openreach to meet certain requirements when developing and providing Backhaul Products.	Requirements to offer products which meet specific requirements can be reflected in SMP conditions imposed on BT in relevant markets, which may include backhaul products in markets where BT is found to have SMP.
5.11	Requirement for Openreach to follow a Statement of Requirements process for requests for network access for non-SMP products.	As noted above, under the Commitments, Openreach will function primarily as a provider of SMP products. However, to the extent that Openreach does offer non-SMP products, under the Commitments, Openreach will be subject to an obligation to treat all customers equally and will not unduly favour any particular CP (including BT's downstream divisions, such as BT Retail) – see Commitment 5 and paragraph 5.4 in particular. We consider this is sufficient to ensure that any processes followed in relation to requests for new forms of non-SMP products are handled in accordance with processes which are objective and non-discriminatory.
5.12 – 5.13	Requirements for Openreach to control and operate the assets contained in the physical layer of BT's access network and BT's backhaul network and to be able to manage assets in the transmission layer of BT's access network and backhaul network for the purposes of providing SMP products.	Under the Commitments, Openreach Limited will manage and operate the assets comprised in the Openreach division, namely the assets of BT's access network and backhaul network needed to provide the relevant SMP products, including those needed to support those products (such as line testing and remote diagnostics) – see Commitment 9A and paragraph 3.5.

Relevant provision in the Undertakings ³⁸		What happens if the Undertakings are released
		Openreach Limited will also undertake trading of Openreach products and services and Openreach assets on behalf of BT plc – see Commitment 9B.
5.14, 5.35	Requirements relating to BT employees that must work for Openreach; restriction on Openreach employees working for other parts of BT (except as agreed by Ofcom).	Under the Commitments, the employment of all Openreach employees will transfer from BT to Openreach Limited and Openreach will have control over their employment– see Commitment 7.
5.15	Provision for temporary deployment of field engineers	It will continue to be possible, in respect of particular geographical areas, for BT field engineers to undertake Openreach activities and for Openreach field engineers to undertake BT activities, provided that this relates to fewer than 250 field engineers at any one time (unless the Openreach Board agrees otherwise) – see paragraph 7.5 of the Commitments,
5.16-18	Backhaul principles	See the discussion about section 5.10 of the Undertakings above.
5.19	Obligation to provide space to CPs for traffic aggregation equipment.	Requirements to offer products which meet specific requirements can be reflected in SMP conditions imposed on BT in relevant markets.
5.20	Where assets controlled and operated by Openreach cease to be used for SMP products, they may be reallocated to another part of BT with relevant employees.	The Commitments provide that, in the event that Ofcom concludes, pursuant to a market review, that BT no longer has SMP in a particular market, then except in the event that BT determines at its sole discretion that it is impractical to do so, products in that market which have become non-SMP products, and management of the related assets, shall be moved out of the Openreach division - see paragraph 3.6 of the Commitments.
5.21	Where a product supplied by Openreach ceases to be an SMP product, BT may transfer provision of that product outside of and re-allocate relevant BT employees outside of Openreach.	The Commitments provide that, in the event that Ofcom concludes, pursuant to a market review, that BT no longer has SMP in a particular market, then except in the event that BT determines at its sole discretion that it is impractical to do so, products in that market which have become non-SMP products, and management of the related assets, shall be moved out of the Openreach division - see paragraph 3.6 of the Commitments.
5.22	Products offered by Openreach will also be offered by BT in Northern Ireland.	Under the Commitments, BT commits to providing equivalently in Northern Ireland the SMP products which are to be provided by Openreach – see paragraph 18.3(b).
Openreach governance		
5.23	Openreach to be a separate division within BT.	Under the Commitments, BT will continue to operate Openreach as functionally separate division of BT and will incorporate Openreach Limited as a wholly owned subsidiary of BT and will engage Openreach Limited to operate and manage the Openreach division of BT in accordance with the Commitments (see Commitments 2 and 4).
5.24	BT to appoint Openreach CEO within one month.	Transitional elements which are obsolete/time-expired will fall away.

Relevant provision in the Undertakings ³⁸		What happens if the Undertakings are released
5.25	Openreach CEO to report solely and directly to BT Group CEO.	<p>The Commitments and the Governance Protocol set out details of the new governance arrangements for Openreach Limited. These include:</p> <ul style="list-style-type: none"> • Provision for the board of Openreach Limited, which will comprise a majority of independent directors (including the Openreach Chairman), to be responsible for setting the strategy of Openreach – see Commitment 6 and Part A of the Governance Protocol. • Provision for the Openreach CEO to be appointed by the Openreach Board and to be accountable to the Openreach Chairman and Openreach Board, with limited secondary accountability to the BT Group plc CEO for specific purposes only – see paragraph 3.3 of Part A and section 5 of Part B of the Governance Protocol. • Detailed rules for the way in which the strategy of Openreach will be set through the Annual Operating Plan (AOP) and Medium Term Plan (MTP) by the Openreach executive and the level of oversight that BT will have over that process – see paragraphs 2.2-2.17 of Part A and sections 2 and 3 of Part B of the Governance Protocol.
5.26	Openreach CEO not to be a member of BT Group Operating Committee.	
5.27	Openreach Management Board shall manage Openreach so as to secure compliance with the Undertakings and shall operate to terms of reference agreed with BT Group CEO following consultation with Ofcom.	
5.28-5.29	Requirements for Openreach to establish an Annual Operating Plan (AOP) to be approved by the BT Group plc Board and for the Openreach CEO to have delegated authority to authorise capital expenditure of up to £75million within the AOP.	
Openreach financial accounting		
5.30	Principles applying to the preparation of the charging approach, management accounts and management information associated with Openreach.	<p>Under the Commitments, where required to do so by SMP regulation, Openreach will provide SMP products on an EOI basis, and it will be subject to a general obligation to treat all customers equally in the exercise of its functions (see Commitment 5). We consider this should ensure that its approach to charging and transparency about its charges is non-discriminatory.</p> <p>Appropriate requirements relating to financial reporting for SMP products provided by Openreach can be reflected in SMP conditions in relevant markets.</p>
5.31	Requirement to present separately the financial results for Openreach as part of the RFS.	Equivalent financial reporting obligations to those applicable under sections 5.31-5.32 of the Undertakings are reflected in Commitment 20B.
5.32	BT to report Openreach's financial performance in BT's annual and quarterly reports in the same format as for BT's existing divisions.	
Physical separation of Openreach		
5.33 and 5.33A	Separation of Openreach Headquarter Management Team	Transitional elements which are obsolete/time-expired will fall away.

Relevant provision in the Undertakings³⁸		What happens if the Undertakings are released
		Equivalent provisions relating to separate Openreach headquarters to those applicable under sections 5.33 and 5.33A of the Undertakings are reflected in Commitment 12.
5.34	Requirement for review of management separation arrangements by the Openreach CEO and the Equality of Access Board (EAB).	<p>Transitional elements which are obsolete/time-expired will fall away.</p> <p>Provision is made for the Openreach Board Audit, Risk and Compliance Committee (OBARCC), replacing the EAB, to monitor compliance with the requirements of the Commitments and Governance Protocol by Openreach under paragraph 19.2 of the Commitments and section 7 of Part A of the Governance Protocol. Provision is made for the BT Compliance body to monitor compliance by BT with the requirements under paragraph 19.4 and section 7 of Part A of the Governance Protocol.</p>
Openreach employees and employee incentive remuneration		
5.35	Restriction on Openreach employees working for other parts of BT (except as agreed by Ofcom).	See the discussion about sections 5.14-5.15 of the Undertakings above.
5.36 – 5.37	Specific requirements relating to the incentive remuneration of Openreach employees.	<p>Transitional elements which are obsolete/time-expired will fall away.</p> <p>Similar provisions relating to Openreach employee incentive remuneration to those applicable under sections 5.36-5.37 of the Undertakings are reflected in Commitment 8.</p>
Commercial independence of Openreach and safeguarding Openreach confidential information		
5.38, 5.41	<p>Restriction on BT employees (not working for Openreach) participating in formulation/influencing commercial policy of Openreach (other than via mechanisms and process that can be used by other CPs).</p> <p>Restriction on access by BT employees (not working for Openreach) to Openreach commercial information.</p>	Similar restrictions on BT employees seeking to influence Openreach commercial policy or having access to Openreach commercial information to those applicable under section 5.38 of the Undertakings are set out in Commitment 10. These are subject to a narrower list of exceptions than applies currently under the Undertakings and in particular there is no longer a list of excepted BT personnel as set out at Annex 2 of the Undertakings.

Relevant provision in the Undertakings ³⁸		What happens if the Undertakings are released
	These are subject to the exceptions set out in 5.41 relating to the BT personnel listed in Annex 2.	
5.39	Restriction on disclosure of Openreach customer confidential information, subject to certain exceptions where disclosures may be made to BT personnel listed in Annex 2.	Similar restrictions on disclosure of Openreach customer confidential information to those applicable under section 5.39 of the Undertakings are set out in Commitment 10. These are subject to a narrower list of exceptions than applies currently under the Undertakings.
5.40	Restriction on Openreach employees influencing the commercial policy of other BT divisions (other than via mechanisms and process that can be used by other CPs), subject to certain exceptions.	We do not consider an equivalent provision is required under the new arrangements in order to safeguard Openreach's independence from BT. We consider the requirements relating to confidentiality and commercial independence set out under Commitment 10 (as discussed in relation to section 5.38 of the Undertakings above) are sufficient.
5.41	Provision permitting certain BT personnel to influence commercial policy / access confidential information, as listed in Annex 2.	See the discussion of section 5.38 above.
5.42	Clarification that Openreach can use BT support services or centres of excellence provided that doing so does not involve the disclosure of Openreach commercial information (except to the extent permitted under Annex 2).	Under the Commitments, Openreach Limited will be able to draw upon BT support services and use BT's centres of excellence, provided that Openreach Limited will not require the disclosure of Openreach commercial information, Openreach Limited consults with the relevant support services/BTTSO on decisions relating to the services and Openreach Limited retains responsibility for any ultimate decision on the use of the support service/centre of excellence – see paragraph 14.1. Similar provisions apply in relation to supply of services from BTTSO under paragraph 14.2.
5.43	Openreach to ensure that the way in which new product requests are received and evaluated and commercial information of Openreach is made available is substantially the same for all CPs (including BT) in like circumstances were EOI applies, and on a not unduly discriminatory basis in the case of other SMP products.	EOI obligations can be reflected in SMP conditions imposed on BT in relevant markets where appropriate. Under the Commitments, where required to do so by SMP regulation, Openreach will provide SMP products on an EOI basis, and will be subject to a general obligation to treat all customers equally in the exercise of its functions, including customer consultation, strategy and investment decisions and a requirement to follow processes which are objective and non-discriminatory (see Commitment 5).
Systems separation		
5.44 – 5.45	Provisions relating to systems separation for Operational Support Systems (OSS) and Management Information Systems (MIS) based on the principle that such systems should be physically, unless exempted.	Transitional elements which are obsolete/time-expired will fall away. Under the Commitments, Openreach Limited will be subject to requirements relating to managing and maintaining its own OSS and MIS separate from BT OSS and MIS, subject to certain exceptions – see Commitment 13.

Relevant provision in the Undertakings ³⁸		What happens if the Undertakings are released
	These included extensive transitional provisions for rolling out systems separation.	
Equivalence of Inputs		
5.46	Obligation for Openreach to provide all products on an EOI basis (subject to exemptions).	EOI obligations have been imposed on BT on a market-by-market basis via SMP conditions where appropriate. Under the Commitments, where required to do so by SMP regulation, Openreach will provide SMP products on an EOI basis, and it will be subject to a general obligation (which also applies where BT provides non-SMP products) to treat all customers equally in the exercise of its functions, including customer consultation, strategy and investment decisions and a requirement to follow processes which are objective and non-discriminatory (see Commitment 5).
Sales channels		
5.47	Requirement for Openreach to be the primary channel to market for its portfolio of products, subject to certain exceptions.	These provisions are largely replicated under the Commitments – see Commitment 15.
Openreach branding		
5.48	BT to develop a separate brand for Openreach.	Under the Commitments, BT continues to commit to separate branding for the Openreach brand and to phasing out the use of “BT” and “British Telecom” in proximity to the Openreach brand as soon as reasonably practicable after the Commitments take effect, including completing certain phases of rebranding in accordance with a specified timetable – see Commitment 16.
Exchange space and power		
5.49	Requirements for Openreach to develop specific space-only allocation products relating to exchange space and power.	Transitional elements which are obsolete/time-expired will fall away. Requirements to offer products which meet specific requirements can be reflected in SMP conditions imposed on BT in relevant markets.
5.50	Requirement to consult with industry with regard to changing the existing co-mingling product.	Requirements to offer products in accordance with certain requirements can be reflected in SMP conditions imposed on BT in relevant markets. The Commitments provide for a customer consultation process to be followed by Openreach Limited in respect of significant investments related to the future development of the Openreach networks and products, which will allow for all customers to input into the development of new forms of network access through industry fora – see Commitment 11.

Relevant provision in the Undertakings ³⁸		What happens if the Undertakings are released
Product and service roadmap commitments		
5.51	Requirement to publish an 18 month product roadmap and update it on a 6 monthly basis.	<p>Transitional elements which are obsolete/time-expired will fall away.</p> <p>The Commitments provide for a customer consultation process to be followed by Openreach Limited in respect of significant investments related to the future development of the Openreach networks and products, which will allow for all customers to input into the development of new forms of network access through industry fora – see Commitment 11.</p>
Next generation access		
5.52	Openreach may control and operate assets in transmission layer of BT's access network and backhaul network as needed for the purposes of providing active FTTC and FTTP products	The Commitments require that the Openreach division of BT (which will be managed and operated by Openreach Limited) will provide on behalf of BT plc those SMP products which are provided over BT's access network and backhaul network and which are important in supporting future downstream competition and for Openreach Limited to control those assets – see Commitments 3 and 9A.
5.53	Active FTTP / FTTC products are to be provided by Openreach.	The Commitments require that the Openreach division of BT (which will be managed and operated by Openreach Limited) will provide on behalf of BT plc those SMP products which are provided over BT's access network and backhaul network and which are important in supporting future downstream competition and for Openreach Limited to control trading of such products on behalf of BT plc – see Commitments 3 and 9B.
5.54	Product requirements if BT provides active FTTC/FTTP products.	Requirements to offer products in accordance with certain requirements can be reflected in SMP conditions imposed on BT in relevant markets.
5.55	Roadmap / customer consultation requirements for active FTTC/FTTP products.	<p>Transitional elements which are obsolete/time-expired will fall away.</p> <p>The Commitments provide for a customer consultation process to be followed by Openreach Limited in respect of significant investments related to the future development of the Openreach networks and products, which will allow for all customers to input into the development of new forms of network access through industry fora – see Commitment 11.</p>
5.56	Openreach to consult with industry on design of FTTC passive inputs and backhaul products.	<p>Transitional elements which are obsolete/time-expired will fall away.</p> <p>The Commitments provide for a customer consultation process to be followed by Openreach Limited in respect of significant investments related to the future development of the Openreach networks and products, which will allow for all customers to input into the development of new forms of network access through industry fora – see Commitment 11.</p>

Relevant provision in the Undertakings³⁸		What happens if the Undertakings are released
5.57	Openreach required to design street cabinets so that it is possible for other CPs to locate their own equipment at or in the vicinity of BT's FTTC street cabinets.	Requirements to offer products which meet specific requirements can be reflected in SMP conditions imposed on BT in relevant markets.
5.58	Equivalence requirements relating to the provision of FTTC passive inputs such that the same (or as far as possible the same) inputs are used as for BT active FTTC products	Requirements to offer products which meet specific requirements (including EOI obligations) can be reflected in SMP conditions imposed on BT in relevant markets.
5.59	Review of NGA obligations by 31 December 2011.	These obligations are obsolete/time-expired and will fall away.
5.60	NGA obligations cease to apply if Ofcom materially changes its approach to cost recovery.	These provisions are redundant following release of the Undertakings and will fall away. Ofcom's approach to cost recovery relating to SMP FTTC or FTTP products can be considered in the context of a market review as appropriate.
5.61	NGA obligations cease to apply if take up is less than 500,000 premises by end 31 December 2010	These provisions are obsolete/time-expired and will fall away.
BT Wholesale		
6.1 – 6.15	These sections set out various requirements in respect of BT Wholesale. Including: <ul style="list-style-type: none"> • Creation of two separate product management organisations within BT Wholesale, • incentive arrangements for employees of BT Wholesale • confidentiality / disclosure arrangements 	The BT March 2017 Notification is specifically focused on new arrangements between BT Group and Openreach. We do not consider it to be necessary to retain requirements on other divisions of BT, such as BT Wholesale, except as to the extent needed to ensure the commercial independence of Openreach, which are provided for under the Commitments.
Equipment location in exchanges		
7.1 to 7.8	Requirements relating to location of CP equipment in exchanges.	Requirements to offer network access which meet specific requirements can be reflected in SMP conditions imposed on BT in relevant markets.
Organisational separation of upstream and downstream divisions		
8.1 – 8.9	Requirements relating to organisational separation of upstream and downstream divisions within BT (i.e. between divisions dealing with CPs vs. end-users).	The BT March 2017 Notification is specifically focused on new arrangements between BT Group and Openreach. We do not consider it to be necessary to retain requirements for separation between other departments of BT, such as between BT Wholesale and BT Retail, except as to the extent needed to ensure the commercial independence of Openreach, which are provided for under the Commitments.
Code of practice		

Relevant provision in the Undertakings³⁸		What happens if the Undertakings are released
9.1 – 9.5	Obligation to have a Code of Practice for BT employees on how to ensure compliance with the Undertakings.	The Commitments provide for BT plc and Openreach Limited to maintain and publish Code of Practice which set out how BT plc and Openreach Limited employees must act to ensure compliance with the Commitments – see Commitment 17.
Equality of Access Board (EAB)		
10.1-10.37	Requirement to establish the EAB. The EAB is responsible for monitoring compliance with the Undertakings and the Code of Practice. This section sets out the EAB's role and functions and related processes.	Monitoring of BT's and Openreach Limited's compliance with the Commitments and Governance Protocol is provided for under Commitment 19 and section 7 of Part A of the Governance Protocol. Openreach Limited is required to establish the OBARCC which will replace the EAB and will be responsible for monitoring Openreach Limited's compliance. BT is required to identify a compliance body with the role of monitoring compliance by BT (which shall not be the OBARCC).
Next generation networks		
11.1	Obligation to provide network access using BT's 21CN (NGN) where it has been determined by Ofcom to have SMP.	This section set out a number of specific obligations which related to the possible development and implementation of BT's 21CN NGN. BT subsequently decided not to proceed with the roll-out of the 21CN and, in that regard, these provisions are obsolete and will fall away. In respect of any future development by BT of an NGN, the Commitments provide for a customer consultation process to be followed by Openreach Limited in respect of significant investments related to the future development of the Openreach networks and products, which will allow for all customers to input into the development of new forms of network access through industry fora – see Commitment 11.
11.2	Network access using NGN must be on T&Cs that allow CPs to compete effectively downstream.	
11.3-11.4	Network design obligations for NGN. And exceptions in 11.4.	
11.5	Explanation of what cost-orientation means in the case of NGN – i.e. that charges should be based on an efficient design.	
11.6 – 11.9	Design of NGN must allow EOI. Where using NGN must be on an EOI basis (with exceptions).	
11.10 – 11.11	Where using NGN BT must provide network access sufficiently far in advance of the provision of downstream services itself.	
11.12 – 11.14	Industry group on NGN.	
11.14A	BT to publish guidelines on its consultation principles for NGN.	
11.15 – 11.17	Provisions relating to the establishment of a dispute adjudicator for NGN.	
11.18	Compensation principles for costs associated with planned network changes to do with NGN.	
11.19	Requirement for BT to not disadvantage MPF and SMPF users in the event that it pre-provisions	

Relevant provision in the Undertakings³⁸		What happens if the Undertakings are released
	broadband on all lines (Broadband dialtone) when upgrading its network to NGN	
11.20	Clarification that nothing in the Undertakings should impede BT's ability to design its NGN.	
Contract management mechanism		
12.	BT to set up a contract management mechanism with 6 months	Transitional elements which are obsolete/time-expired will fall away. There is now an established and recognised industry group for contractual discussions, which we would expect to remain in place, and appropriate obligations could be reflected in reflected in SMP conditions imposed on BT in relevant markets.
Northern Ireland		
13	Details which provisions apply to BTNI	In the Commitments BT commits to a number of steps in relation to BTNIN, including to BTNIN being a virtually separate organisation, with its own senior management team to manage BT's network in Northern Ireland – see Commitment 18
Information requests		
14	Provision allowing Ofcom to issue information requests to BT to monitor compliance with the Undertakings.	Under the Commitments, Ofcom will continue to have the ability to issue information requests to BT or Openreach for the purposes of monitoring compliance with the Commitments or Governance Protocol – see Commitment 20A.
Directions		
15	Provision giving Ofcom power to issue directions relating to breaches of the Undertakings.	See Section 6 of this document which discusses how Ofcom intends to monitor BT's and Openreach's compliance with the Commitments and the Governance Protocol.
Breach of Undertakings		
16	Clause confirming that failure to get Ofcom's consent where required is a breach of the Undertakings.	This provision is redundant following release of the Undertakings, as the Commitments will not be legally binding on BT.
Compliance with other legal requirements		
17	Confirmation that BT is required to comply with other legal obligations.	These provisions are largely replicated under the Commitments – see Commitment 17.
Variation, expiry, termination		
18	Ofcom and BT can agree variations to the Undertakings.	This provision is redundant following release of the Undertakings, as they will cease to have effect. Provisions relating to variations to the Commitments are set out in Commitment 24, which includes provision for notification of a proposed variation of the Commitments to Ofcom.

Relevant provision in the Undertakings ³⁸		What happens if the Undertakings are released
19	Provisions detailing expiry and termination of the Undertakings.	This provision is redundant following release of the Undertakings, as they will cease to have effect. Provisions relating to expiry and termination to the Commitments are set out in Commitment 26, which includes provision for notification of withdrawal to Ofcom.
20.1 – 20.10	These are a series of general provisions relating to the effect of the Undertakings	These provisions are redundant following release of the Undertakings, as they will cease to have effect. Relevant general provisions of similar effect are included in the Commitments where appropriate – see Commitment 27.
20.11	BT can take reasonable and proportionate steps necessary to deal with exceptional incidents (terrorist attacks, risk of loss of life, significant damage to network). Notification provisions relating to exceptional incidents and process for EAB to produce a report.	These provisions are redundant following release of the Undertakings, as they will cease to have effect. Equivalent provisions relating to exceptional incidents as those set out in section 20.11 of the Undertakings are provided for under Commitment 22. In addition, Commitment 25 sets out the process for agreement of exemptions from the Commitments.
Annexes		
1	Dates for when EOI will apply to various products.	These provisions are obsolete/time-expired and will fall away.
2A	List of BT Group individuals allowed to share Openreach confidential information and participate in the formulation of Openreach's commercial policy.	See the discussion of sections 5.38-5.41 of the Undertakings above.
2B	List of BT Group functions able to share confidential information with Openreach.	
3	Specific provisions relating to leased lines relating to BT Wholesale	These provisions are largely time-expired/obsolete and relate to obligations on BT Wholesale and will fall away.
4	List of CP equipment that BT is required to provide exchange space for in accordance with section 7 of the Undertakings	See the discussion of section 7 of the Undertakings above.
5	List of MIS	See the discussion of section 5.45 of the Undertakings above.
6	List of shared OSS	See the discussion of section 5.44 of the Undertakings above.