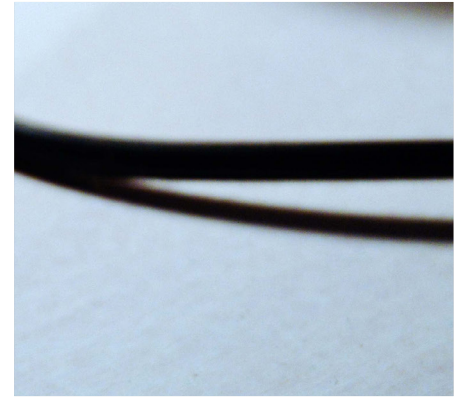
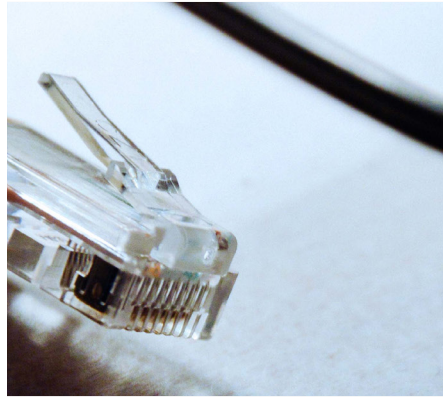
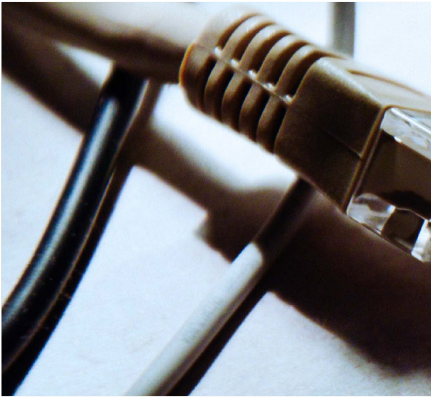


Ofcom announces mechanisms to ensure BT and Openreach comply with the enhanced independence they have committed to



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Openreach, and its alleged flaws, have been a consistent target of Ofcom since it launched the first part of its 'Digital Communications Review' back in 2015. This Review highlighted Ofcom's concern that the relationship BT has with its network arm Openreach may be incentivising discrimination against other communications providers, to the detriment of competition and service delivery.

On this basis, in late 2016, Ofcom notified the European Commission of its intention to force the legal separation of Openreach from BT. To avoid such separation happening on Ofcom's terms, BT Group launched negotiations with Ofcom, which ultimately led to Ofcom accepting voluntary Commitments from BT on measures to enhance the independence of Openreach, on terms agreed by both parties.

In this latest update, Ofcom has announced that it intends to fully release BT from the Undertakings that underpinned the creation of Openreach (which required Openreach to provide services to all communications providers on an equivalent basis), which are to be replaced by the Commitments offered by BT. Ofcom's announcement also sets out how it intends to police compliance with the Commitments, and the mechanisms it may use to enforce them.

The Commitments

The Commitments given by Ofcom in March of this year were accompanied by a Governance Protocol, which provides further details how Openreach will be governed going forward (the Governance Protocol).

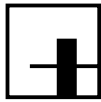
We discussed in detail the key changes the Commitments and the Governance Protocol will have on BT and Openreach process and governance in our earlier article ([please click here](#)).

The crux of the Commitments is that Openreach has become an independent legal entity, Openreach Limited, albeit it continues to operate as a wholly owned subsidiary of BT plc and part of 'BT Group'. The new entity has its own articles of association, and a majority

independent board, with control over its own strategy and annual operating plans. In addition, a number of practical business separation tools are to be implemented, including maintaining and enhancing separation between IT systems¹ and information ring-fences, and limiting and making more transparent interactions between BT and Openreach. However, Openreach's overall budget will continue to be set by BT Group and BT plc will continue to have a role in approving Openreach plans.

The Commitments regime is formally subject to four pre-conditions, and until their satisfaction, the Undertakings remain in place. Two of these pre-conditions are in relation to the expansion of the BT pension scheme to cover employees that are now employed by the new

¹Other than for specific listed systems that will continue to be shared.



'Openreach' legal entity, and a third is in relation to the TUPE process required to transfer employees to the new entity. These processes are currently underway.

Ofcom's Announcement

The final condition is the subject of Ofcom's announcement: Ofcom has proposed to release BT from the Undertakings 30 days after receiving notice from BT that the three aforementioned conditions have been met.

There has been some push back by stakeholders on the release, with concerns raised over whether the Commitments actually address competition concerns, and how to overcome the fact that, unlike the regime under the Undertakings, the Commitments are voluntary and not legally binding.

Ofcom is, however, of the view that the Commitments will not only replace, but will enhance, the current position, strengthening the independence of Openreach. It has declared that that the combination of the Commitments and existing SMP regulation will enhance the existing competitive landscape, and that, albeit they are voluntary, Ofcom has a number of monitoring mechanisms and enforcement tools at its disposal should it find BT and Openreach are not complying with the letter and spirit of the Commitments.

Measuring Success

But what exactly are these tools, and are they sufficient to quell the concerns of stakeholders? Ofcom in its announcement seeks to take a two pronged approach, on the one hand setting up a dedicated Openreach Monitoring Unit (OMU) to assess compliance with the Commitments and the Governance Protocol, and on the other observing the impact of the arrangement on wider market outcomes. The key aspects of each are as follows:

Openreach Monitoring Unit

The OMU will be a dedicated unit, tasked with the continuous proactive monitoring of BT and Openreach's activities in relation to the Commitments. It will assess, in particular:

- Implementation of the Commitments;
- Compliance with the Governance Protocol;
- Openreach and BT delivery against policy objectives, such as independence and equal treatment of customers.

To monitor these, Ofcom will work closely with Openreach, BT and other stakeholders. In particular, Openreach has set up a board audit, risk and compliance committee (OBARCC), and there will be an equivalent BT compliance body, who will be responsible for collecting information on compliance that will be made available to Ofcom (for

example, minutes of meetings and records of interactions between BT and Openreach). Ofcom aims to build a good working relationship with these bodies to facilitate its monitoring activities, whilst also developing a framework outlining the methods of communication between the bodies, and the information Ofcom expects to be provided with.

Ofcom will release a report six months after the commencement of the Commitments, and thereafter annually, detailing the results of their compliance monitoring.

Wider Regulatory Outcomes

In addition to the specific mandate of the OMU, Ofcom will assess the success of the new arrangement in light of broader consumer and industry outcomes. They will consider in particular the extent to which the new arrangement is contributing to competitive investment in broadband infrastructure, and improvements in Openreach's service to customers.

To do this, Ofcom will consider certain metrics, such as: the availability of fibre based broadband networks; number of good quality connections; and quality of service. Of particular note, Ofcom has specifically stated that it expects Openreach to be responsive to different commercial models of investment proposed by its customers, including considering co-investment and risk sharing.

The outcome of this assessment will be detailed in reports published alongside the dedicated OMU compliance report.

In addition to these new considerations, Ofcom will continue to ensure that Openreach and BT comply with existing regulatory obligations and SMP remedies.

Tried, and Found Wanting

Ofcom, has, however, already considered the consequence of BT and Openreach failing to adequately comply with the Commitments. Ofcom has suggested three different manners in which BT / Openreach's may be found non-compliant:

- A failure to provide information requested either voluntarily or under Ofcom's formal statutory powers, which have been considerably expanded under the Digital Communications Act;
- A failure to comply with specific obligations under the Commitments or Governance Protocol; or
- A failure to comply with the 'spirit' of the Commitments or Governance Protocol.



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Ofcom's reaction to any such failing will be dependent on the gravity of the conduct: one off or minor misdemeanours may be resolved through lower-level engagement, but more serious or repeat offences may require escalation to senior executive and CEO level or an amendment to the Commitments or Governance Protocol.

In parallel, Ofcom will continue to ensure BT and Openreach's compliance with the existing regulatory framework and the relevant SMP remedies. Any violation of these may lead to considerable penalties, as has been seen in recent Ofcom decisions against BT and Openreach.

Ultimately, in the event of repeated or serious breaches of compliance, or where Ofcom does not see any true improvement in the broadband landscape in the UK within the next three years, it reserves the right to consider further regulatory solutions – with the potential to impose full structural separation.

Last chapter in the story?

It is likely that BT and Openreach are hopeful that this is the last chapter in what has felt like a never ending story.

However, as noted above, Ofcom has estimated that it will take around three years to assess whether the new model is working, and delivering for all customers in the UK. Given the fact that Ofcom has retained the threat of structure separation it is unlikely that BT and Openreach will be at complete ease for the foreseeable future.

This time-frame, and its overlap with Brexit negotiations, also raises questions as to the regulatory framework that will govern the future powers Ofcom has to impose remedies on BT and Openreach. A cynic might suggest the acceptance of the Commitments was a move to kick Ofcom's goal of structural separation into the long grass, until such time as they can independently, without oversight from the Commission, require BT to divest itself of Openreach.

For now, however, Ofcom, communications providers and consumers alike will be monitoring for the improvements the Commitments are intended to bring: should they fail, there will undoubtedly be calls to impose more radical change.

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