

Delivering a more independent Openreach

A response from the Federation of Communication Services.

The Federation of Communication Services represents companies who provide professional communications solutions to professional users. Our members deliver telecommunications services via mobile and fixed line telephony networks, broadband, satellite, wi-fi and business radio. In the context of this submission, FCS speaks for the 98% of Openreach's customer base (by volume) which accounts for 14% of Openreach's revenues. FCS members rely extensively upon the services of Openreach to deliver connectivity, either contracting directly or via wholesale providers like TalkTalk Business or BT Wholesale, who are themselves reliant upon the services of Openreach.

Our members' customers range from SMEs, home-workers and micro-businesses up to the very largest national and international private enterprises and public sector users. FCS is the largest trade organisation in the professional communications arena, representing the interests of nearly 400 businesses with a combined annual turnover in excess of £45 billion.

It is significant to note that as recently as 2012 – seven years after signing the Undertakings – BT and Openreach had no formal mechanisms to identify and address the specific needs of these business customers. Or even to distinguish between business lines and consumer lines. FCS was a key instigator of the approach to Stuart MacIntosh (Ofcom's then director of competition) which led to the creation, at Ofcom's insistence, of the Openreach Business Service Improvement Programme. It is further worth recording that the scope of this programme was limited to the copper network. It is only in the last six months, with the appointment of Clive Selley as Openreach CEO, that the issues of Ethernet provisioning have begun to be seriously addressed. Even so, FCS members still regularly report Ethernet lead times in excess of 12 months.

We would furthermore note that Ofcom's investigation into Openreach's use of 'deemed consent' in the Ethernet provisioning process was undertaken only after the accumulation and presentation of a wide body of evidence. This investigation took a further two years, and only then resulted in a finding – and concomitant financial penalty – that Openreach had acted improperly.

In the course of this investigation, Ofcom also discovered that BT had failed to respond fully and properly in providing evidence to the periodic Narrowband Market Review. A failing for which Ofcom exacted a fine of £300,000. Had the 'deemed consent' investigation not taken place, this failure to comply with the regulator's requirements would have remained undiscovered. All this took place whilst BT was party to the Undertakings, a legal contract to which BT and Ofcom are both signatories. It seems strange, given that this is simply the most recent example of systematic failure by BT to live up to the letter of the Undertakings, that Ofcom now proposes to trust BT to abide by a 'voluntary undertaking',

given on terms which BT has dictated, and without proposing any significantly greater powers of redress than were available under the Undertakings.

We all want to see Openreach succeed as a flexible, customer-responsive strategic partner, upon which we can rely for prompt service and strategic investment in the nation's vital infrastructure assets. FCS believes this goal is frustrated not by lack of management expertise or even investment, but by a systemic cultural drag resulting from the legacy of nationalised monopoly privilege and the ongoing ownership by BT plc. BT plc's voluntary notification does nothing to address this concern.

Summary of main concerns:

FCS believes Ofcom's proposal to accept BT's voluntary notification is unacceptable as it stands. As Ofcom had previously noted, BT's initial response to the Strategic Review of Digital Communications fell well short of Ofcom's proposals. (And as FCS and others noted at that time, Ofcom's proposals themselves fell well short of what Openreach customers had collectively agreed were necessary to guarantee the appropriate level of independence and accountability¹.) This culminated in BT announcing the appointment of a nominally independent chairman to the new Board of Openreach – constituted as a BT business unit -- the day before Ofcom's conclusions were made public.

Ofcom stated at that time that this approach fell short of Ofcom's requirements, and subsequently notified the market of its intention to escalate the issue to the EU. BT went on to appoint three further non-executive directors to the Openreach Board. Only once this process was completed did BT offer its voluntary notification of a separately incorporated Openreach with a majority of non-BT employees on its Board.

As we have noted in previous submissions on this issue, Ofcom and BT are joint signatories to the Undertakings. Both signatories have spent 10 years attempting to make them work, and it is in the interest of neither party to pronounce them a failure. Nonetheless, FCS believes the market developments and technology convergence which have taken place since 2005 require something more fundamental than a revision of the status quo. We are not convinced Ofcom, as an interested party, has the necessary detachment to undertake such a first-principles revision. And BT, Ofcom's co-signatory, has clearly demonstrated an ongoing desire to attempt to negotiate revisions favourable to its own commercial position. BT's voluntary notification, and Ofcom's proposed intention to accept it, do nothing to convince us of the need to revise our position. Quite the reverse.

For this reason, we again repeat the suggestion we first made in 2015 that the converged communications market in general, and the BT Undertakings in particular, should be reviewed from first principles by the Competition & Markets Authority, under scrutiny of the House of Lords Select Committee on Communications. This market-testing, fact-finding, best-practice process need not be delayed by the current election to the Commons.

¹ http://www.fcs.org.uk/image_upload/files/10%20Point%20Plan%20for%20a%20Better%20Openreach%20-%20Industry%20Proposal.pdf

1. FCS welcomes the overall direction of travel of Openreach away from the direct influence of BT group executives. In particular, we welcome the announcement that Openreach’s engineering and administrative workforce are to become Openreach employees.
2. Nonetheless, Openreach’s Board – both the executives and the non-executive members -- consists entirely of individuals who were appointed to their roles by BT prior to the voluntary notification.
3. BT has consistently demonstrated a predilection to ‘test’ the Undertakings over the last 10 years. Resulting in Ofcom having to undertake a series of investigations and impose a series of penalties, of which 2016’s Deemed Consent and Narrowband Market review fines are simply the latest. In this context, we are concerned at the language in Paragraph 1.11 that “we believe BT’s notification should address competition concerns set out in the DCR subject to BT’s continued commitment to these arrangements.” BT’s track record in regard to keeping to its commitments is very far from exemplary.
4. We are unclear about the intention behind Para 6.32, and seek clarification that Ofcom, BT and Openreach all expect and intend existing protections for WLR customers accorded by the Undertakings to continue under the proposed new arrangements.
5. To give the market confidence, FCS argues that the role of the new Openreach Monitoring Unit should be written in terms of ex-ante rather than ex-post remedies: Ofcom’s default position should be that full structural separation of Openreach from the BT Group is necessary to deliver the required outputs for the market. The role of the Openreach Monitoring Unit is to provide sufficient evidence on a timely and periodic basis to stay Ofcom’s hand.
6. In this context, we propose Ofcom should transpose the bullet points in its proposed approach to compliance failures (Para 1.31). Structural separation needs to be firmly and visibly on the table from the beginning. Ofcom envisages a three-year window within which to determine whether this new model for Openreach is delivering the required results. Within the context envisaged by these commitments, it is unlikely compliance failures will be large and obvious. They are far more likely to be a series of small compromises and ‘slippages’ in pursuit of nominally defensible operational objectives. It will therefore take time to identify the cumulative effect, and more time to gather sufficient evidence to point clearly to the cause. The burden of proof should be on Openreach; not on Ofcom.
7. For the avoidance of doubt, FCS continues to regard full structural separation of Openreach from BT as the optimum strategic result for the industry. BT have enjoyed 10 years with the opportunity to make functional separation work, and by Ofcom’s own criteria, BT have failed. Ofcom now proposes a period of at least three years to give BT the “opportunity to make legal

separation work". From Openreach's industry customers' point of view, setting the base line back to zero for another three years is a step backwards, unless there are clear, strong and speedy mechanisms of redress. It is worth stressing in this context that the Openreach Customers' 10 point plan was proposed as a means of clearly laying out a set of *minimum* criteria upon which to base discussions of a non-separated future for Openreach in a context which would satisfy customer concerns.

8. The Undertakings of 2005 involved the creation of a distinct Access Services division within Great Britain only. Northern Ireland was excluded. Openreach does not exist in Northern Ireland. We note BT's March notification is not intended to apply to Northern Ireland. While it is clearly not in BT's interests to change the existing status quo in Northern Ireland, it is by no means clear to FCS why the same should be true for Ofcom. We repeat below the arguments we raised in our submission to Ofcom's Digital Communications Review, which we do not consider to have been at all addressed in this process. To wit:

- Ofcom allowed BT to create a NI structure from 2005 whereby engineering and sales appear inseparable to the casual observer. No clear strategic justification was advanced for maintaining a different operating infrastructure in the Province. And no specific commitment was made to review it or learn its lessons. In particular, to explain why service in Northern Ireland should be so fundamentally better than elsewhere in the UK.
- FCS is deeply concerned that Ofcom has failed to take this opportunity to align custom and practice in Northern Ireland with that of the rest of the UK. Not least, to require Openreach in Great Britain to meet or exceed the engineering provisioning and service levels enjoyed by CPs in Northern Ireland. If engineering in NI were brought under Openreach it would surely represent an excellent opportunity for GB engineering to learn from what works in Ulster.
- The status quo of BT's Northern Ireland Networks clearly suits BT, but it is by no means clear that this is the optimal solution for the present and future needs of government, businesses and consumers in the Province. The lack of a distinct infrastructure brand serves to blur the distinction in customers' minds between BT rep whose quote they rejected and the CP from whom they are buying the service, and who is now arranging installation by ... BT. The lack of a clear brand differential between BTNI reseller activities and BTNI utility activities means many companies in Northern Ireland view CPs as resellers of BT lines – and thus nothing more than middle men who can be 'cut out' by going direct to BT sales. The BTNI workforce culture could be described as a BT Retail culture: even senior BTNI Wholesale staff see no issue with defending the BT retail brand position in NI.
- In addition, any profit margin from CP orders which result in BTNI engineering installs is fed back into BTNI which sits within BT Business division thereby making BT Business

more profitable overall. No separate accounts are published by BTNI which has an annual turnover of over £400m and an estimated GP of over £100m.

- The CEO for Ireland is in charge of both the NI and Southern Ireland business units, which must risk creating conflict of interest when planning network investment. The CEO for Ireland also controls BT Business sales and Wholesale sales in Northern Ireland with access to information such as CP install numbers. This, also, must risk a conflict of interest.
- CPs' only guarantee against the above incentives and abilities for BTNI to use its vertically integrated structure to discriminate against competing communications providers in the market is the work of the Equivalence of Access Office. Ofcom's proposal envisages no future role for that office. Ofcom's proposal provides no legal certainty in terms of what BTNI will provide in the future. The statement "adopting similar principals insofar as it can" is worryingly vague.
- Whilst FCS has the greatest respect for BTNI, we take serious issue with the implication that it operates as some kind of philanthropic operation. BTNI is ultimately responsible to BT Group, not to the people and businesses of Northern Ireland. BTNI's embedded position with the Assembly, alongside portfolios such as inward investment, serves to maintain a position where BT is the supplier of default. This is not consistent with the provision of a customer-neutral infrastructure service.

Detailed Responses:

In this and subsequent sections, FCS responds to specific paragraphs in the Ofcom document.

Section 1 -- Executive Summary

1.12 Ofcom suggests that a voluntary settlement is likely to deliver benefits more quickly than imposing formal regulation. Speed is not the only criterion: the market needs the sustainability of certain and consistent outcomes. The option of formal regulation must remain on the table in the event voluntary commitments prove inadequate in practice.

1.14 FCS does not consider the new arrangements will 'work for consumers and businesses in Northern Ireland'. For reasons detailed in point 7 above, we believe they will 'work' only for BTNI. We are concerned not to see any detailed justification for Ofcom's continued willingness to allow BT to treat 2.2million citizens of the United Kingdom so fundamentally differently to the others simply by reason of BT's operational preferences.

1.15 We do not consider swapping contractual Undertakings for a promissary note to be a fair exchange.

1.23 We are glad to note Ofcom's commitment to include the experience of Openreach customers as a crucial input into the proposed monitoring process. No specific mechanism is proposed for this in the consultation. FCS, as the voice of Openreach's business CP customers, would propose a quarterly review meeting with a small group of FCS members with the proposed OBARCC, with a direct escalation pathway to Ofcom personnel.

Section 3 – BT's Notification to Ofcom

3.7 It is worth noting that it took Ofcom 10 years to reach this conclusion. In spite of having agreed a series of binding legal Undertakings with BT and kept them under close scrutiny.

3.10 These issues of competition for network investment decisions also apply in Northern Ireland, where UK citizens' connectivity risks being held hostage to decisions to invest on the other side of the Border. Ofcom proposes no remedies to safeguard or scrutinise these investment decisions.

3.26 It is not clear to what extent Openreach profits are proposed to be ringfenced for re-investment in improving and maintaining the network. It is FCS's understanding that Ofcom's price-controls factor in the costs of a 12-year infrastructure replacement cycle. Is it proposed to maintain at least this minimum level of investment in maintaining the network?

3.30 We note and understand Ofcom's decision not to proceed with the imposition of a formal regulatory solution at this time. Nonetheless, we urge that the preparatory work which has already been undertaken should not be allowed to lapse. Ofcom should ensure it is in a position to rapidly move to the imposition of a formal regulatory solution in the shortest possible time frame, and with the absolute minimum of administrative delays, in the event BT and Openreach Ltd fail to deliver the promised outputs.

3.33 As noted above, BT's 'several voluntary measures' in respect of service in Northern Ireland continue to treat the citizens and businesses of Northern Ireland differently from those of every other part of the UK. We ask Ofcom firstly to explain and justify the regulatory rationale for this anachronism. Secondly to set a time frame for the phasing out of all BT-branding on clothing and vehicles.

3.41 A crucial test of the extent to which BT Group and Openreach Ltd are working in the interests of better investment outcomes will be to monitor the competitive tendering process for Openreach fleet vehicle maintenance contract and the backhaul network for EE's expanding mobile network.

Section 4 – Consultation on releasing BT from the Undertakings

4.5 We note that the Undertakings were given in lieu of a market investigation to the Competition Commission. We further note that these present Commitments were advanced on the same basis, and in order to avoid the same threat. This means that no formal, expert, third-party analysis of the

competition issues surrounding a vital piece of UK infrastructure has even taken place. We urge Ofcom to invite the Competition & Markets Authority to participate fully in the process of setting up and analysing the work of the OBARCC and the separate BT processes, and the Monitoring procedures detailed in Section 6 of the Consultation document.

- 4.8 As this paragraph (and 4.9) makes clear, today's Commitments may require re-examination in the light of technological changes or market consolidation. It is important that these unpredictable future industry developments are not allowed to compromise the core commitments to transparency and independence. For this reason, we argue again that there must be a continuing burden of proof on BT and Openreach Ltd that they are complying with the spirit of the Commitments, rather than a requirement on Openreach customers to collect evidence and present it to Ofcom in order to trigger an investigation – a process which might allow malpractice to continue unchecked for several months or even years.

4.25 Consultation Question

FCS agrees that a 30 day notice period is appropriate. But we believe a number of issues and questions remain to be addressed to the industry's satisfaction before it is appropriate to release BT from the Undertakings.

But we do not believe

Section 6 – Monitoring Compliance

- 6.17 We do not consider it sufficient that the provision of services from Northern Ireland Networks should be subject simply to compliance monitoring by BT. There is no justification from a regulatory point of view for perpetuating the present status quo in Northern Ireland. As a minimum, the Openreach OBARCC should be fully engaged in monitoring compliance within NIN, in the same way as the Equivalence of Access Office does today.
- 6.23 We note the obligation on the BT Board to notify Ofcom of individuals it proposes to appoint to the Openreach Board. Can Ofcom please confirm the extent to which this process was complied with when BT appointed the first Chairman and three non-executive directors to the Openreach Board prior to offering these present Commitments?
- 6.28 FCS is concerned to ensure the voice of Openreach's business-to-business CP customers is fully represented in the monitoring process. We propose a series of meetings (initially quarterly) between OBARCC members and a small representative group of CPs, convened by FCS.

6.32 We seek urgent clarification regarding what principle or approach is proposed by this paragraph.

“Our starting point on unregulated product 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.”

Whether or not a product is delivered via the Openreach network is surely a function of the technology and the infrastructure needed to deliver it, rather than whether or not that product is subject to specific price control? In 2005, the original Undertakings were very much focused around protection for access to WLR products, such that BT was required to consume WLR products on an equivalent basis to third-party CPs. The only potentially relevant clause we can identify in the BT Commitments is clause 15.1.(b)(i) about Openreach taking orders for other BT lines of business (which is already in the BT Undertakings). For the sake of clarity, can Ofcom please confirm that the intention about including Openreach’s wholesale customers in discussions about product development and investment extends to customers who are consuming WLR? Are any additional or alternative protections for WLR customers envisaged?

6.35 and 6.36 After 10 years’ experience of Ofcom’s relationship with BT in response to failures to comply with the spirit of the Undertakings, FCS questions why Ofcom should wish to continue the relationship on the same cat-and-mouse basis. We urge Ofcom to keep the instrument of full structural separation firmly on the table as the default position. The burden should be on Openreach and BT to prove they are complying, rather than on the disadvantaged customer and the Regulator to prove they are not.

7.3 Ofcom should set a formal process in place to ensure all constituencies of Openreach customers are consulted as part of the monitoring mechanisms. As part of this process, FCS proposes regular review meetings with business-to-business CPs.

7.13 Models for structural separation should be maintained as ‘live’ options as a matter of course. The burden of proof that they are not needed should rest with BT and Openreach, not with the disadvantaged customers and the regulator.

FCS looks forward to discussing this approach with Ofcom and Openreach management.

SUBMISSION ENDS