

Plan of work team  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

Email: [planofwork@ofcom.org.uk](mailto:planofwork@ofcom.org.uk)

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Dear Ofcom,

### **Ofcom's proposed plan of work 2024-25**

I am writing to you on behalf of Open Fibre Networks Limited (OFNL), part of the BUUK Infrastructure Group of companies, in response to [Ofcom's Proposed Plan of Work for 2024-25](#) which was published in December 2023. I can confirm that this response is not confidential and can be published on the Ofcom website.

### **An introduction to BUUK and OFNL**

BUUK Infrastructure (BUUK) is a leading UK multi-utility infrastructure investor, working across Great Britain and competing against incumbent utility companies. We have provided over 2 million utility connections and now serve customers across 30,000 discrete networks and six essential utilities. Our main shareholder is Brookfield, a global investor in property, infrastructure and renewable energy. We cover every utility sector and can therefore provide a unique perspective on evolving utility and regulatory policy.

We apply our considerable experience, across multiple utilities, to the fibre industry via OFNL which has been providing gigabit ready full fibre broadband connections to the new build housing sector since 2008. Our fibre networks are often chosen by developers in preference to the solutions offered by the monopoly incumbent. We also operate a wholesale business, Open Fibre Networks (Wholesale) Limited (OFN(W)L), offering wholesale services to Communication Providers across the UK.

### **Ofcom's Proposed Plan of work for 2024-25**

We welcome the transparency that publication of Ofcom's proposed plan of work for 2024-25 provides, particularly recognising the opportunity it gives stakeholders to comment on the content presented and to seek to influence Ofcom's focus for the coming year. Given our role in the fibre industry, we have focused our comments on the planned work that Ofcom presents with respect to its enduring priority around securing 'internet we can rely on'. Our comments on the work proposed regarding this outcome fall within the following three overarching areas; each of which is discussed in turn in the following section.

- Key issues that the Wholesale Fixed Telecoms Market Review (WFTMR) should address;
- Key areas of focus for the Openreach Monitoring Unit (OMU); and
- Key areas that renewed guidance on the Telecoms Security Act 2021 should cover.

### **Key issues for the WFTMR**

We concur with the description of the UK communications sector that Ofcom presents within the consultation, acknowledging that the industry has been characterised by rapid change and transformation over the past 20 years. Indeed, we also agree that this trend is only likely to accelerate in the future. In this vein, we are acutely aware that the broadband sector is currently undergoing significant change due to several substantial programmes of work that have been commenced by Openreach. This includes its rapid rollout of fibre, its copper retirement programme, and the recently commenced PSTN switch-off, as well as the planned local exchange closure programme which is scheduled to commence in the late 2020s.

Recognising the combined impact that these projects could have and the potential for significant change in the broadband market between 2026 and 2031, we see the upcoming WFTMR as a critical market review. As such, it will be imperative that Ofcom carries out a detailed assessment of anticipated industry change to ensure the review is appropriately scoped and captures all relevant issues. A comprehensive programme of stakeholder engagement will be a key input to this assessment; providing opportunities for a range of parties to meaningfully engage on the issues and allowing them to input their views / seek to influence the future direction of policy. To effectively scope the WFTMR, Ofcom should complete a full assessment of the views expressed and demonstrate how these have informed its resulting policy. If there are cases where stakeholder views do not impact resulting Ofcom policy, the regulator should provide clear and rationale reasoning for the decisions it takes with respect to the scope of the review and the direction of policy.

In our assessment of the programmes of work that Openreach is currently progressing, we have identified three key areas that we are particularly interested to understand in more detail and which we strongly believe should be included within the scope of the WFTMR.

- **The treatment of PIA and external Cablelink services within the exchange closure programme:** We note the consultation that Openreach published in June 2023 which presented initial thinking on “How Openreach proposes to exit the 103 priority exchanges by 2030”. Within this consultation, Openreach set out its prevailing view that the early proposed exchange closures would not require any change to the availability of PIA products. However, the consultation also clarified that if CPs had used an external Cablelink to connect PIA to an exit exchange they would need to rearrange their network to handover at an alternative location. In recent years we have utilised the provisions established to support the Openreach PIA remedy and our network configuration therefore includes installed dark fibre in Openreach Ducts. As a result, we have external Cablelink assets in around 100 of the local exchanges that Openreach is planning to close from the late 2020s, and we are naturally focused on ensuring that these assets do not ultimately become stranded.

In our response to the June 2023 Openreach consultation, we stated that the treatment of Cablelink services should be aligned to the treatment of other similar products (e.g. DFA, DFX or EAD), where Openreach has committed to freely migrate existing services to an enduring OHP exchange. As such, we suggested that Openreach should similarly commit to migrating external Cablelinks to the nearest enduring OHP. If this solution is not feasible, we identified that a possible alternative would be for Openreach to make low-cost dark fibre available to the exit exchange location to allow CPs to rearrange their network without needing to build more dark fibre using PIA.

- **Retention of the concept of local access EAD leased circuits:** In its June 2023 exchange closure consultation, Openreach clarified its view that “Exchange exits will not impact the exchange area”. Recognising this, in our response to the consultation we stated that we were keen to understand whether future local access pricing would still be based on the current configuration of exchange areas. In this respect, we highlighted that the existing 5,500 exchange areas are designated as Area 1, 2 or 3, depending on levels of observed competitiveness; and questioned whether local access pricing should continue to be based on this configuration given that 4,500 of these exchanges have been earmarked for closure. In our response, we suggested that it may make more sense for local access pricing variations to be applicable to newly defined areas that will be served by an enduring OHP. Given the complexity of these issues and the potential impact the decisions could have on a range of market participants, we think these issues should be resolved as part of the WFTMR. A key guiding principle for these policy considerations should be that overall new and existing EAD costs will not be adversely impacted by the Openreach programme of local exchange closures given that original CP investment decisions did not account for these costs, and they only arise as a result of change initiated by Openreach.
- **Ofcom review of WFTMR monitoring in the context of competition issues:** In November 2023 the Department for Business and Trade (DBT) issued its consultation [Smarter regulation: strengthening the economic regulation of the energy, water and telecoms sectors](#). The consultation was initiated recognising the criticality of the services that the energy, water and telecoms sectors provide to the public and the imminent need for investment in each sector to support maintenance of these essential services. The consultation highlighted the substantial change to the regulatory environment that has been observed since the regulators were first created and the new challenges that each of the sectors now face, which were not anticipated at privatisation. This has led to an increase, not only in the demands that are placed on the respective regulators but also in the number of overarching legal duties that they are required to consider as part of their decision-making process. DBT suggested that these factors have, in some cases, led to a reduction in regulatory clarity and consistency for investors at a time when it will be critical for these sectors to attract significant inward funding. Within this context, the consultation presented a suite of proposals to strengthen economic regulation across a range of areas.  
  
A key area in which proposals were presented was in relation to competition. With respect to the communications market specifically, DBT highlighted stakeholder concerns that Ofcom “had not sufficiently monitored and enforced competition (at a wholesale and retail market level) following the introduction of the WFTMR in 2021”. In particular, the

consultation referenced concerns that had been raised around the commercial decision, taken by the BT consumer businesses (e.g. BT Retail, EE and PlusNet), to exclusively use Openreach networks to provide end customer services; despite the parallel availability of Ultrafast Altnet coverage in many areas and unique Ultrafast Altnet coverage in other areas where Openreach do not have assets installed. Stakeholders had noted that these operating practices were of particular concern in rural areas where availability of broadband network services is lower and Openreach may not have coverage or may only have low speed services available. In these instances, the BT consumer decision to exclusively use Openreach networks to provide end customer services effectively amounts to an active BT consumer choice not to engage with customers in these parts of the market. As a result, there are industry concerns that operational decisions taken by the BT consumer business continue to be influenced by potential commercial implications for its affiliated Openreach network; and this is in direct conflict with the letter and spirit of the separation commitments that the respective business made in 2017. It can also have direct consumer impacts by reducing the choice of services to which these customers have access.

The consultation therefore included a proposal that would require “Ofcom to review whether existing monitoring is sufficiently capturing competition issues in the sector”. We are very supportive of this proposal, particularly against the backdrop of our experience of the communications market since we began offering broadband services in 2008. In fact, in our response to the June 2023 Ofcom [Openreach monitoring report](#) we raised specific concerns around the BT retail decision to exclusively use Openreach networks to provide end customer services. Further detail regarding our concerns in this area are presented in the following section of this response ‘Key areas of focus for the OMU’. Given the strong industry views in this area, we think Ofcom should include these issues within the WFTMR. Indeed, we think Ofcom should initiate stakeholder engagement in this area as a priority to ensure the regulator attains a full understanding of the issues that have been identified and can appropriately scope the work that should be taken forward as part of the WFTMR.

### **Key areas of focus for the OMU**

As outlined in the preceding section we welcome the recognition of stakeholder concerns, around whether Ofcom has “sufficiently monitored and enforced competition (at a wholesale and retail market level) following the introduction of the WFTMR in 2021”, within the recent DBT Smarter Regulation consultation. In line with this, we also welcome the DBT proposal that “Ofcom [should] review whether existing monitoring is sufficiently capturing competition issues in the sector”. We have had concerns about some of the operational practices that BT Consumer and Openreach engage in for quite some time, and indeed, raised these concerns in response to the OMU reports which were published in December 2021 and June 2023. We have summarised our views on these issues, including the key areas that the OMU should focus on in the following section.

Ofcom’s rationale for enforcing the legal separation of BT and Openreach in 2017 was linked to concerns that vertical integration (VI) could allow the BT Group to discriminate against competitors and that this could undermine the incentive for companies to invest, as well as influencing the price, quality and availability of services. We think that the absence of material

regulatory protections around the behaviour of the BT consumer business also has the potential to lead to undesirable outcomes given the ability that this former-monopoly business has to abuse its position of market dominance. In this respect, we believe that the BT consumer decision to exclusively use Openreach network services undermines the incentives for AltNets to invest as it effectively forecloses a significant portion (around 33%) of the retail market to competition. In turn, this has the potential to directly threaten the development of effective network competition which Ofcom stated in the 2021 WFTMR “should bring benefits to consumers in the long term from innovation...choice, stronger incentives to price keenly to attract customers, and higher quality of service”.

The decision of the BT consumer business to exclusively use Openreach network services also has a significant impact on the availability of BT services, and resulting end customer choice, as these services can only be offered where Openreach network assets are already installed. This means that certain portions of the market, e.g. new build sites where Openreach does not have a presence and Government funded Project Gigabit rural areas, where Altnets will be the only provider of Ultrafast broadband connectivity, will not have access to services from the biggest ISP in the market. The BT consumer decision to exclusively use Openreach networks has a number of further impacts on the effective development of fibre competition, and the recent INCA report [Securing long-term benefits for broadband customers](#) provides a detailed overview of these.

In terms of the potential remedies that could be implemented, we think a first-best solution to address these competition concerns would be to require full structural separation of the BT Group; and note that Ofcom ‘reserve[d] the right to take forward structural separation’ in its 2016 [Initial conclusions from the Strategic Review of Digital Communications](#). This would also align with the approach that was taken in energy in 2009 via the ‘Third package’ of European legislation whereby retailers and generators were required to unbundle their operations from those of their affiliated transmission networks. However, we also recognise the cost / resource that could be involved in implementing this approach and therefore think it would make sense for Ofcom to assess the range of possible remedies that could be considered. In this respect, we note that Ofcom’s 2016 proposals on [Strengthening Openreach’s strategic and operational independence](#), it made reference to the industry’s 10-point plan for Openreach reform which included a proposal that would “require[e] BT to tender for network providers for its retail operations”. Although Ofcom did not to consider this element of the 10-point plan as it did not “relate...directly to Openreach’s strategic and operational independence”, we think this remains a viable option that should be assessed as a potential solution to address remaining competition concerns that exist in the fibre market. As part of the upcoming WFTMR we would like to see Ofcom complete an assessment of the full spectrum of possible remedies that could be implemented to address outstanding competition concerns around the potential for current BT consumer / Openreach practices to impact investment decisions and consumer outcomes in the market.

### **Key areas for renewed guidance on the Telecoms (Security) Act 2021**

Within the context of the increased value that is now attached to technological connectivity, and the mounting threats of cyber-attack, we acknowledge the importance of establishing targeted provisions to ensure the security of our telecommunications networks and services.

We therefore fully support the overarching intent of the proposed 2021 Telecommunications (Security) Act and note the reference in the Ofcom proposed plan of work to its intent to issue a consultation on revised guidance for communications providers on the resilience of their networks and services.

When considering revised guidance, one area where additional clarity could be provided is in relation to the equivalence of security measures across tiers. In this respect, in line with the provisions of the Telecommunications (Security) Act, Ofcom has previously proposed that where Tier three providers supply parts of networks or services to Tier one or two providers, they must take security measures equivalent to those taken by the primary provider. We are concerned about the potential for these provisions to place an undue burden on smaller suppliers, and the implications this could have for their growth / wider competition. We would therefore welcome further clarity in the guidance about Ofcom expectations for compliance with these provisions and the party that will be held accountable for potential breaches.

I hope these comments are helpful. I would be happy to discuss our response in more detail; please feel free to get in touch ✂.

Yours sincerely

Keith Hutton  
**BUUK Group Regulation Director**