[GB] Ofcom updates plans to make Openreach independent of BT for the benefit of all UK telecom providers

IRIS 2017-2:1/18

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On 29 November 2016, Ofcom updated its plans to reform the structure of Openreach, which is a wholly owned subsidiary of the BT (British Telecom) Group. Openreach develops and maintains the United Kingdom's main telecoms network, including broadband, and its infrastructure is used by other providers such as Sky, Talk Talk, Vodafone and BT's own retail business.

In February 2016, in its Strategic Review of Digital Communications in the United Kingdom, Ofcom expressed its concern that Openreach was not sufficiently independent of BT, that it favoured BT in its dealings, and that this was anti-competitive towards BT's rivals (see IRIS 2016-4/16). As a consequence of the Strategic Review, BT was invited by Ofcom to make proposals to create an independent Openreach.

Ofcom's November announcement revealed that BT had failed to offer voluntary proposals to address the regulator's concerns for providing an autonomous Openreach which works in favour of all telecom providers. As such, Ofcom proposes that Openreach become a distinct company with its own board of directors, including non-executive directors who, in the majority, would not be affiliated to BT. Such an independent board would have the autonomy to make their own impartial strategic investment decisions, particularly with regard to the development of a full fibre broadband.

As part of the process, on 28 November 2016, Ofcom gave written notification to the European Union that they intended to impose an exceptional remedy on BT, requiring the separation of Openreach. The letter also flagged that Ofcom was preparing a notification on which it intended to seek consultation during the early part of 2017; it would then quickly submit the notification to the European Commission once it had taken account of all consultation responses, in accordance with the procedures set out under Article 8(3) of the Access Directive. The Directive states "Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), national regulatory authorities shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate". Articles 9 to 13 refer respectively to

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obligations of transparency; non-discrimination; accounting separation; access to and use of the network facilities; and price control and cost accounting obligations. Subject to the Commission's decision, Ofcom would implement its reforms as soon as possible.

In its November announcement, Ofcom made it clear that throughout the process they would remain open to voluntary commitments from BT that addressed the competition concerns.

Whilst some of those responding to the Strategy Review raised concerns about the cost of separation and the effect on the BT Pension Scheme, Ofcom considered, on balance, that separation was in the wider public interest; it also believed that the possible effect upon the pension fund had been overstated.

Ofcom also indicated that if legal separation between BT and Openreach did not engender independence without undue influence from the BT Group, then it may mean a full structural break up, whereby Openreach ceases to be part of the BT Group altogether.

Ofcom, Update on plans to reform Openreach, 29 November 2016

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

Ofcom, Letter to the European Commission, 29 November 2016

https://www.ofcom.org.uk/__data/assets/pdf_file/0026/94940/Final-signed-letter-to-the-European-Commission-281116.pdf

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