

25 March 2019

Dear Sir/Madam, Date

Please find enclosed toob's response to DCMS's consultation on Statement of Strategic Priorities. toob is a Fibre to the Home (FTTH) business that secured £75M of funding in 2018 from the National Digital Infrastructure Fund managed by Amber Infrastructure Group. This initial funding will be used to deploy an FTTH network to 120k premises over the next two years with an overall plan to extend to 1 million premises over the next ten years.

Our plan is predicated on achieving cost targets that are only possible through the re-use of infrastructure and we plan to be scale user of BT's ducts and poles.

Our belief is that if the UK is to meet the Government's targets of 15 million premises having access to full fibre broadband by 2025 and all premises by 2033 then a healthy Alternative Network community to challenge and compliment Openreach's deployment of full fibre is essential.

There is much in the consultation that we believe is positive for the deployment of fibre infrastructure in the UK. We have suggested a small number of enhancements in our response that we believe would further enhance the speed of deployment of fibre networks

I am very happy to meet to discuss any of our points more fully if that would be helpful to the consultation.

Yours faithfully,

Nick Parbutt CEO and Founder

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Response from *toob ltd* to DCMS consultation on the draft SSP

Introduction

1. toob is a new business that has been established to invest in digital fibre infrastructure to provide full fibre broadband services to homes and businesses in the UK. toob has been founded by personnel with extensive knowledge of the UK telecommunications markets resulting in funding awarded from the National Digital Infrastructure Fund managed by Amber Infrastructure Group. toob's ambition is to build FTTP based full fibre broadband services to 1million homes and businesses over the next 10 years, using BT's duct and pole product wherever possible.
2. toob is therefore encouraged by DCMS draft first Strategic Statement of Priorities ("SSP") in relation to telecommunications and in particular fibre broadband investment, where toob's interests and expertise lie.
3. Over the last 5 years, Ofcom and the DCMS's own Future Telecommunications Infrastructure Review ("FTIR") have both set out strategies in relation to fibre broadband investment. Of course Ofcom's is limited by its scope and powers; the FTIR then built on Ofcom's work. This draft SSP effectively requires Ofcom to deliver those aspects of the FTIR that are in its remit. However rather than setting high level, clear objectives or strategic priorities with a view to Ofcom delivering through the means it has available this draft SSP sets out some quite specific activities. It is unclear whether cumulatively, they will deliver full fibre to 15million homes by 2025 as there are no clearly measurable objectives.
4. New public and private capital is ready to invest in the UK's full fibre infrastructure, however the business case faces not just the challenges of the market place, but also the challenges of an incumbent monopolist in the market. BT has, according to Ofcom's 2018 Wholesale Local Access Market review, well over 50% market share in wholesale broadband. This means it has over 50% of homes and businesses are connected to its network, it has duct and pole assets across the UK, and it also has the scale to move investment from one location to another depending on the competitive threat it faces. If BT were to use these assets in an anti-competitive way, it would limit investment across the UK, and without competition, BT faces no incentive to invest fully.
5. The biggest risk facing new fibre investors is the risk of Openreach strategically overbuilding new fibre investors to eliminate them from the market. One way to minimise the risk of game playing is for Openreach to share with Ofcom their investment plans for the forthcoming period (at least three years) and then to restate them every 3 months. In this way any systematic switching of investment by Openreach could be spotted and addressed. Art 22 of the new European Electronic Communications Code Directive sets out a process that could be used by Ofcom.
6. This draft SSP provides clarity on the Government's thinking on full broadband investment and roll out in the UK. However, we believe that it needs to give Ofcom a more proactive and ambitious role to better enable the objectives to be achieved. For instance, the SSP should:

a. Set clear targets and measurable objectives that make clear Ofcom's specific roles in delivering on the strategic objective of 15million homes served with full fibre by 2025.

b. Clarify the difference between the need for regulatory support for voice-only customers when BT switches off its narrowband voice network (unrelated to fibre investment) and consumer driven market engaging switching across existing and new platforms. c. Set out the need for Ofcom to take a very proactive role in the development and take up of Openreach's duct and pole product to ensure it meets fibre infrastructure builders requirements in a timely fashion. d. Provide more clarity on the expectation for Ofcom to monitor and stamp out anti- competitive behaviour through poorly delivered duct and pole access product, anti-competitive wholesale pricing or aggressive overbuild and in particular empowering Ofcom to demand fibre build plans in order to monitor for systematic overbuild.

Does the SSP mean more regulation?

7. Whilst this draft SSP sets out actions for Ofcom, it is of value in providing clarity to a wide range of stakeholders including investors, market players and customers. Whenever Ofcom makes a decision it generally has to weigh up a number of factors to determine the best course of action. Does it regulate for the short run or the medium term; encourage investment (with potentially higher short term prices) or reduce prices to improve consumer welfare but possibly hinder investment; wait to understand where competition might emerge and regulate the gaps or is regulation needed to stimulate competition?

8. Without clear objectives, it can appear that Ofcom has to look at these (and many other questions) afresh with every decision. This can reduce clarity necessary for long term, risky investments. The SSP should aim to reduce the number of these decisions that Ofcom needs to make in isolation, therefore improving certainty for fibre infrastructure builders and customers alike.

9. However, we urge DCMS not to be too prescriptive in setting out the details of regulation, rather giving Ofcom clear objectives, with targets that are measurable. For instance, in order to deliver the fibre broadband roll out targets, both this draft SSP and Ofcom have recognized the need for market entry and expansion by alternative network operators through easy access to Openreach's ducts and poles. Openreach launching a duct and pole product on the right date cannot be seen as the only success criteria: the take up and operational efficacy of the duct and pole access has got to be the right benchmark. In 2006, Ofcom measured the success of Openreach's LLU product by take up (not launch), and only when 1million LLU lines were connected was it considered to be a successful product launch: of course, we could only say it was a successful launch in hindsight, once the 1million customers had been connected. The SSP should be clear about success measures, so that the trajectory to 15 million homes passed by 2025 can be seen.

10. We therefore **recommend** that the SSP sets our clearly measurable objectives so that the path to 15million homes passed by 2025 is clear. For instance, we would expect that there would be over 1million homes passed by alternative networks using Openreach's duct and pole access by 2022 for the 2025 target to be achieved.

Fibre Networks are brilliant

11. Fibre broadband does not just deliver higher headline speeds; they provide modern efficient broadband connectivity to homes and businesses. Fibre broadband provides:

- Multi-screen, multimedia families with high bandwidths
- Home workers and businesses with reliability and quality of service
- On-line gamers with low latency networking and
- Vloggers with upstream, as well as downstream, bandwidth.

12. And full fibre broadband *will* offer a better consumer experience; with fibre broadband, customers do not need to

- Guess, as with the current copper-based products, what “up to speeds” will really deliver
- Buy a bundle of voice and broadband, when the voice is really not used
- Worry about how far away the exchange (or a cabinet) is likely to be: there is no postcode penalty with fibre broadband, nobody need pay for what they don't get, as fibre broadband does not deteriorate with distance.

13. In other words, fibre broadband will change the customer experience, product and market structure as much as the underlying infrastructure will be modernised. We should welcome this shift, as fibre networks and fibre infrastructure builders can bring much to the market to improve customer experience just by letting them deliver, without the need for specific customer protection regulation.

14. However, this is not to say that customer protection regulation is not required, rather we must be careful not to assume the current market model will automatically map into a fibre broadband market and therefore making assumptions about where and how regulations will need to apply. For instance, once full fibre broadband becomes prevalent, there will be little need for very specific detailed rules about advertising broadband speeds (subject to general laws about advertising accuracy): customers will not need to squint at small print defining ‘up to’ or ‘average’ or other very product specific rules, rather they will be very happy with their experience and the very specific issues associated with interpreting ‘up to’ speeds will no longer need regulatory attention. A transition to fibre will bring many new benefits and some new risks, we must be careful to avoid encumbering fibre with old assumptions. We discuss this further in para 17-19 below.

Switchover processes

15. Section 1.5 of the draft SSP document conflated two separate activities, namely BT (and others) desire to **switch off** narrowband, copper based voice networks and consumers' decisions to **switch between** providers and in particular to switch to fibre based networks. We look at each of these in turn.

Narrowband Voice Switch off

16. BT's narrowband voice platform (and indeed narrowband voice provided by all suppliers) has now outlived its expected life. Based on its own vendors' ability to support, BT initially planned to switch off its narrowband voice platform in 2012. It had no plans at that time to carry out any fibre broadband

investment.

17. Sky, TalkTalk and others have been providing for well over 10 years, an IP based voice service using the broadband service (rather than the narrowband voice channel). This does not require access to BT's voice service nor is it reliant on a fibre access infrastructure.

18. BT's narrowband voice switch off, something that it will have to initiate and deliver, would, if no alternative action was taken, result in some customers having no fixed voice capability. For some of these customers it would be a choice, as they could have a fixed voice capability if they had a broadband service, or they could rely on a mobile voice service. For other customers, particularly in remote locations, such a broadband based voice or mobile voice service may not be available. Regulatory intervention should protect these voice-only customers, particularly where mobile services are not available.

19. However this is only a requirement for very specific customers. The policy and any ensuing regulation should take account of all available services in the market including mobile voice. There should be no presumption that a broadband provider will provide voice, in the same way there is no regulation requiring ISPs to provide firewall or email services as part of a consumer broadband product. Full fibre broadband networks are built for and optimized for broadband unlike copper broadband which uses a technology originally built for voice. Some customers will require a regulated voice safety net but this should not result in a General Condition type obligation being placed on the whole broadband market. In other words we consider this to be a Universal Service style obligation and not a General Condition.

20. Full-fibre broadband providers will individually decide if and how they will provide a voice service: possibly bundled with the broadband service, provided as an optional extra or even not at all. Any regulation set by Ofcom's should not be prescriptive, it should not require the whole market to provide broadband with voice.

Consumer switching is necessary to enable a vibrant market

21. As broadband becomes increasingly embedded in households and businesses, it should be possible for consumers to coordinate the move from one broadband provider on one platform to another provider with a simple transfer of any applicable services (such as voice). It would be a missed opportunity if large-scale investment in fibre broadband took place, but was under-utilized because the consumer experience does not meet customers' needs. DCMS is right to recognize in para 28 and 58 of the draft SSP, the need to improve industry processes for broadband switching including across platforms. As previously discussed, this should not be conflated with a separate goal of providing a safety net voice only service, as narrowband voice is switched off.

22. We would **recommend** that final version of the SSP clearly separates out the need for regulation to address the Narrowband Voice switch off (which is independent of full fibre network deployment) and separately the need to facilitate competition by developing processes for consumer driven switching between broadband platforms. These are separate activities with separate risks, different regulatory intervention and timelines.

Effective Access to Passive Infrastructure in telecoms and other utilities

23. We agree with section 1.2 of the draft SSP; effective access to passive infrastructure, particularly Openreach's ducts and poles is necessary for full fibre infrastructure investment. Whilst we take comfort from the draft SSP's assertion in para 17 that "if the duct and pole remedies... are not being fully implemented by Openreach, then all options should be considered to ensure compliance", in reality, any option that would materially address the size of the non-compliance would take some time to implement. Therefore it is likely that investment in new full fibre infrastructure by new fibre infrastructure builders will have already slowed down or stopped before any compliance or remedial action is taken against Openreach, by Ofcom.

24. However given both the sentiment and direct instruction expressed by the statement, "...that all options should be considered...", it feels right and proportionate that Ofcom takes a very active role in the development and take up of this Openreach's duct and pole product. Over the last 12-24 months, a number of stakeholders have made considerable efforts, using their know how and experience to develop the duct and pole product and offer. However, without real, industrialised (volume) usage, we really do not know if we have a product that is effective and efficient at scale. As well as requiring the product launch, Ofcom should ensure that Openreach puts in place all appropriate improvements on the product in a timely fashion, and as a minimum, annual refreshes of the product for the next 3 years. Ofcom must actively oversee this process of development, rather than just leave it to Openreach and fibre infrastructure builders.

25. Openreach's duct and pole product is not provided on an equivalence basis, but on the basis of "no undue discrimination". Equivalence creates the presumption of 'the same', whereas 'no undue discrimination' allows difference that are not discriminatory. There must be a clear mechanism for Openreach to explain each and every difference, so that Ofcom can make a decision whether they are or are not unduly discriminatory. This process needs to be open so that stakeholders who use the products, such as new fibre infrastructure builders, can input into Ofcom's decision.

26. As DCMS recognises "Sharing [passive infrastructure such as duct and poles] can reduce rollout time, costs and disruption...". tooo wholeheartedly agrees with this statement. The development of Openreach's duct and pole product cannot be left to chance, Ofcom must take an active development and enforcement role to ensure the product is fit for purpose when used on an industrial scale. This SSP should make clear the scope and scale of Ofcom's role in the development and adoption of Openreach's duct and pole product.

27. We would therefore **recommend** that this SSP sets out requirements for Ofcom to take a proactive role in development of Openreach's Duct and Pole product and in particular

- a. Put an obligation on Openreach to refresh the product in a timely manner with at least annual updates for the next 3 years
- b. Develop and set out a punitive compensation structure (to be included in the Duct and Pole contract) such that it incentivizes Openreach to develop and offer the product effectively and
- c. Set out a process for Openreach to use to describe to Ofcom and fibre infrastructure builders each and every difference between the product used internally and the product offered to new fibre infrastructure builders such that Ofcom can make a decision on Openreach's compliance

with its “undue discrimination” obligation.

Stable and Long-term Regulation that encourages network investment

28. We agree that stable and long-term regulation is necessary to encourage network investment. Whilst a change in Government following a general election can be a trigger to amend the SSP, we hope that this will not be a decision taken as a matter of process in future but that stability and certainty is an integral foundation to the SSP.

Anti-competitive behaviour

29. The biggest risk to the delivery of the government’s objective of full fibre availability to 15million homes is BT and Openreach behaviour. Competition is the only way that the Government’s target of full fibre roll out will occur, and yet competition struggles to emerge in a market where the risk of anti-competitive behaviour from BT and Openreach directly affects an fibre infrastructure builder’s business case.

30. Ofcom must be alert to and emboldened to take action against, behaviour intent on maintaining Openreach’s near-monopoly. This could include, as already discussed, providing a substandard or discriminatory duct and pole access product or it could involve anti-competitive wholesale contracts.

31. However, one of the most challenging threats to new fibre infrastructure builders fibre build is aggressive overbuild by Openreach. We have already witnessed Openreach announcing built in towns and cities that had previously been announced by new fibre infrastructure builders. Compare this with the behaviour of new fibre infrastructure builders who have not felt it necessary to overbuild each other, but are delivering the benefit of fibre across the UK. This over-build will not just jeopardise investment in those towns and cities where it is taking place, but jeopardise and curtail new investment *across* the UK. We recognise that there are no legislative restrictions to enter the fibre broadband market in the UK (which is quite right), and indeed competition law would prevent us from preventing market entry, however incentives could be used to ensure that the maximum number of premises benefits from fibre broadband, allowing us to deliver on the 15million homes with access to full fibre.

32. For instance, there is currently a suspension of business rates on new fibre networks until 2021. It would be possible to extend this scheme beyond 2021, but only for the first fibre investor in a given geographic areas. The second provider would not receive a discount. This would encourage fibre infrastructure builders in the early years to focus on delivering to the unserved rather than overbuilding.

33. Ofcom must also be extremely vigilant to spot anti-competitive overbuilding in order to remove competitors from the market. The specific risk is Openreach targeting towns and cities as they are announced by fibre builders. By Openreach building in areas of the city that the fibre builder is yet to reach, Openreach starves the competition of scale and hence lowers the expected return. In such a way Openreach has the ability to frustrate the roll-out of the fibre builder and reduce the expected return. Such actions will limit the amount of investment in alternative fibre builders over the medium term.

34. Ofcom could be empowered to be able to demand that Openreach share their investment plans with Ofcom for the forthcoming period (at least three years) and then to restate them every 3 months. In this way any systematic switching of investment to reflect competitive behaviour could be spotted. Art 22 of the new European Electronic Communications Code Directive sets out such a process. Such transparency

would not be a disproportionate obligation on a market player with well over 50% market share across the wholesale broadband market in the UK (except Hull).

35. We therefore **recommend** that this SSP requires Ofcom to

- a. proactive monitor BT's build for signs of strategic overbuild and
- b. put an obligation on BT to share its build plans with Ofcom and
- c. identify ways to sanction BT if there is repeated anti-competitive overbuild as described above

36. Without competition, investment in fibre broadband in the UK will be limited, the regulatory framework must find a way for new fibre infrastructure builders to survive despite their inferior starting position compared with BT.