



27th March 2019

Submitted by email only to :- sspconsultation@culture.gov.uk

Statement of Strategic Priorities

1. Introduction

UKCTA is a trade association promoting the interests of fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. We advocate regulatory outcomes designed to serve consumer interests, particularly through competition to Ofcom and the Government. Details of membership of UKCTA can be found at www.ukcta.org.uk. We welcome the opportunity to comment on DCMS' Statement of Strategic Priorities. We note that Hull has been excluded from this market review and would like to make clear that this response is submitted on the basis that there is no read over to any review of the infrastructure market in Hull¹. Sky has not participated in the drafting of this UKCTA response and intends to submit its own response to the consultation, nothing in this paper should therefore be read as representing the views of Sky.

2. Impact on the independence of the Regulator

UKCTA members have serious concerns about the potential for the SSP to undermine the independence of Ofcom. Although the Government did provide itself with the legal power to create an SSP, we believe that the SSP as drafted comes very close to conflict with both the provisions of the Framework Directive and also the new European Electronic Communications Code (EECC) in relation to the requirement for the regulator to be independent of government

¹ Please see KCOM's submission in response to the PIMR.

Framework Directive

Article 3(2) talks about the independence of the NRA and Article 3(3) about impartiality. Article 3a explicitly says the regulator shall ***not take instructions from another body*** in relation to ex-ante regulation or dispute resolution. The setting of priorities in the SSP and the requirement for Ofcom to have regard to them seems at odds with the requirements of regulatory independence.

EECC (which the UK plans to implement)

Article 8 of the Code requires political independence of the NRA. Unlike the Framework Directive, this is not confined just to disputes or matters of ex-ante regulation. The Code goes further and requires absolute political independence.

Domestic Law

Nor is this a matter only of Community law, domestic law is also relevant. Sections 2A-2C of the Communications Act 2003 require Ofcom to have regard to the requirements of the SSP. We also note that in Section 22 of the SSP DCMS talks about telling Ofcom ***how*** to regulate. There is also mention of matters which are subject to SMP, such as passive infrastructure. UKCTA is deeply uncomfortable about the setting of political direction in these matters since we believe they are matters which properly ought to be at the discretion of the regulator rather than politicians.

There is a clear conflict between the new provisions of the CA2003 (Sections 2A- 2C), the current Framework Directive and the EECC.

This is not good from the perspective of regulatory certainty. Regardless of whether UKCTA members agree with the type of directions being given in this SSP or not, we do not believe it is appropriate for politicians to take a direct role and the precedent set for political interference in the affairs of the regulator is not welcome.

This is not a merely academic or theoretical concern, it is all too easy to envisage that that a well resourced CP which took issue with the direction set by Government for the regulator to pursue could mount a very disruptive appeal in order to frustrate or at least delay the policy objectives of government. Such a CP could run some very credible arguments against the politically motivated approach taken in the SSP. It might be that the Regulator would have pursued those same policies of its own volition but the addition of political direction to pursue those policies would leave them vulnerable to legal challenge, thereby further eroding regulatory certainty.

There is nothing wrong with Government responding to consultations, there is nothing wrong with the Government publishing what its political priorities in the sector are, these are all legitimate approaches which Government can and should utilise. But this is very different from the Government requiring Ofcom by statute to have regard to the priorities of the politicians of the day. That, we feel is a step too far.

There are a number of instances in the SSP where the Government crosses over into directing Ofcom on both the ‘means’ and the ‘ends’ to achieve its objectives. We believe that Ofcom should remain free to decide how to use the instruments at its disposal.

As noted above, this type of approach severely undermines regulatory certainty; it undermines the well established evidence-based, objective regulatory process; and in so doing it threatens the case to be made for investment in UK infrastructure.

3. Scope of the SSP

In addition to the lawfulness point raised above, we have concerns about the confused nature of the SSP in that it mixes strategy and detailed policy which ought to implement strategy. There ought to be a clear differentiation between these two and if Government is to have a role in setting priorities these ought to be confined to setting broad strategic outcomes rather than intervening in detailed matters of implementation.

The SSP represents a serious erosion of the NRA’s independence. We have concerns that it appears to tell Ofcom what to do with regard to Openreach and that if Openreach does not co-operate as intended then Ofcom can ask Government to change the law to ensure compliance. This is a most unwelcome precedent.

4. Scope of Consumer regulation

UKCTA has long argued that (other than the very smallest businesses) businesses simply do not need the same protections as consumers. Business are often well resourced and positioned to negotiate their own bespoke terms with CPs and often have very strong bargaining positions. Clearly smaller businesses are in a different position and how to differentiate between the two and decide where the line is to be drawn is a difficult question. UKCTA members believe that what is needed is *appropriate* regulation for business services and a strategic objective of securing better information about the state of business provision would be welcomed.

The consumer regulation initiatives which are set out in the SSP resemble an attempt to gold plate what the EU has already set out. The overall sense is that the SSP leaves us with a confused mix of strategic aims and low level policy issues. As noted above UKCTA believes that this is a mistake. Government, if it chooses to intervene in this area, should confine itself to setting strategic direction and leave to the regulator the setting of the regulatory policies designed to achieve those strategic objectives.

We think the strategic priorities for the UK at present are:-

- Pursuing an outside in-policy in relation to fibre investment
- Determining who delivers the USO
- How is the USO to be funded? It has to be acknowledged that some form of state aid is needed, but there needs to be a new approach, repeating the BDUK approach is not a realistic option.

5. Business v Consumer

The SSP appears to continue the mistaken thinking that the needs of businesses are the same as those of consumers, or worse, that businesses do not need the same regulatory focus as consumers (except when consumer protection regulation is to be applied to them).

UKCTA maintains that the statistics quoted by government and regulator mask the poor state of business broadband provision. Government continues to promise economic benefits from consumer broadband, whereas businesses are the main driver of economic growth, decent provision of broadband designed for businesses will be needed to deliver those economic benefits. We have raised these issues multiple times with Government and Ofcom and now require concrete actions to address this key issue.

One example of this is in the section on the so called outside in approach – the SSP refers to premises. This masks the problems which we have identified to Ofcom and DCMS – in order to address the shortcomings of the current approach UKCTA would like to see the Government define premises as including business premises, and to recognise that the “outside” is not just rural, for businesses the outside can be city centres or business parks. Another area that the “outside-in” strategy should cover is exchange-only lines, which cannot be upgraded to FTTC as there is no cabinet – these should be prioritised for FTTP as customers using such lines have been left behind in the technology jump.

Another related proposal which we *would* like to see extended to big businesses is the proposal to require Ofcom to gather better address level data and information – this really must be expanded to include business premises so that we have an accurate view of the state of broadband provision in the UK. This information should then be presented clearly and transparently so we know what is being reported and how.

The Government should include improving business connectivity issues as a strategic priority, and require Ofcom to provide details of how it is supporting this objective, including its current data collection processes and its assessment of connectivity in the business market.

6. Data portability and customer complaints

UKCTA is not at all sure why it is thought that this can or should be applied to broadband services. The majority of broadband packages (and an increasing number of voice packages) are unlimited in their use. Customers pay a fixed fee per month regardless of the amount of the service which they consume. As a result, CPs do not typically collect usage information other than where an end user is consuming far greater amounts than is the norm and a breach of the CP’s Acceptable Use Policy is suspected. Although government wishes to mandate the passing on to intermediaries of customers’ usage data, in practice there is no data to be passed on. Although we do not accept this has any application for any type of broadband end user, even were it to be mandated we believe this is completely unnecessary for large business customers.

Government appears to think this is a good initiative, something which has been explained to us in face to face meetings with DCMS officials but we have seen no evidence, either in meetings with officials or in the SSP to support the need for such an initiative. We believe that before proceeding, more work is needed to justify such a move, looking at the opportunities and the threats such a measure would involve. The Statement should be amended to set the expectation that Ofcom undertakes this necessary first step.

Similarly, the SSP asks that Ofcom intervene further in consumer regulation with proposals that Ofcom should improve its Quality of Service reports by including data on consumer complaints made directly to providers as well as to Ofcom, and that Ofcom should work with the UKRN to introduce performance scorecards for all providers and digital comparison sites. As with data portability, we deem that any such proposal requires detailed consideration and justification to ensure that publishing internal complaints recording does not lead to unintended consequences and confusing outcomes for consumers. For example, providers recording complaints incorrectly, late or differently in order to give the appearance of fewer complaints.

7. Cyber security

Ofcom's role should be confined to that of ensuring network integrity. We think that other than this there ought to be a single source / authority for cyber. Fragmenting it by expanding Ofcom's role is not helpful. It is also unclear from the SSP which of the provisions on cyber are guidance and which provisions are mandatory.

It is also likely to make little difference applying these provisions to CPs serving business customers since they typically will go over and above these minimum levels to win corporate business anyway so there seems little point in mandating business CPs to implement lower standards.

8. Passive access

The SSP speaks about looking to other utilities to ease the provision of fibre infrastructure, much as was done in the 1990s. We question the practicality of using such infrastructure given that industry has already looked at these solutions, for example using electricity networks to deploy trunk fibre networks in the mid to late 1990s. There *are* barriers which Government can and should tackle, for example Network Rail wayleaves are a serious issue in the telecoms industry which have been an issue for many years, and yet they are within the remit of government to resolve (since Network Rail is a government owned body). We also believe that government needs to look at the access to infrastructure regulations to

allow CPs to access suitable infrastructure where they identify feasible solutions- the regulations are so full of get-outs they are not as useful as they might be. We would also like to see a call for Ofcom to assist DCMS in the timely review of the Access to Infrastructure Regulations which was announced as an action in the Future Telecoms Infrastructure Review.

Yours faithfully

Domhnall Dods
UKCTA Secretariat