A RESPONSE BY MARK SWARBRICK

The Government has invited views on its Draft Statement of Strategic Priorities. Having spent many years involved in telecoms policy in both BEIS (and its predecessors) and DCMS (but now retired), I welcome the opportunity to contribute to this discussion. My comments are restricted to the issues around digital infrastructure, specifically fibre networks and 5G.

Two questions have been asked in respect of the strategic priorities. Firstly whether there is agreement with the Government's strategic priorities and desired policy outcomes for telecommunications, the management of radio spectrum and postal services.

On telecoms, the Government's policy outcomes are to see a world class infrastructure, defined as nationwide coverage of fibre networks by 2033 (with an interim target of 15 million premises by 2025) and deployment of 5G technology across the majority of the country by 2027.

It is not clear what is meant by nationwide coverage, presumably not 100% which has not been achieved for current broadband coverage. However if the UK is to match other leading countries in the deployment of fibre, then a target of around 97% is probably required. Equally, the 5G target likes any specificity, the majority of the country is 51% and above, it is not clear how far above 51% the Government is seeking to achieve.

The interim target for fibre deployment would seem to be achievable if the industry delivers on its existing pronouncements. BT has suggested it could deploy to 10 million homes and CityFibre has set out its target of 5 million premises. There are a number of altnets that will provide additional deployment, such as Hyperoptic and Gigaclear. There will of course be a large degree of duplicate building, so the key challenge will be extending the potential 10m footprint of BT, as well as ensuring that the industry does deliver close to its aspirations – this has not always been the case.

However the continuation of Government funded programmes, local initiatives ideally involving local authorities and some additional regulatory tweaks on top of industry targets have the potential to reach the 15m premises. It will of course require ongoing Government focus and pressure to ensure that progress is maintained.

The nationwide coverage by 2033 would appear to be much more of a challenge. There are currently around 25 million homes in the UK, with around 80% of those being houses. There are also around 2 million business premises. If the 15m target is it, there will still be a need to deploy fibre networks to around an additional 12m premises in the following 8 years, and the majority of these will be in harder to reach and less profitable areas.

In 2016, the Independent Networks Cooperative Association did a survey of its members which reported that by 2020 the Altnets were forecasting their FTTP networks will pass nearly 5m premises. The Altnets' said that their deployment plans could increase by between 25% and 50% in a more supportive policy and regulatory environment, in other words they could reach around 6.25 – 7.5m premises. That more supportive regime is being introduced, through the outcome of Ofcom's strategic review and decisions by

Government such as the 100% business rates relief for full fibre network, so it is to be hoped that the altnets will deliver on their forecasts. However even if they do (and perhaps a little bit more besides) that will still leave around 20m premises to be connected. As it stands the only company who is in any position to do that is BT. (I do not expect Virgin to widely deploy fibre as their cable infrastructure is likely to be able to deliver gigabit services through future iterations of the DOCSIS standard).

The Government's hope that half the country will benefit from competition of gigabyte capable networks is of course possible if Virgin's network is included (but not if those networks have to be FFTP). However that will still leave many premises relying on Openreach to make the necessary investment, a fact the Government seems to recognise.

The Government is setting great store on the legal separation of Openreach from the BT Group to deliver the outcome it seeks. It is worth bearing in mind though that the decision by Ofcom to effect that change was driven by competition concerns in general, not specifically about investment in fibre networks. Ofcom has set its hopes on duct and pole access to drive competition and future investment, along with access to dark fibre, although it has run into considerable problems with the latter regulatory proposal. Even if these prove to be successful, and the jury is still out on that, it still doesn't seem to allow for the sort of expansion that is required.

It is not clear to me, and it never has been, as to why Openrach would invest in fibre to the premise if there was no clear economic return on doing so. Despite the clamour for fibre by certain vocal industry players, pundits and commentators, it is not at all clear that demand is there or the willingness to pay any premium for fibre networks. A look at the UK market would support the view that not all consumers are interested in higher speeds. Despite the widespread availability of super fast broadband (over 90% availability) take up is around 44% according to Ofcom's 2017 Communications Market report[1]. Why demand is lagging supply is not clear, but it does raise questions about whether greater consideration should be given to a more nuanced approach as to what levels of connectivity will be demanded. If speed was the primary reason for consumers taking a broadband connection, then you would expect operators who offer the highest speeds to enjoy 100% market take up in those areas where they operate, but this clearly is not the case.

The Government may therefore find itself with a rather greater gap than the 10% of the premises it currently estimates won't be commercially viable. As it stands though it is not clear what the Government is planning to do within that 10%, other than saying it will pursue an outside in approach. Some additional funding is going to be necessary and that funding needs to be announced soon, of the Government is going to "deploy at the same time as the market deploys to commercially viable areas" – as that is happening right now. It will also require Ofcom to respond quickly and effectively to ensure the regulatory framework is suitably supportive of investment. This brings us to the second question set by the Government, about Ofcom's role which I discuss below, after first considering the Government's priorities on mobile and 5G.

[1] https://www.ofcom.org.uk/__data/assets/pdf_file/0017/105074/cmr-2017-uk.pdf

The Government states that the auction of 700MHz and 3.6 – 3.8GHz has the capability to "materially improve mobile coverage across the UK, particularly in rural areas and on the UK's major roads". This has been on the agenda for some years now and the Government has directly engaged with operators to try and push up reliable coverage into the mid 90 percent. It also financed the provision of 75 mobile masts in areas not previously served. Despite this, coverage has not yet reached the levels that the Government sees as necessary. It is not clear to me therefore why the release of the new spectrum will materially change the dynamic, operators access to 800MHz spectrum hasn't resulted in the desired levels of coverage and so the release of 700MHz may not have the desired effect either, even allowing for coverage conditions being applied.

Alongside this, the Government sees various changes in the regulatory framework as assisting in delivering its priorities. These include new infrastructure models, licence conditions and utilising the provisions of the European Electronic Communications Code. However these actions rely of Ofcom bringing them into effect and there is no guarantee this will happen – I discuss this further in the section below.

What is interesting in this paper is that it makes no mention of the power of direction that the Government has in respect of certain aspects of spectrum management. Although the power has been used once in 2010, it is nevertheless something for the Government to consider whether its use may further the achievement of its objectives if future decisions on spectrum fail to deliver these. Ultimately much here will depend on decisions made by Ofcom.

As well as mobile coverage, the Government is keen to see deployment of 5G services to the majority of the country. This desire may however run counter to the economic realities facing operators. The recent GSMA publication[2] noted that "the policy environment in Europe s not sufficiently supportive of network investment. Delivering 5G connectivity will stretch operators' financial resources to the limit, particularly if a sustainable business model for 5G remains elusive. The challenge is how to meet government expectations to cover every remote corner of every country – even where there is no business justification for it – while still delivering 5G connectivity".

At present the most likely deployment of 5G is in areas of high usage and in certain vertical sectors, but business models still seem to be uncertain. Although the Government is investing in a number of 5G projects, it will be operators who determine how widely and how quickly 5G will be deployed, even allowing for any conditions that may for example be applied to future licences.

The second question posed by the Government is whether the document sets out clearly the role of Ofcom in contributing to the Government's strategic priorities and desired outcomes?

There is I feel some ambivalence in the question the Government poses here. On the one hand the Government states that Ofcom is independent and that it is critical that independence remains, on the other hand it clearly expects Ofcom to take notice of its suggestions on regulatory matters.

[2] A Mobile Industry Manifesto for Europe GSMA 2019

The fact is that Government is just one stakeholder among many that Ofcom has to pay due regard towards. Is the Government suggesting that its views should hold greater prominence than those of say the mobile industry? If this were to be the case I think Ofcom would face considerable challenges. In addition, Ofcom already has a considerable number of duties it is required to give due regard to, as set out in the Communications Act 2003. In reality therefore, Ofcom could give due regard to the Government's views, but decide on a set of actions that the Government may not find to its liking, if Ofcom considered its balancing of its other duties required it to act in that way.

So whilst the Government's statement is useful in setting out in public its priorities, it is not clear to me that this will necessarily result in Ofcom acting in the way the Government has suggested it might.

There are for example several areas where the Government is suggesting a particular action which Ofcom in the past has been completely against. These include regulatory forbearance and national roaming. Just because the Government thinks these are good ideas won't necessarily result in Ofcom using these options if it thinks they undermine other duties.

Some of the Government requirements are also suitably vague. On 5G the document states that "mobile investment should be closely monitored by Ofcom and appropriate options considered if it becomes clear the current market structure is not supporting investment in 5G at sustainable levels". This poses all sorts of questions as to how such things should be determined and whether Ofcom is actually best placed to decide whether the mobile industry is making suitable investments. There may be many reasons why such investments are not made and there appears to be a significant risk of interference in the market to an extent that would undermine the competition that the Government is so keen to see. In any event, the Government itself has probably the greatest influence on levels of investment by making the wider economy suitable for such investment.

Other elements of the role of Ofcom just seem to state things Ofcom is already doing, such as completing the award of 700MHz and 3.6 - 3.8GHZ bands. I note the use of the phrase "in a timely manner", whatever that is supposed to mean. Those who know about the history of spectrum allocation in the UK will know that Ofcom's attempts to bring spectrum into use are often delayed by the industry itself through various legal challenges. It is not clear what Government expects Ofcom to do in these circumstances, or what the Government will do if things do not happen in what it considers to be a timely manner.

At the heart of this question lies another question, what is the future relationship of Government and Ofcom? At present Ofcom is independent (although a remarkable number of people still seem to think that Ofcom is part of government) and that independence is underpinned by European directives. However in a post Brexit world, assuming that is the outcome, these regulations will no longer apply. So will the Government retain that independence, or will the temptation to intervene become too great, particularly if Ofcom does not act in the way the Government would like?

The Government is also setting itself a challenge. The telecoms regulatory environment is complex and challenging. If the Government is to become more vocal on setting out what it thinks is the right form of regulation, then it really will have to be confident that it has done the necessary thinking and analysis to ensure that such demands are firmly based. At present the Government does not have the level of knowledge and expertise that Ofcom has, so it needs to consider how far it is willing to develop its capability.

The Government is clear that Ofcom's role is critical to the delivering of its objectives, yet as it stands it lacks the necessary levers to ensure those outcomes. It is more than likely that Ofcom will, seek to deliver much of what the Government would like, but it may chose to do this in different ways, for reasons suggested above. However the document is silent on what happens if Ofcom does not create the necessary regulatory environment to support fibre and 5G roll out, nor if it does not take the actions the Government would like to see. Although Ofcom is required to report on how it will respond and its subsequent actions, there is nothing to say what happens if they chose for whatever reason not to follow the Government's suggestions, which is entirely possible in wishing to assert their independence. As mentioned earlier, the Government does have the power of direction in certain circumstances (which may or may not apply), but this is a cumbersome process and so may not be a suitable response.

So the question of the future relationship of Government and Ofcom is crucial. After Ofcom was established in 2003, the Government was content to step back and allow Ofcom to function. However in the last decade, as the importance of telecoms to society and the economy has become ever more recognised, Government has sought to intervene more and more, starting with the then Government's Digital Britain report (or indeed before that the Caio review) and continuing through direct action in such areas as spectrum (its 2010 Direction), in the mobile space (the Mobile Infrastructure Programme and direct engagement with the industry to increase coverage) and in delivering broadband connections through its BDUK programme. The SSP is another milestone in that path of intervention. Considering the journey over the last ten years, it is an interesting question as to where the next 5-10 years will take us, something perhaps everyone involved should be giving serious thought towards.