

Response to DCMS's consultation

Statement of strategic priorities for telecommunications, the management of radio spectrum and postal services

Joint submission by Colt, TalkTalk, Sky and Vodafone (the 'Passive Access Group')



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1. Introduction

- 1.1. The Passive Access Group or PAG (TalkTalk, Vodafone, Colt and Sky) write in response to DCMS's *Statement of strategic priorities for telecommunications, the management of radio spectrum and postal services* (SSP) consultation published on 15 February 2019.
- 1.2. The PAG is a group of the UK's major communications providers. Though fierce competitors – PAG members all have their own, individual ambitions – the PAG is united in their view that more and better access to BT's passive infrastructure (i.e. dark fibre, ducts and poles) is required to deliver the current and future communications demands of consumers and businesses alike efficiently and swiftly.¹ At present, the UK is fast falling behind the rest of the developed world in this regard.
- 1.3. The PAG formed in 2014 and since then has engaged with Ofcom and government on every possible opportunity to push for better access to BT's passive infrastructure. This included responding to Ofcom's Business Connectivity Market Review Consultations (BCMR) and Wholesale Local Access (WLA) consultations on requiring BT to provide ducts and pole access (DPA) and dark fibre access (DFA) – Ofcom's principal market review mechanism for requiring BT to provide wholesale access to its infrastructure. The PAG has also supported Ofcom against an appeal by BT attempting to thwart Ofcom's plans for providing better passive access to the market.
- 1.4. The PAG welcomes the government's proposals to use their powers under the Digital Economy Act 2017 (DEA17) to set strategic priorities for Ofcom to help secure world class digital infrastructure for the telecoms market.
- 1.5. The government's proposals broadly align with the views of the PAG. The PAG welcomes the opportunity to provide views on the SSP proposals from industry participants who will be critical to ensuring digital infrastructure is in place to meet the needs of consumers and ambitions of government.

2. Implications of designation of the Government's SSP:

- 2.1. As noted in the SSP consultation, should the Secretary of State (SoS) designate a Statement of Strategic Priorities (SSP) under section 2A of the Communications Act 2003 (CA03), section 2B requires Ofcom to "*have regard to the statement when carrying out*" its telecommunications, spectrum and postal services functions.
- 2.2. The CA03 obliges Ofcom to discharge a variety of duties and meet a number of objections, which sometimes compete, to varying degrees in a hierarchy.
- 2.3. While it is settled law that Ofcom may not derogate or disregard its principal duties when performing any of its functions, section 2B of CA03 clearly provides government with the

¹ This response represents the PAG's collective view. Any inconsistencies between the group's view and that of any of its individual members', shall be resolved in favour of the member's view as representing the correct position with respect to that member.

power to steer Ofcom's approach to its duties and so have an impact on how it discharges those duties and meets its objectives.

2.4. In addition section 2B (3) DEA17 requires Ofcom to issue a statement on what it plans to do "*in consequence*" of the SSP and section 2B(4) requires Ofcom to publish a review of what it has done 'in consequence' of the SSP every 12 months.

2.5. Thus, the SSP:

2.5.1. provides the SoS with a broad ranging power to add to a source of primary law, which will have an important impact on Ofcom's approach to its functions and objectives; and

2.5.2. secondly, endows Ofcom with a significant additional discretion to interpret how it will implement the SSP. This clearly adds to the CA3 and thus provides an additional source of 'grey letter law' to Ofcom's powers.

2.6. This may give rise to a number of potential issues:

2.6.1. The fact is that there are winners and losers from any 'new' source of law. Disaffected stakeholders will therefore be looking for ways to challenge or set interpretational precedent as to anything that does not suit them or enhance anything that does.

2.6.2. Any 'new law' creates a source of uncertainty. This can have a detrimental impact on investment, especially in regulated sectors, where the scope of competition is set by government or the regulators. Actual or perceived uncertainty which reduces investment obviously has knock on effects to competition, ultimately undermining the goals that government is setting out to achieve through the SSP.

2.7. The SSP unfortunately creates two new areas of uncertainty (1) in relation to the SSP itself and (2) in relation to Ofcom's interpretive statement. Although, the SSP cannot avoid creating uncertainty to greater or lesser degrees, therefore presenting additional sources of challenge for stakeholders dissatisfied with either the SSP or Ofcom's interpretation and statement, government's approach to the SoS can mitigate this. To this end government should:

2.7.1. Seek full consensus from stakeholders before setting their mind on the final SSP.

2.7.2. Ensure the SSPs do not contradict or purport to substitute Ofcom's principal statutory duties. This includes ensuring the SSPs do not require Ofcom to take actions that go beyond those statutory powers and duties. Any new power should be introduced via primary legislation so to not undermine legal certainty.

2.8. Ultimately, the PAG welcomes the fact that as a result of this SSP Ofcom will be under more pressure to review their current approach to copper networks and full fibre networks due to the governments proposed approach to full fibre technology investment

and implementation. The SSP are intended to provide Ofcom with the context and guidance about the Government's priorities and desired outcomes in relation to telecoms and should not go any further as it could otherwise undermine Ofcom's independence. However, the PAG also sees the SSP as an opportunity for the government and Ofcom to work together to take bolder policy initiatives to enable the UK to move towards full fibre connectivity across the national territory.

3. PAG's general comments on the SSP:

- 3.1. The PAG recognises that the SSPs for telecoms are also targeted at addressing harmful business practices, improving customer engagement, exploring the potential of greater data portability and tackling loyalty penalties being paid by some customers. While these policy proposals are outside the remit of the PAG, these are matters that are important to PAG individual members and the PAG members may choose to respond to these proposals through their individual responses.
- 3.2. In the rest of this response the PAG provides comments on the specific government proposals that are relevant to the PAG and are targeted at Ofcom. As a general comment on the proposals in this consultation, the PAG considers that any SSP adopted by government that has at its heart to incentivise infrastructure investment and full fibre connectivity should at the very least require Ofcom to introduce truly unrestricted DPA and DFA as remedies throughout the national territory.
- 3.3. Similarly, the PAG welcomes the government's proposal in the FTIR to address the current barriers to deployment through legislative and non-legislative measures². While the PAG welcomes the advances made under the Electronic Communications Code, there are still barriers for CPs wishing to undertake infrastructure investment in the UK. For example, there needs to be quicker and cheaper access to land for CPs and there still exist significant bureaucratic barriers for CPs to get permission to close roads or repair infrastructure. The PAG would like to see construction companies to charge more cost reflective prices to CPs laying Fibre-To-The-Premise ("FTTP") to new homes and to address the situation with wayleaves³. The PAG believes that taking action on this front is squarely a role for the government intervention to address.
- 3.4. Finally, the PAG acknowledges that legal separation of OR was a step in the right direction, however under the current arrangements the downstream market cannot be said to be contestable. The PAG considers that the SSP is a good opportunity for the government to, at the very least, ask Ofcom to take a more meaningful step towards legal separation (for example through better governance rules around financial planning).

² Para 13 of the consultation document.

³ The PAG notes that there are still significant barriers in terms of costs and burden for securing wayleaves for different types of building. Despite the electronic communications code the process remains time-consuming and onerous particularly in relation to single build areas.

4. Effective access to infrastructure:

- 4.1. The PAG welcomes the government's support for unrestricted access to OR's ducts and poles (DPA) and welcomes DCMS position that if the new DPA product is not fully implemented by OR 'Ofcom should consider all options'⁴. The PAG's position is that true unrestricted access to DPA means moving to a framework where OR is required to give access to its ducts and poles on an equivalent basis. Given that OR still has an incentive to favour BT over other CPs, Ofcom should also properly monitor for undue discrimination.
- 4.2. Furthermore, as highlighted in the section above, the PAG considers the government will be unable to meet its strategic priorities through the SSP unless it requires Ofcom to introduce fully unrestricted DFA where Ofcom finds that BT has SMP in the supply of very high bandwidth.⁵ DFA and DPA are complementary to governments' objectives for digital infrastructure and must both be considered. Ofcom has failed to adopt this seemingly self-evident approach to passive access, perhaps as a result of its competing priorities to incentivise infrastructure investment. Government intervention is clearly required to steer Ofcom in this area. Government could formulate the SSP so that Ofcom must have regard to the fact that dark fibre is complementary and should be imposed alongside other passive products on a regulated basis.
- 4.3. Equally, the PAG welcomes DCMS position on trying to encourage Ofcom to work with other regulators and explore options for passive access to various types of civil engineer infrastructure and remove barriers for other communications providers ('OCP') OCPs to access these types of passive infrastructure⁶. However, the PAG considers that access to passive infrastructure should not be a remedy that is only available when DPA is not possible. DCMS policy position should be to promote unrestricted passive access in general. In terms of busting barriers to accessing these types of passive infrastructure, the PAG considers that promoting a level playing field on costs and access to other utilities such as a water and energy companies is a good place to start.

5. Stable and long-term investment encourages network investment:

- 5.1. The PAG welcomes the government's plan to work with Ofcom and OR to ensure there is greater transparency of OR's build plans. There are two different purposes for asking OR to publish build plans: on the one hand, it will discourage inefficient over-build by enabling other communication providers than BT/OR to avoid building where OR has already plans to build⁷. On the other hand, it will reduce BT's incentives to act anti-

⁴ Para 16 and 17 of the consultation document.

⁵ Para 18 of the consultation document.

⁶ Para 19 of the consultation document

⁷ For example, this was a problem with the BDUK programme to roll out FTTC across the country where due to the uncertainty of Openreach plans there were cases of overbuild (e.g. by Gigaclear).

competitively by, for example, discouraging BT from taking advantage of the information it has from other providers when deciding where to lay their infrastructure. Therefore, the PAG considers it would be positive to encourage Ofcom to require OR to publish each year the areas in which it proposes to roll out FTTP over the next three years ..

- 5.2. The PAG also welcomes government's proposal to introduce flexibility which will enable telecoms providers to agree commercial deals that share risks and gains from network deployment to support investment. The SSP should reflect policy that takes into account the high cost of deploying digital infrastructure and the difficulty of having a profitable income from those investments. Ultimately, the SSP is an opportunity for the government to ensure that the regulatory and market model encourages and supports FTTP investment.
- 5.3. However, the PAG is concerned that DCMS seems to anticipate that in prospectively competitive areas Ofcom will not need to have regulation in place given that 'competitive pressures should shape investment and pricing decisions'⁸. This is particularly concerning given that Ofcom is proposing to categorise 69% of the national territory as 'prospectively competitive' despite there being varying levels of competition across these sub-geographies. This approach could result in large swaths of the country becoming unregulated or lightly regulated, which will discourage investment.
- 5.4. The PAG particularly cautions the risk of wrongly de-regulating areas where some competition exists. This is because Ofcom is moving to a 5-year market review period which could create a corresponding five-year lacuna period if Ofcom wrongly deregulates in areas where regulation is needed to protect consumers from BT's SMP position. While the PAG agrees that 5-year market review periods are likely to bring greater regulatory stability, the PAG recommends that a form of interim review (or other measures) be put in place to ensure that regulation reflects actual competitive conditions in a particular area.
- 5.5. Furthermore, Ofcom should only be encouraged to de-regulate in areas where there is no longer SMP. Even in areas where there is a strong and genuine prospect of OCP investment in the medium term, reducing regulation before the investment occurs (enabling OR to raise price above cost) will reduce the chance and/or extent of that investment occurring (since competitor's return on investment will be reduced). It will also reduce the incentives for BT to invest since the margin between FTTP and legacy prices will be reduced in those areas.
- 5.6. The PAG supports the 'fair bet' regime approach to spectrum management put forward in the European Electronic Communications Code (EECC)⁹. A fair bet regime allows firms to make large and risky investments having confidence that any regulation will reflect a

⁸ Para 22 of the consultation document

⁹ Para 22 of the consultation document

fair return on investment decision, which aims to give confidence for investors in full fibre technology. However, the only way this can work is if Ofcom is incentivised to take regulatory decisions which enable CPs to recover their cost.

6. Spectrum management

6.1. The PAG has been pushing Ofcom to allow mobile operators to have unrestricted access to OR passive infrastructure for the provision of backhaul services as soon as possible. However, DFA should not be an option only when DPA is unavailable but mobile operators should be given unrestricted access to both remedies simultaneously.

7. The switchover process:

7.1. The PAG agrees with the government's position that the switchover from copper network to FTTP should be led by industry with the support of Ofcom and government to achieve this transition¹⁰.

7.2. The PAG also agrees with the government that the most effective way to achieve switchover and avoid parallel networks is through encouraging demand-led migration. This could be achieved by OR offering attractive wholesale terms to operators that are necessary for them to drive demand onto the new networks. This is particularly the case because there is likely to be a general relatively low willingness to pay for FTTP and there will be additional costs/disruption as part of the migration process.

7.3. To address these issues, in markets where BT has SMP, Ofcom should be encouraged to intervene to ensure that there is a level-playing field in the migration process and that wholesale prices are cost reflective. In parallel, encouraging Ofcom to provide better access to OR's passive infrastructure (DPA and DFA) will also promote a more competitive downstream market, resulting in lower prices for fibre products for end-users. This will in turn encourage end users to switch to fibre and make the transition process to fibre quicker and more seamless.