

Response to Ofcom's consultation

Promoting investment and competition in fibre networks: approach to geographic markets

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 Ofcom's consultation published on 11 December 2018 "Promoting investment and competition in fibre networks - Approach to geographic markets" (the '**GMR consultation**').
- 1.2. The PAG is a group of the UK's major alternative communications providers. As fierce competitors, PAG members all have their own, individual ambitions and plans to secure the benefits that passive access will bring to our customers – and help us with new ones. PAG members are united in their view that more and better access to BT's passive infrastructure (i.e. dark fibre, ducts and poles) is what is required in order for UK communications providers to meet the current and future demands of consumers and businesses alike¹.
- 1.3. The PAG has found it difficult to provide a constructive response to this consultation. The PAG appreciates that the aim of this consultation is to lay the foundations for Ofcom's formal market review proposal and for Ofcom to signal to stakeholders what it is planning to do in that formal proposal ². However:
 - 1.3.1. Ofcom has not yet defined a product market – a prerequisite to geographic market definition; and
 - 1.3.2. Ofcom has not described what remedies it intends to apply to different geographic areas.
- 1.4. Furthermore, the PAG thinks that there are some fundamental errors in Ofcom's proposal: namely, how Ofcom has chosen to categorise the geographic areas. Despite the illustrative example provided in section 4, it is still very unclear to the PAG how Ofcom will carry out the geographic market assessment given that many of Ofcom's decisions will be based on assumptions of future network roll out.
- 1.5. With the above caveat in mind, in summary, the PAG:
 - 1.5.1. welcomes Ofcom's initiative to take a holistic approach in their review of wholesale markets and to extend the market review period to 5 years. However as highlighted in this response, given that the impacts of any mistake by Ofcom are likely to be much greater under the new market review model, it would be a material error for Ofcom not to put in place safeguards that are capable of minimising the consequences of any regulatory lacuna period that may result from an appeal. The PAG believes that Ofcom should also consult on those safeguards. Furthermore, Ofcom must properly analyse whether the different wholesale markets e.g. WLA and BCMR and the networks that underlie them are in the same economic markets or not (**see section 2 of this document**).
 - 1.5.2. cannot determine whether Ofcom's proposed approach to geographic market is suitable if we do not fully understand what the product market is and how remedies will be applied to those areas. The PAG does not think that broadly defining the networks that will be covered in the geographic assessment is enough, Ofcom should still define the relevant

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.

² Paragraph 1.5 of the consultation document.

market. Furthermore, the PAG think Ofcom is wrong in their decision to exclude leased lines-only network from the product-market definition stage. Finally, while the PAG appreciates that Ofcom is trying to move towards a network focused market review model and has promised to take into account competition between different services, Ofcom should consult on how it intends to achieve this rather than simply promising stakeholders that it will do so. To be clear: this is a substantive error in analysis. The geographic markets are unlikely to be correctly defined in the absence of a clearly specified product market (**See section 3 of this document**).

1.5.3. considers that Ofcom should recast its approach to categorising geographic areas for the purpose of setting regulation. The PAG's collective position is that remedies should be tailored to address the market dynamics in each particular geographic area. Specifically, the PAG highlights risks with Ofcom's proposed 'potentially competitive' and 'competitive' categories and how Ofcom intends to apply remedies to these areas. Although the PAG acknowledges that Ofcom intends to consult on the remedies separately, market definition and remedies are inevitably interlinked and the current proposal on geographic market definition is very unlikely to yield a correct application of the remedies (**see section 4 of this document**).

1.5.4. supports, in principle, Ofcom's approach to assessing network presence in different geographic areas by using the most granular approach available to determine the geographic unit. However, given that Ofcom does not expect any area to be fully competitive by 2026 the PAG considers that market segmentation in the form proposed by Ofcom is premature (**section 5 of this document**).

2. Ofcom's proposed approach to market reviews:

2.1. The PAG recognises that Ofcom wants to move to a market review approach which undertakes a consistent market evaluation across fixed network services. This approach has the benefit of dealing with cross-market matters consistently but also raises a number of risks, such as the enormity of the work and the risk of legal challenges leading to widespread market uncertainty. It is more critical than ever, given the wider reach of the market review and the longer term of the market review period, that Ofcom is robust in all aspects of its analysis and approach. This requires a fully evidenced product market analysis and geographic market analysis.

2.2. While the PAG acknowledges the need for Ofcom to move to longer market review periods of 5 years in line with the new European Electronic Communications Code (EECC), and welcomes this policy decision, the PAG is really concerned that the combination of longer market review periods, high rate of Fibre-To-The-Premise (FTTP) network build and this new holistic approach to market analysis increases the risk that any regulatory failure (e.g. too little or too much regulation) may have further reaching and longer consequences for market players. Therefore, the PAG requests that Ofcom puts in place safeguard mechanisms that enable it to undertake short consultations and make adjustments to the market definition within the 5 years period³.

³ For example, by enabling Ofcom to make mid-review adjustments to the regulatory condition and prevent the impact of any potential regulatory lacunas that could arise as a result of an appeal. The PAG considers that it would be a mistake for Ofcom not to learn from past failures and put in place a mechanism to minimise the chances of a regulatory lacuna similar to that giving rise to the BCMR temporary conditions.

3. Ofcom's failure to undertake a product market analysis

- 3.1. The PAG does not object to Ofcom's intention to begin its analysis of markets from a network point of view rather than focusing on specific products. However, Ofcom has not consulted stakeholders and has not been clear about what types of network Ofcom is intending to include as part of that geographic market analysis.⁴ The PAG does not think that Ofcom's reference to the networks identified on the connected nations report is enough to discharge this duty⁵. Ofcom must consult on how it intends to define the market.
- 3.2. Furthermore, Ofcom's decision not to include "leased lines only" networks in their identification of product markets at the network level is wrong for the following reasons:
 - 3.2.1. Ofcom has included in its product market definition multi-purpose networks that serve residential and business needs which include BT's network, Virgin's network and presumably all new FTTP networks.
 - 3.2.2. Ofcom have excluded leased line networks from the product market definition⁶ but then intend to include leased line networks in the remedies stage to be able to not apply any remedies in the CLA for leased lines.
 - 3.2.3. This is incoherent. It is legally and economically unsound and may lead to incorrect remedies. Ofcom should include leased lines at the product definition stage. It is only by doing this properly that Ofcom can understand substitutability and the degree of competitive constraints.
- 3.3. The PAG understand and supports that Ofcom's ultimate strategy is to implement regulation that will support (FTTP) deployment and encourage competition between network infrastructures that use a mix of technology to serve customers. However, until these networks are fully rolled out, Ofcom must determine how it will deal with wholesale products that currently need regulation due to BT's Significant Market Position (SMP) position in those geographic market. It is not enough for Ofcom to promise that *'it will not ignore any significant difference in the level of competition for particular services'* and that it *'will take those difference in the level of competition into account when it sets out the remedies'*.⁷ Ofcom must consult on how it will take these services into account in their competition market assessment and not just in the remedies stage.

4. Ofcom's proposed approach to categorising geographic areas:

- 4.1. The PAG is particularly concerned with Ofcom's proposals in relation to categorising geographic areas. The PAG considers that further engagement with stakeholders is necessary to determine the best way for Ofcom to assess prospective competition.

⁴ Paragraph 3.29 of the consultation document.

⁵ Paragraph 3.32 of the consultation document.

⁶ Paragraph 3.30 of the consultation document.

⁶ Paragraph 3.53 of the consultation document.

⁷ Paragraph 2.11 of the consultation document.

Potentially competitive areas

- 4.2. Ofcom's 'potentially competitive' category is liable to group together geographic markets which present variations in the levels of competitive conditions (i.e. markets where BT plus two other (than BT) OCPs are present and where BT is the only provider but there is prospective entry in sight). Therefore, Ofcom must appreciate that there are risks to treating all 'potentially competitive' areas as being the same for the purpose of the remedies applied to those areas.⁸
- 4.3. Given that Ofcom has predicted that the 'potentially competitive' areas category amounts to 69% of the UK, Ofcom must ensure that it strikes the right balance between incentivising FTTP investment and protecting consumers from BT's SMP position in the market when setting the remedies in these areas. It is important that Ofcom takes a targeted approach to remedies that fits the need of each geographic market .
- 4.4. The PAG also understand that Ofcom has already been talking to Communication Providers (CPs) about what remedies it intends to apply in these areas. While the PAG's position is that Ofcom should not commit to any remedy without an appropriate consultation, the PAG understands that Ofcom is, generally, not intending to introduce Dark Fibre Access (DFA) in the 'potentially competitive' area. The PAG will not support this position for the following reasons:
 - 4.4.1. On the one hand, given that there will be no be additional FTTP investment in some of these areas for the initial market review period, lack of DFA is likely to result in consumer harm given that DFA is likely to encourage competition and therefore reduce the market incentives to prices above cost.
 - 4.4.2. On the other hand, if one or more OCP is present, Ofcom should not deprive the market of a remedy like DFA which is very likely to incentivise network roll out and therefore result in increased choice for consumers⁹.
- 4.5. Furthermore, in those areas where BT is the only provider and there is prospective competition in sight, Ofcom should adopt an approach where the proposed regulation on legacy technology is reduced only when investment in FTTP actually occurs. Ofcom's approach of reducing regulation from the start of the market review period where it thinks Other Communications Providers ('OCP') FTTP might be rolled-out has two harmful effects: first, FTTP roll-out might not occur; and, second, even if FTTP roll-out does occur any deregulation prior to this point will reduce investment and result in excessive prices for no benefit.
- 4.6. In our view Ofcom has four options in order to ensure that it applies effective remedies to 'potentially competitive' areas and does so in a way that strikes the right balance between

⁸ In particular, if, as the PAG understands, Ofcom is intending not to apply dark fibre, to impose wholesale price caps above cost (MPF, GEA 40/10, Ethernet) and to have no price cap for GEA 80/20 or FTTP.

⁹ The PAG notes that in the new 15 February 2019 Department of Culture Media and Sport (DCMS) consultation on Ofcom's proposed statement of Strategic Priorities (which Ofcom will be bound to follow as prescribed by the Digital Economy Act 2017), Ofcom will have an enhanced duty to encourage infrastructure investment through passive access regulation including when necessary relying on the dark fibre remedy. See paragraph 18 of the DCMS consultation where DCMS states that: *'Where access to Openreach's ducts and poles network is not available or effective, there should be other options to support competitive network deployment, for example dark fibre access.'*

incentivising investment and protecting consumers from BT's significant market power. Ofcom could:

- 4.6.1. Introduce specific sub-categories within the 'potentially competitive category' which reflect the varying competitive conditions in those areas and consistently apply the same remedies in areas which fall under the same sub-category. This will enable remedies to more accurately reflect varying forms of potential competition. It is misleading for Ofcom to say that it is not appropriate to add sub-categories to this area because *'Ofcom is not in a position to assess the likelihood of network build plans being carried out in part or in full; or the extent to which existing or planned networks will ultimately provide effective competition to Openreach or predict the number of networks that will emerge in a given area'*¹⁰. If Ofcom is intending to categorise areas as potentially competitive on the basis that one other OCP network is already present in this area and on the basis that an OCP have specific plans to build in that area it is possible for Ofcom to take those factors into account when differentiating geographic units within a particular category.
 - 4.6.2. carry out a mid-market review period assessment to determine whether the remedies applied to the potentially competitive category are still appropriate. However, as we set out elsewhere in this response, the PAG considers that, rather than as an alternative, this safeguard mechanism should be in place irrespective of the approach ultimately taken by Ofcom to apply targeted remedies to potentially competitive categories.
 - 4.6.3. Set regulation so that it is responsive to changes in competitive conditions as they occur during the market review period e.g. when rival FTTP build occurs.
 - 4.6.4. Alternative to all the above, Ofcom could develop a framework so it can apply different remedies to geographic units which fall under the 'potentially competitive category' in a transparent and consistent way but without having to introduce sub-categories.
- 4.7. Ofcom has numerous options at its disposal to make sure that remedies are appropriate for each specific geographic area and strike the right balance between the need to incentive investment and protecting consumers from BT's SMP. Given that it is in potentially competitive areas where the bulk of FTTP investment will happen, it is crucial that Ofcom gets regulation in these areas right. While individual PAG member hold different views as to what the best approach to regulating these areas is, PAG members are consistent in their position that the current Ofcom proposal to apply common remedies across 'potentially competitive' areas may, given differences in competitive conditions, result in variations as to how effective those remedies are.

Ofcom's 'Competitive' category

- 4.8. Similarly, in relation to the category of 'competitive areas', Ofcom will be making a mistake if it chooses to take an "all or nothing" approach to deregulating these areas instead of considering phasing out regulation gradually. Ofcom has been known in the past to consider an area competitive even though BT holds a market share of above 50% (e.g. in CLA in BCMR16 and BCMR19¹¹). Removing all regulation in these areas is very likely to affect competition in the

¹⁰ Paragraph 2.23 of the consultation document.

¹¹ Business Connectivity Market Reviews for 2016 and 2019.

market and have more far reaching consequences if Ofcom gets their findings on market power wrong, than if regulation on legacy technology is progressively phased out.

Non-competitive areas

4.9. Ofcom has not provided enough detail about how it proposes to assess geographic areas where it is less clear cut that there is prospect of alternative ultrafast network roll out and what process will Ofcom follow to decide whether a marginal case is moved from a 'non-competitive area' to the 'potentially competitive' category. Ofcom has not provided enough detail on how it intends to regulate this category or what actions it will take if a non-competitive area becomes 'potentially competitive' during the market review period. Therefore, it is not possible for the PAG to comment on this specific aspect of the proposal.

5. Ofcom's proposal for determining geographic units:

5.1. In principles, the PAG supports the use of postcode as the starting geographic unit to delineate the areas on which Ofcom will carry out the competition assessment to categorise and apply specific remedies. However, in delineating the geographic unit, Ofcom should not stop at the postcode sector level, and, rather than simply taking into account existing network footprints and planned network roll out it should include these elements in delimiting the geographic unit. In any case, the PAG prefers the post code option over that of relying on service areas of Openreach's network given that it is a less granular measure, and postcodes will enable Ofcom to have a more accurate idea of competitive conditions and the size of a specific market.