Response to Ofcom's consultation – Wholesale Local Access Market Review: Consultation on Duct and Pole Access Remedies

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

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Introduction

1. The Passive Access Group ("PAG") is a group of the UK's major alternative communications providers – Vodafone, Sky and TalkTalk. As fierce competitors, we each have our own, individual ambitions and plans to secure the benefits that passive access will bring to our customers – and to win new ones. But we have come together to speak with one voice to emphasise the clear and unequivocal case that we see for expanding the role of passive access to promote competition in UK telecoms markets.

2. The PAG warmly welcomes Ofcom's attention to reform of the Physical Infrastructure Access - Duct and Pole Access remedy ("DPA"). As noted in the PAG's previous consultation responses, the PAG believes that the ineffectiveness of the current DPA remedy is one factor constraining other CPs from rolling out full-fibre networks. Experience overseas shows that fit-for-purpose DPA remedies can unleash significant new competitive FTTP investment.

3. Each of the members of the PAG is preparing its own individual submission to this consultation. This response identifies a number of areas where Ofcom must strengthen and tighten its proposals to ensure DPA is an effective remedy, fit-for-purpose for widespread use. The views set out here are shared by the members of the PAG – which comprise some of the largest potential users of DPA.

4. This submission addresses the key areas where Ofcom's proposals need to be enhanced to meet CPs'[1] minimum requirements for incorporating DPA use in their business plans. It also highlights areas where the proposals currently could be improved by reflecting the lessons learned from other jurisdictions where DPA has been successful. Our intention is for this submission to inform Ofcom's refinement and improvement of its proposals in relation to the DPA remedy.

5. In summary, the PAG's key concerns are as follows:

   a) <u>Usage restrictions</u>: Ofcom states its preference to impose a general obligation – one without usage restrictions – given the risk of regulatory failure arising from imposing such restrictions. Ofcom's concerns are borne out, in our view, and usage restrictions can cause uncertainty and wasted costs.[2] Should Ofcom retain any usage restrictions, compliance should be managed by Ofcom (and not Openreach). If this solution is not adopted, at the very least, a "streamlined" dispute process should be put in place and the burden of proof must lie with Openreach to demonstrate non-compliance.

   b) <u>Non-discrimination</u>: The PAG acknowledges that Ofcom does not intend to immediately impose EOI. However, Ofcom needs to clarify further the meaning of its proposed "strict non-discrimination" approach, and explain the changes this approach will require from Openreach (as compared to the status quo). Ofcom needs to ensure any exceptions to EOI are clearly and narrowly defined, and time limited, to ensure a clear pathway to delivering EOI in the long run.

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[1] In this submission, we use the term CPs generically to refer to communications providers other than BT.

[2] Condoc para 4.72.

Ofcom should also commit now to establishing clear KPIs to give assurance that Ofcom's proposed non-discrimination obligation is delivering results.

c) Process issues: The PAG encourages Ofcom to review the complex DPA provisioning process from end to end, and to recognise that further changes are still required to ensure the products are effective and deliver certainty about time and costs. This submission outlines a number of changes to the provisioning process, to dispute resolution mechanisms and a proposal for an SLA/SLG regime to help deliver a fit-for-purpose DPA remedy.

d) Pricing: The PAG is disappointed that Ofcom does not appear willing to impose a full charge control at this stage. However, the PAG considers it essential that Ofcom puts the machinery in place now, such as changing BT's reporting obligations and retaining the powers to introduce a charge control mid-market review, so Ofcom can apply a charge control if it becomes necessary. We look forward to the more detailed pricing consultation in summer, when we will provide detailed feedback on Openreach's pricing proposals, including the threshold above which network adjustment charges will be payable.

e) Timing: To have the DPA remedy working effectively as soon as possible (and not allow BT to use every tactic to slow it down), there needs to be recognition that DPA is a live product today and we are therefore amending the terms rather than starting afresh. We welcome Ofcom's intention to implement parts of the new proposal upon the final statement coming into force (rather than wait until 2019). We would welcome a clear statement from Ofcom as to which items will take effect immediately on the final statement coming into force (eg, pricing, enhanced non-discrimination and relaxed usage restrictions) and which may follow in the revised reference offer. The PAG also encourages Ofcom to consider imposing a more ambitious timeframe for negotiation of the reference offer (given this is not a new product), including requiring Openreach to agree, publish and "bed in" certain changes before the expiration of any 12 month period for a "final" reference offer.

6. History does not show BT in a good light where the imposition of regulatory products is concerned – with LLU being a prime example. We do not consider the climate has yet changed for there to be confidence that Openreach will cooperate to ensure the success of the revised DPA remedy given that Openreach's commercial incentives are for DPA to fail. While Ofcom has provided assurances that it will hold Openreach to account, the legal conditions imposed on BT (and Ofcom's guidance in the consultation document) continue to provide it with significant discretion and the ability to delay and impose time and cost uncertainties on CPs. The PAG therefore urges Ofcom to recognise that:

a) Whether CPs will invest in developing and using PIA will depend on whether they are confident that the product will expeditiously improve as problems are identified.

b) In practice, CPs constantly find that Openreach pays no regard to "guidance" (where this guidance is in Ofcom's consultation documents or part of the explanation of its final statement). Ofcom needs to ensure that any guidance is

in the legal text of the SMP conditions, or that the legal text provides for a new and formal secondary document where Ofcom will set out its guidance; and

c) specific and stricter requirements about how Openreach is allowed to behave are necessary now for the remedy to be effective, to avoid Openreach exploiting any discretion granted to it by Ofcom for its own commercial advantage. For example, it is critical that Openreach is subject to SLAs in relation to every step of the process where it can cause delays and that its ability to refuse consents or authorisations is strictly curtailed to predefined reasons.

7. Failure to take these steps now means Ofcom is simply delaying what is needed, at the cost of more competitive infrastructure networks and better services for businesses and consumers.

8. Clearly, it will be critical for Ofcom to remain deeply involved in monitoring the development of the DPA remedy, and Openreach's behaviour, and making ongoing modifications to the product to ensure it is a success. The PAG welcome Ofcom's assurances that it will allocate staff and resources for this purpose, and that it will not simply make its final statement and leave it to Openreach to neutralise the remedy once again. But this <u>cannot</u> be a substitute for imposing appropriate legal constraints on Openreach, to remove its ability to frustrate the success of DPA.

Usage restrictions

9. Ofcom explains that its preference is to impose a general DPA obligation, unconstrained by any usage restrictions. The PAG agrees that this is the appropriate starting point and that usage restrictions can cause uncertainty and wasted costs.

10. However, Ofcom proceeds to:

    a) define the geographic scope of the DPA remedy as allowing DPA use for providing local access segments, by reference to the access seekers' local access networks (rather than by reference to BT's network); and

    b) impose a mixed usage generic rule. Specifically, Ofcom proposes to allow DPA to be used:[3]

    > *for the purposes of the deployment of broadband access networks serving multiple premises primarily for the provision of broadband access services to end users, provided that the provision of non-broadband access services on any such broadband access network facilitate that overall broadband access network deployment.*[4]

11. The PAG supports Ofcom's decision to define the geographic scope of the DPA remedy by allowing DPA use for providing local access segments by, reference to the CP's network, and its clarification that CPs may break in and out of BT's physical infrastructure as required.[5] This will be critical to allow CPs to not be constrained by BT's old (and now sub-optimal) network topology and to innovate to provide consumers and business with services where they are needed.

12. The remainder of this section addresses the mixed usage rule.

13. Ofcom states its preference to impose a general obligation – one without usage restrictions – given the risk of regulatory failure arising from imposing such restrictions. Ofcom's concerns are borne out, in our view, and usage restrictions can cause uncertainty and wasted costs.[6] The PAG has previously explained in detail why many of the reasons Ofcom cites for maintaining usage restrictions are weak[7] and that there is a real question about whether such restrictions are permissible.[8] To the extent there is any concern about costs not being recovered proportionally through the appropriate market, Ofcom is able to review the impact on BT's pattern of cost recovery and could regularly review and make changes to ensure the WLA market does not bear costs which should be allocated to other markets – passive or active, and regulated or unregulated.

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[3] Condoc para 4.80.
[4] Condoc page 199, proposed SMP condition 2.1(d).
[5] Condoc para 4.82.
[6] Condoc para 4.72. See also the PAG submission to Ofcom's Wholesale Local Access Market Reivew – Initial Proposal to Develop an Effective PIA Remedy, para 68 et seq.
[7] PAG submission to Ofcom's Wholesale Local Access Market Reivew – Initial Proposal to Develop an Effective PIA Remedy, para 73.
[8] Ibid para 77.

14. If a "mixed usage" rule is adopted (i.e. some usage restrictions are retained whereby DPA can be used for providing non-WLA products providing that such use supports the use of DPA for WLA products), we acknowledge that a specific rule may carry greater risks of regulatory failure,[9] but think that a principles-based approach could still undermine the remedy by creating significant uncertainty and/or wasted costs for CPs. This will occur if it allows rejection or delays to orders in an unpredictable way or in inappropriate circumstances – or even if Openreach is given the freedom to do so, which will itself create a lack of confidence from CPs about the timing and costs of using DPA. Both the time and cost implications of formal Ofcom disputes, and the material risk of these arising, are likely to inhibit CPs from preparing a credible business case for using DPA.

15. From its discussions with Ofcom, the PAG is concerned that Ofcom may be underestimating BT's determination, incentives and ability to continue to undermine the DPA remedy in this way. In the event that Ofcom does not heed our preference, Ofcom rather than Openreach should be responsible for enforcing the usage rules. DPA customers should be entitled to engage with Openreach on the basis of it being a willing supplier. If Ofcom cannot adopt this approach, then at the very least, the burden of proof must lie with Openreach if it argues that the "mixed usage" rule has not been complied with and an appropriate "streamlined" dispute process is required.

16. The PAG believes that several other changes will go some way to reducing the risks with the proposal:

    a) first, Ofcom's guidance could be improved by ensuring it has legal force, by providing greater clarity and specificity on the obligations BT faces, and by providing it with less room for discretion; and

    b) secondly, compliance with the "mixed usage" rule must be assessed at the point of order, and not be reassessed at any later points without good reason (e.g. where there is a material deviation from a CP's business plan).

    thirdly, we consider that it should be **Ofcom and not Openreach must have responsibility to monitor and enforce the rule**

17. The most important change to make "mixed usage" more workable is for Ofcom rather than Openreach to monitor and enforce the "mixed usage" rule. SMP conditions are intended to mimic the operation of a fully competitive market – one with willing suppliers. It is not consistent with that objective to grant Openreach the ability (when it already has the incentive) to reject requests on the basis of the downstream use to which CPs wish to put DPA. It is much more appropriate for these types of limits on the remedy to be monitored and enforced by Ofcom. The PAG would be happy to discuss how this option could work in more detail with Ofcom.

18. In the event that Ofcom does not adopt this solution, we are concerned that significant additional changes are required, which will require significant changes to process and will still generate more costs and uncertainty than Ofcom taking responsibility for monitoring compliance with the rule.

[9] Condoc para 4.76.

Openreach must bear the burden of proof based on appropriate information

19. First, if Openreach is still allowed to enforce the rule, we are concerned that Ofcom has not fully thought through the types of evidence which would be required to satisfy the test and cover the factors set out above. Ofcom states that:

> *we do not propose that telecoms providers would be compelled to provide any information to Openreach beyond the details of the duct and poles they are seeking access to.*[10]

20. Instead, Ofcom appears to suggest that Openreach should look only at the details of the passive infrastructure proposed to be used and the CP's public marketing activities:

> *the number of scale users of PIA is anticipated to be limited and together with public visibility of their marketing activities, we would expect Openreach to be able to assess whether it considers a PIA order to be compliant with a mixed usage rule, without this assessment being burdensome to Openreach or Ofcom.*

21. We have doubts as to whether this is realistic, and think this is a compelling reason why Ofcom – and not Openreach – should be responsible for monitoring compliance with the mixed usage rule. However, even if advertising was all that was required, in fact CPs are very unlikely to begin developing advertising material until rollout occurs and the services are ready (or close to being ready) to be ordered by residential customers. Rolling out networks using DPA involves considerable uncertainty in timing and everything must occur in the appropriate sequence: both due to the risk of delays and obstruction caused by Openreach, and the inevitable blockages, third party consents and similar issues, the length of which cannot always be estimated in advance. In this context, it is far from certain that in all cases CPs will have public promotional materials available for Openreach to scrutinise in connection with a DPA order. We assume that there is no intention on Ofcom's part to disrupt CPs' business plans and "require" CPs to prepare any particular marketing material earlier than they otherwise would, purely for the purposes of Openreach scrutinising that material. Ofcom needs to clarify what will happen in this context. In particular, it must not be possible for Openreach to reject an order purely based on the fact that there is not yet any promotional material available.

22. Many of the factors Ofcom point to require significant evidence, which would be commercially confidential to CPs and competitively sensitive. Therefore, while Ofcom may state that CPs will not be "compelled" to provide information to Openreach, we are concerned that Ofcom's proposal would allow Openreach to systematically reject orders, on the basis that it is not satisfied (based on publicly available information) that the mixed usage rule has been met unless such commercially confidential and/or competitively sensitive confidential information is handed over. For example:

    a) Ofcom has not explained what it thinks CPs must show in order to meet the test of showing that the mixed usage "enables investment". However, we envisage Ofcom might require evidence of, for example, (i) the revenues for business

[10] Condoc para 4.95.

services make residential rollout significantly more viable; and/or that (ii) there are efficiencies in rolling out networks to serve both services together. To demonstrate these points would require the CP to disclose significant confidential information about its revenue expectations and cost base.

b) In proving an "intention to rollout broadband", Ofcom notes that this would be evidenced by (i) contracts in place with residential developers for broadband services, or (ii) committed funding and orders for equipment only suited for broadband services. Again, this type of evidence goes much further than providing evidence of how CPs have advertised services and is likely to be commercially sensitive.

23. Even if Openreach was not permitted to review this information at the order stage, knowing that Ofcom would review a much greater scope of material (including contracts, business plans, and revenue and cost forecasts) will provide an incentive for Openreach to systematically reject orders so that a decision can be made by Ofcom on dispute having regard to a greater range of documents and evidence, leading to more uncertainty.

24. Therefore, Openreach should be responsible for monitoring compliance, or at least, the guidance needs to be substantially reworked to provide Openreach with clear and more specific guidance about the types of DPA orders which must not be considered to fail the "mixed usage" rule and a comprehensive and exhaustive list of reasons which Openreach is allowed to cite for why there is non-compliance. In particular, it must be clear that:

a) CPs should be allowed to submit a simple "statement of use" requirements committing that their primary purpose is to rollout to the WLA market; and

b) Openreach must not be permitted to reject orders, except after a CP has failed to provide a reasonable response as to why the CPs' publicly available marketing information or other information already available to Openreach shows a conflict with the "mixed usage" rule. The burden of proof must lie with Openreach to justify a rejection, not on a CP to prove otherwise by filing a regulatory dispute with Ofcom. The acceptable reasons for a refusal on this basis should be clearly and exhaustively set out.

An appropriate dispute process would be needed

25. Secondly, Ofcom has clarified in the consultation document that Openreach has the right to reject an order, including for alleged non-compliance with the mixed usage rule, and it would then be up to the CP to challenge that rejection, including through the Ofcom dispute resolution process.[11] The PAG does not consider that this is appropriate given Openreach's commercial incentive is to make DPA fail, and given that CPs should be put in the position (as far as possible) of dealing with a willing and cooperative supplier. It should be Ofcom's role to monitor and enforce usage restrictions.

[11] Condoc para 4.89.

26. However, if Ofcom permits Openreach to reject orders on this basis, we understand from our discussions with Ofcom that Ofcom has confidence that Openreach will have limited scope to refuse orders on this basis (i.e. because it will be clear in most cases whether the mixed usage rule is met) and there will only be a few disputes to begin with to settle the parameters.

27. For the reasons set out above, the PAG strongly disagrees with this approach and is not convinced that Ofcom's guidance ensures that, in most cases, it will be clear whether the mixed usage rule is met. Adopting an approach that relies on the Ofcom dispute resolution process to sort things out is fundamentally flawed. It could only take a single costly and long running dispute (which BT is likely to appeal should it lose) to undermine the entire remedy or provide a sustained period of uncertainty in which CPs will not be willing to invest. Such a 'dispute driven' approach to the legal framework will seriously undermine the ability of CPs to develop significant business cases. This could in turn lead to a "chicken and egg" problem with the usage rule.

28. Furthermore, for some reason, Ofcom appears to have confidence that Openreach will suddenly now cooperate and implement the revised DPA remedy in good faith, despite the long track record of Openreach stymying the remedy and implementing changes only after many years of disputes, complaints and in the shadow of further regulatory intervention. BT has habitually appealed almost every new Ofcom decision in the last five years including the most recent business connectivity market review, average porting conveyance charges, margin regulation for VULA, and overcharging for Ethernet. Furthermore, it is now public knowledge that BT last year entered into a litigation funding deal, providing it with a $45 million "war chest" which it can use to challenge regulatory decisions it does not like, or to benefit from the uncertainty and delays which regulatory challenges cause.[12] In the context of such a deal, we have even greater concerns about Ofcom's assumption that Openreach is genuinely seeking to ensure the DPA remedy is a success.

29. The PAG therefore urges Ofcom to consider approaches which will give CPs upfront certainty about compliance with the mixed usage rule. In particular:

    a) If Ofcom does not monitor the rule itself, it should consider delegating to the OTA, or another appropriate independent body, the task of determining whether CPs will meet the "mixed usage" requirement.

    b) The OTA could be required to make this determination within a specific period of time (e.g. 5 days) and could require the DPA customer to provide relevant confidential information to assist in the determination.

    c) The SMP conditions should be amended, under this proposal, to ensure that the OTA's determination would be definitive as to whether the "mixed usage" rule had been complied with.

    d) While the dispute is being determined, Openreach should be required to continue to progress the order as far as practicable, to minimise the extent to which disputes impact the end-to-end provisioning timetable.

[12] https://www.thelawyer.com/bt-signs-45m-litigation-funding-deal-with-burford-capital/.

30. Such a proposal should significantly constrain BT's ability to create uncertainty and delays by pursuing the Ofcom regulatory dispute process, and lighten the burden on Ofcom's dispute resolution resources.

Ofcom's guidance should have clear legal force, and provide greater clarity and less room for discretion

31. Regardless of who is responsible for monitoring and enforcing the rule, the PAG considers that Ofcom should give its proposed "guidance" on the mixed usage rule legal force if CPs are to have confidence that it will be respected. This is especially important if Openreach is allowed to enforce the rule, because CPs constantly find that Openreach pays no regard to "guidance" which Ofcom publishes in consultation documents or its final statement (except where it benefits Openreach).[13] Ofcom needs to ensure that any guidance is either in the legal text of the SMP conditions, or that the legal text provides for Ofcom to create a new and formal secondary document where Ofcom will set out its guidance in full.

32. Ofcom's guidance would also benefit from significantly more detail and definitive views. The current draft merely sets out "an indication of the factors we would likely take into account",[14] without any indication of the relative importance of various factors; the thresholds at which factors will be likely to be considered as sufficient for Ofcom to conclude the rule is satisfied, and which types of circumstances militate against compliance with the "mixed usage" rule; nor are there examples of particular types of deployments and whether or not they would (as a general matter) comply with the rule. Merely setting out "an indication of factors" gives DPA customers and Openreach little certainty about whether particular deployments are likely to comply with the rule or not. While we accept Ofcom cannot be fully prescriptive about the precise circumstances that would be compliant or not, Ofcom can and should provide examples of what would *almost certainly* be compliant and what would not be compliant.

33. As examples:

    a) In terms of services offered, Ofcom has indicated that "telecoms providers installing more leased lines than the number of broadband premises passed would be unlikely to meet the requirements of the mixed usage rule". But framing it in the negative in this way is an extreme and unlikely example, and so is of little assistance. It is also unclear whether Ofcom would assess mixed usage on the area being built comprising both business and residential, the mix of connections actually made or the target of the marketing. It is also unhelpful given that (if Ofcom is truly going to allow this nascent market the flexibility to develop) CPs may need to initially install more leased lines and then roll out broadband services once there is sufficient scale and investment. It would be more helpful, for example, if Ofcom indicated that "*telecoms providers passing*

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[13] For example, in relation to the appropriate quantum of SLGs for past products where a reference offer was negotiated.
[14] Condoc para 4.90.

multiple broadband premises for each leased line connection would be likely to meet the requirements of the mixed usage rule".[15]

b) In terms of the extent to which passive assets are shared between local access and leased lines, it is not clear why Ofcom is proposing to place such importance on sharing the same passive assets. As we understand it, Ofcom's intention is to enable deployment of both broadband and business services, where the primary purpose is the deployment of broadband and the mixed use enables investment in broadband generally. This does not necessarily require the same passive assets to be shared. For example, efficiencies can be realised (and therefore investment in broadband enabled) through having a single provisioning process and "truck roll" to an area, even if the precise ducts used for both broadband and business deployments are not identical.

c) In relation to certainty of intention to rollout broadband, we welcome Ofcom's clarification that the mixed usage rule would enable leased line services to be deployed in advance of broadband services.[16] This reflects the commercial reality of how rollouts may occur. However – as we note below – there will be considerable uncertainty (especially when the revised DPA remedy is being bedded in and until CPs can assess Openreach's behaviour under the new remedy) about timing and feasibility of using DPA and the proportion of the 'mix' in any actual business plan. We would urge Ofcom to recognise this, by acknowledging that an order for DPA is the very start of the deployment process, and therefore may logically come before CPs enter into significant contractual commitments for later stages of deployment. Indeed, it may be that two CPs work together, one on the leased line services, and one on the broadband services, and so the "mixed usage" rule must take this into account (allowing for leeway so long as there is not a fundamental change to the inclusion of broadband services in the business plan). BT faces no restriction on its business plans before it can use its own passive infrastructure. Accordingly, minor changes to CP's business plans must not trigger a complete reassessment of whether the "mixed usage" rule has been complied with: there must be some leeway for CPs' business cases to change after an initial order has been placed.

d) In respect of how broadband services are provided, Ofcom acknowledges that the same technology may be suitable both for broadband services and leased lines. While Ofcom says it wishes to support technological innovation and flexibility, merely pointing to the "type of customers being targeted and the type of services being sold" is insufficient. The very point is that:

(i) the type of customers being targeted will, in many cases, be those that "fall between" the broadband and business markets. For example, medium-size enterprises may require quality of service that exceeds standard broadband, while not having the financial capacity to pay for a standard leased line, or may be able to take advantage of resilient

[15] Condoc 4.91.2.
[16] Condoc 4.91.4.

connections from a CP using DPA, whereas BT choose only to offer non-resilient services; and

(ii) the products themselves are innovative, "category-busting products" which blur the lines between these two categories. For example, Ofcom is aware that some CPs are investigating providing multiple SMEs with services based on a single shared leased line (providing a service superior to residential broadband, but at far less cost than traditional business connectivity services). There will also be a number of cases where consumers "look like" businesses and vice versa and so require services that are not traditionally associated with them.

Accordingly, it provides no assistance to CPs for Ofcom to say it will treat these as "relevant factors": they are the very reason why there may be perceived to be ambiguity. It would be more helpful if Ofcom can indicate in the guidance that – where the deployment can, at least in part, meet demand in part of the WLA market even if there is some possible overlap with the business connectivity market – the "mixed usage" rule will be complied with.

The "mixed usage" rule must apply at the point of order, and not be reassessed without good reason

34. An important aspect noted above is that intentions and business strategies may change over time. Ofcom's approach in this situation is unclear:[17] at what point or points is a CP's compliance with the mixed usage rule to be assessed? It is essential that it is clarified, that the rule applies at the point when DPA is ordered, and that CPs are not subject to the ongoing uncertainty of continual reassessment of their compliance.

35. It is clearly an unacceptable commercial proposition for CPs to invest in DPA, on the basis that they then are "locked into" their initial business case, and have no flexibility to change the mix of services provided using the DPA remedy. This is of particular concern given that a sensible business strategy would be to deploy higher-margin business connectivity services with a view to "filling in" those networks with residential FTTP later. Any sensible business must have the flexibility to adapt its offerings, and change its focus on different potential customer groups in response to market dynamics. BT has that flexibility when it deploys services so it would be unfair to unduly restrict CPs in this way. But it is difficult to see how a sensible analysis could be made: how is Openreach or Ofcom to determine how credible a second-stage residential FTTP rollout is, and why is it fair to then prevent a CP from making a bona fide change to its plans if market circumstances warrant such a change?

36. This raises questions about how workable a mixed usage rule is at all, especially one which is assessed by Openreach rather than by Ofcom. However, if such a rule is to be implemented, Ofcom must be aware that if there are continuous and ongoing reviews about CPs' use of DPA and whether it complies with the CP's original business plan or marketing materials, this will cause significant levels of uncertainty and render

[17] It states only that "This approach would also be relevant if intentions changed for commercial reasons after network deployment using PIA": Condoc para 4.91.4 fn 106.

business cases unviable. Furthermore, the consequences of a decision that the "mixed usage" rule is no longer met could have severe and unpalatable consequences for CPs. Such uncertainty is likely to serve as a significant disincentive to use DPA in the first place.

37. Accordingly, the only acceptable position for CPs is that:

a) the "mixed usage" rule applies to the business plan at the point of order; and

b) compliance with the rule may only be revisited if there has been a <u>fundamental departure</u> from the original business plan or marketing materials, or there does not appear to have been a bona fide representation of the CP's plans for using DPA in the first place.

Equivalence of inputs

38. It is still unclear to the PAG exactly what Ofcom proposes with its "strict non-discrimination" requirement – and, specifically, the extent to which it is intended to require changes from the processes Openreach has in place today, and the extent to which "strict non-discrimination" approaches true EOI.

39. As the PAG has previously emphasised, we consider that effective EOI must be put at the heart of regulating markets where BT has SMP. This has come to be self-evident from BT's behaviour in the past, and from the way that past ineffective remedies like LLU have been reinvigorated. Accordingly, the PAG would have real concerns if Ofcom were to move away from a clear determination to achieve EOI as its ultimate goal, as it recognised in the strategic review that EOI is 'vital' to effective competition based on access to BT's network.

40. Ofcom's consultation document, when looking at alternatives to EOI, presents "strict non-discrimination but with exceptions" as one end of the continuum, with "equivalence of outputs" at the other end. Further, Ofcom has said that "any non-discrimination requirement we propose should be **as close to EOI as possible since this is required in order to ensure a level playing field … leading to an effective PIA remedy**" (our emphasis).[18]

41. The PAG fully agrees, and understands from this that Ofcom is proposing strict equivalence – as required by full EOI – for all processes and sub-products, <u>except</u> in specific circumstances where Ofcom has set out defined and transparent exceptions.

42. If this is correct,[19] then it is an approach which the PAG believes could provide more confidence to the industry. However, a substantial amount of work will be required from Ofcom and Openreach to (i) set out the entire end-to-end process undertaken by Openreach when it uses passive infrastructure itself, and the equivalent steps in the DPA process; (ii) identify specific points where the systems, processes, procedures or terms of access are not exactly the same; and (iii) publicly explain and justify those differences, including explaining how overall equivalence and non-discrimination will still be achieved, and how each exception will be removed over time. This must all form part of BT's SMP conditions and not simply be part of the "explanatory" material accompanying the final statement.

43. Industry will also need to know exactly what difference Ofcom's "strict non-discrimination" obligation will make, and what improvements it will ensure compared to the ineffective status quo. Ofcom needs to outline for industry exactly which types of process and system changes will be imposed on Openreach, and where exceptions will not be available. Industry needs clear evidence that Ofcom is not just using stronger words, but is actually committed to requiring Openreach to change.

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[18] Condoc para 5.36.

[19] If this is not what Ofcom has in mind, then the PAG is concerned that Ofcom has failed to properly explain in its consultation document what it intends by "non-discrimination", and has therefore failed to give stakeholders an informed opportunity to comment. We would have real difficulty in understanding Ofcom's decision to back away from its findings in its recent strategic review if the substance of Ofcom's proposal is anything other than "EOI with temporary exceptions".

44. Despite the PAG's previously stated concerns that this is what is required, there is no evidence yet that Ofcom recognises the need to undertake this substantial body of work, to provide transparency and confidence to the industry. Until the PAG has a clearer understanding of how Ofcom intends to implement "strict non-discrimination" in practice, and what this actually means in terms of the specific differences which Openreach and other CPs face when using BT passive infrastructure, the PAG cannot provide an informed assessment of Ofcom's proposal. We urge Ofcom to address this.

45. This section now explains some minimum changes which are required to Ofcom's approach if it continues to proceed down this path:

    a) First, it is important – especially in the context of Ofcom's findings and assessment in its recent Strategic Review – that Ofcom not content itself with a "quick fix", but instead combine the "quick fix" with a plan to require Openreach to deliver EOI in the long term.

    b) Ofcom must require that any new ultrafast broadband rollouts use EOI after a suitable implementation period.

    c) The basis on which exceptions will be granted needs to be clearly and narrowly defined. Without much greater rigour and transparency around the exceptions Ofcom would allow, and the resultant differences between Openreach's internal and external processes for using passive infrastructure, industry will not have confidence in Ofcom's proposed approach.

    d) Ofcom must commit now to implementing detailed key performance indicators (KPIs), to give assurance to DPA customers that "strict non-discrimination" is delivering results and send a clear signal to Openreach that its performance is being closely monitored. These KPIs must be based around any core differences which continue to exist, but will also be appropriate on an ongoing basis while BT is not itself engaged in rolling out ultrafast broadband using EOI.

Ofcom's "quick fix" needs to be supplemented with a pathway for establishing real EOI

46. We understand that Ofcom wants to see "quick wins", and we welcome Ofcom's determination to improve the effectiveness of the DPA remedy as quickly as possible. However, we are concerned that, in focusing on short-term "quick win", Ofcom has simply abandoned any longer-term thinking about how to achieve EOI.

47. Ofcom has not indicated in the consultation document any interest in developing a roadmap for Openreach to change its existing processes and systems for full EOI – instead, Ofcom's approach seems predicated on a binary choice between delivering a "quick fix" now and BT incurring huge expense and time to achieve EOI later. The PAG does not accept that this is an either/or proposition. We recognise the benefit in ensuring a "quick fix" now, which is certainly required, but Ofcom must establish a longer-term roadmap to EOI at the same time.

48. We think a failure to establish such a roadmap lacks foresight and ambition. EOI has proven to be the most effective way to ensure equivalence and to give industry confidence. We need a specific plan to see it achieved, which should be by way of clearly setting out the defined exceptions, ensuring that those exceptions are time-

limited, and ensuring that Openreach has in place a plan for delivering EOI by the end of the period for which the exception has been granted.

49. This is simply implementing Ofcom's own decisions. In its strategic review, Ofcom decided upon stronger separation of Openreach from the rest of BT. In that context, although the industry submission proposed that there needed to be strict separation of Openreach's passive and active network business, Ofcom decided that this was a matter to be addressed as part of SMP regulation:

> *Whilst potentially valid points in the wider regulatory context, we consider that proposals of this type are not directly related to our present competition concern. Instead, these submissions raise points that can be addressed through our normal process of periodic market reviews and SMP-based regulation, including our upcoming work on duct and pole access.*[20]

50. At the same time, Ofcom has reiterated that a key element of its plan to promote investment is to:

> *make it easier for telecoms providers to invest in advanced, competing infrastructure by improving duct and pole access (DPA).*[21]

51. Specifically, Ofcom stated that:

> *In order to improve Openreach's incentives to deliver an effective DPA product, we will work to apply equivalence of inputs, requiring Openreach to provide DPA to all telecoms providers (including other parts of BT) in the same way – for example, in terms of timescales, processes and terms and conditions.*[22]

52. The PAG is astonished that Ofcom appears to be attempting to "side step" this commitment made in its strategic review, despite insinuating that its review of SMP conditions (and its review of the DPA remedy in particular) was the obvious time to implement the EOI commitments. Stakeholders have long argued that the lack of EOI was a key cause of the failure of the DPA remedy.[23] The PAG can accept, reluctantly, that Ofcom is not prepared to demand that Openreach implement EOI with respect to DPA immediately. But to decide upon some lesser form of non-discrimination, without a specific plan to deliver EOI over time, would simply represent a betrayal of the commitments which Ofcom made to industry in the strategic review.

53. We do not accept that EOI is disproportionate indefinitely. The primary reason that Ofcom cites – that it will "take time to implement and potentially be costly" (5.42) – would have been obvious to Ofcom made it set out its commitment that DPA be

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[20] https://www.ofcom.org.uk/__data/assets/pdf_file/0022/76243/strengthening-openreachs-strategic-and-operational-independence.pdf Para 8.14.

[21] https://www.ofcom.org.uk/__data/assets/pdf_file/0031/68791/july_2016_progress_update.pdf para 1.5.

[22] Initial Conclusions from the Strategic Review of Digital Communications, February 2016, paragraph 4.30. This was reiterated in https://www.ofcom.org.uk/__data/assets/pdf_file/0031/68791/july_2016_progress_update.pdf para 1.10.

[23] Ofcom, Fixed Access Market Review – Statement Volume 1, 26 June 2014, https://www.ofcom.org.uk/__data/assets/pdf_file/0032/78863/volume1.pdf, para 12.394.

provided on an EOI basis in its strategic review. Furthermore, such reasoning is insufficient and circular. To simply give up on EOI because by chance Openreach's systems do not currently allow EOI is putting the cart before the horse. If Ofcom is serious about regulating DPA effectively it must require Openreach to change.

54. As we have previously noted, if competition based on passive remedies is to become sufficiently effective that downstream products can be deregulated to some extent (which is clearly what Ofcom hopes to achieve), then there will need to be the same level of assurance about non-discrimination that there is today in relation to active products. The costs of EOI will need to be incurred at some stage for this to be achieved and we would welcome Ofcom's acknowledgement of this reality. Furthermore, the PAG object in principle to Ofcom citing time and cost considerations as a reason not to impose EOI, without the type of detailed assessment for which the PAG argued in its initial submission on this topic.[24]

55. In this respect, the PAG observes that there is substantial international recognition that – as competition moves from being based on the active layer to the passive layer, unleashing much greater scope for innovation and product differentiation – there is a need to ensure a fair competition based on passive inputs. For example:

a) In Australia, the National Broadband Network Company is currently permitted to participate in multiple levels of the value chain. However, the Federal Government has directed the company to "retain optionality for future restructuring or disaggregation"[25] – for example, by enabling future separation of the passive and active network activities. This is achieved through the company using separate OSS and BSS where practicable, for example. Such system separation will allow EOI to be more easily implemented in future.

b) In Singapore, as part of the FTTP network rollout, the passive network assets (such as ducts and exchanges) were owned by a business trust (the NetLink Trust) and managed by a trustee-manager (CityNet). This structure was in place to ensure access to the passive assets is provided to all stakeholders in an equivalent manner. In 2013, CityNet acquired the shares of the owner of the fibre network, and undertakings were put in place to ensure operational independence was maintained.

c) As the PAG noted in its previous consultation response, DPA remedies across the rest of Europe have been implemented on an EOI basis (with minimal or no exceptions), including in the countries like Spain and Portugal where it is commonly accepted that DPA remedies have been most successful at unlocking investment and promoting the rollout of FTTP infrastructure. Similarly, in France, EOI has been imposed on duct access since 2014 on the basis that it prevents the incumbent from giving priority to its own deployments over those

[24] https://www.ofcom.org.uk/__data/assets/pdf_file/0031/98248/Passive-Access-Group.pdf para 44.
[25] http://www.nbnco.com.au/content/dam/nbnco2/documents/soe-shareholder-minister-letter.pdf.

of other operators, and makes it easier and simpler for the regulator to verify compliance.[26]

56. If Ofcom will not implement EOI immediately, then at the very least it must commit to a phased project of delivering EOI over time, which should be set out by ensuring any exceptions to EOI are time limited. It is not acceptable for Ofcom to fudge EOI at the first hurdle, abandoning the commitments it made in its strategic review, and purport that a "quick" solution is acceptable induefinitely.

57. We note that Openreach currently outsources much of its network build activities to external third-party contractors. This offers a valuable opportunity to ensure EOI for those activities, since the work is not performed "internally" by Openreach and therefore the processes and procedures should already be documented and appropriate for DPA customers' staff to undertake too. The conditions imposed on and the flexibility granted to Openreach's own contractors should reflect the conditions and flexibility granted to potential DPA customers. For example, where Openreach grants contractors the right to amend network designs, modify network assets or perform (and be reimbursed for) other work without Openreach input/approval, DPA customers' contractors must have those same rights.

Any new ultrafast broadband rollouts must use EOI

58. At the barest minimum, the PAG would expect that (after an appropriate implementation period from the date of the final statement) any future deployment of ultrafast broadband services by Openreach must be based on EOI. We understand that it will take Openreach a period of time to rework its systems for EOI and BT should be granted a reasonable period to undertake this work. However, once BT has had a reasonable opportunity to undertake this work, it will no longer be acceptable for Ofcom to allow BT to continue to unfairly dominate the next generation of broadband services.

59. Yet Ofcom has not even committed to this basic principle, for reasons which the PAG considers demonstrates weak resolve and which the PAG profoundly objects to:

    a) First, Ofcom argue that this would require complex boundaries inside Openreach, including "a boundary between the supply of duct access for ultrafast broadband services and for other products".[27] But this is incorrect. Even if Ofcom imposed EOI only in respect of the use of passive infrastructure for FTTP services, this would not require a boundary between the use of passive infrastructure for FTTP and for other services. Openreach would be fully able to adopt the same processes and procedures for all uses of passive infrastructure, to avoid such a boundary. If Ofcom permitted Openreach to implement such a boundary, and Openreach decided to adopt this solution in order to continue to exploit its vertical integration in other markets, that would be entirely Openreach's own choice.

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[26] https://www.ofcom.org.uk/__data/assets/pdf_file/0031/98248/Passive-Access-Group.pdf para 24, http://www.arcep.fr/index.php?id=8571&no_cache=1&tx_gsactualite_pi1%5Buid%5D=1896&tx_gsactualite_pi1%5BbackID%5D=26&cHash=a2cd755dc169c43f277b1094f794d8d9&L=1.
[27] Condoc para 5.35.1.

b) Secondly, Ofcom argues that EOI would be "most effective when both BT and other telecoms providers have aligned requirements", and since BT has no widespread FTTP rollouts, EOI may not be fully effective. This reasoning is perverse. If Ofcom waits for Openreach to rollout FTTP networks on a non-EOI basis, then the costs of "retro-fitting" processes and systems to implement EOI later will be significantly greater. Based on experience to date, Ofcom will then argue that the costs of doing so are disproportionate.

c) Thirdly, Ofcom argues that EOI may "even incentivise BT to reduce the deployment of its own FTTP services compared to what might otherwise have been the case".[28] From all publicly available information BT does not currently appear to deploy (or have any committed plans to deploy) ultrafast FTTP broadband services proactively at scale. It is absurd for Ofcom to assert it is scared of Openreach stopping or rolling back a project it has still not committed to, despite years of pressure. Furthermore, it is unacceptable for Ofcom to incentivise Openreach to make future investments by holding out the "carrot" of being able to continue to discriminate in its dealings with potential competitors.

60. The PAG's position is that any EOI and associated "must use" obligation must apply to Openreach generally, not just to its FTTP rollouts.[29] However, in any event, the PAG's position on one point is unequivocal: if Openreach decides to rollout FTTP in future (and if Ofcom can design the DPA remedy effectively, it may need to, in order to compete with CPs), it must do so on an EOI basis.

The basis on which exceptions will be granted needs to be clearly and narrowly defined

61. As will be evident from the discussion above, despite Ofcom's assurances in the consultation document, the PAG fear that there is the potential for significant and wide-scoping exceptions which will undermine CPs' confidence in, and the effectiveness of, the DPA remedy. Specifically, Ofcom's consultation document provides very little guidance as to what "non-discrimination" means in terms of actual processes and procedures.[30]

62. To address this, it essential that:

a) First, Ofcom provide a full and comprehensive explanation of the processes, procedures, systems and service levels by which Openreach currently use passive infrastructure for deployment, and in respect of ongoing operations and maintenance. This is likely to require a significant "deep dive", which is more appropriately (and well suited to be) undertaken by an independent expert, in relation to early stages of duct access. In other respects (such as where build is undertaken by third party contractors), identifying the processes and

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[28] Condoc para 5.35.2.

[29] See https://www.ofcom.org.uk/__data/assets/pdf_file/0031/98248/Passive-Access-Group.pdf para 14.

[30] "There is no indication at present on what Ofcom actually has in mind – for example: what are the actual differences in how PIA is delivered? What is the impact of these differences on CPs and Openreach, for example in terms of costs, time, complexity and resource requirements? What proportion of total activities will not be subject to EOI?": PAG submission para 10, https://www.ofcom.org.uk/__data/assets/pdf_file/0031/98248/Passive-Access-Group.pdf.

procedures should be relatively simpler since they will already be documented. This process will also need to cover post-deployment operations and maintenance issues (such as SLA/SLGs for faults, and processes covering any circumstances where work needs to be performed on ducts used by DPA customers). It is only with transparency of Openreach's existing processes, procedures and systems that there can be (i) confidence for CPs that they are being treated equivalently; and (ii) a proper baseline to assess the significance and necessity for the approach and exceptions to EOI.

b) Secondly, Openreach must precisely and accurately present the areas where exceptions are required. These exceptions must be specifically justified, together with an assessment of how the changes affect certainty, timescales and costs for CPs, and include a plan to ensure that (despite any difference in process) *actual* equivalence in outcomes is maintained and DPA users are not at any disadvantage. It is essential that these exceptions are consulted on, so that CPs are able to scrutinise whether the exception is required and that Openreach's plan to ensure equivalence of outputs is sufficient.

c) Thirdly, Ofcom must robustly and transparently assess claims for exceptions. Consistent with Ofcom's statutory duties, any justifications should be based on benefits to consumers – not the cost to BT, looked at in isolation. Ofcom should publish Openreach's claims and invite comments from CPs so they can comment and assist Ofcom to determine whether Openreach's claims are justified, while putting alternative evidence about the impact on consumers. We strongly consider that more robust assessments of Openreach through triangulated engagement with CPs will greatly assist Ofcom to achieve better regulation of Openreach going forward. Furthermore, any exceptions must be time-limited to ensure that Openreach is required to move towards full EOI as soon as practicable.

63. The PAG made similar points in its initial consultation response, and it is therefore surprising and disappointing that Ofcom has not seen fit to provide a proper and comprehensive level of analysis as requested yet. The PAG continue to believe this is essential and strongly urge Ofcom to confirm it will begin this undertaking.

Key performance indicators will be required

64. For the period that EOI is not imposed, the PAG welcome Ofcom's commitment to requiring BT to publish key performance indicators (KPIs) relating to non-discrimination.

65. From our discussions with Ofcom, we understand that Ofcom's current thinking may be not to propose upfront KPIs at the same time as its final statement.

66. The PAG strongly believe it is important for appropriate KPIs to be set up front. KPIs, self-evidently, provide only transparency. This transparency is essential to identify potential problems with discrimination which require further investigation – a failure to put in place KPIs is therefore likely to delay or prevent potential problems becoming apparent. Even if there are no problems, publication of KPIs is essential to provide assurance and confidence to CPs which may be looking at using DPA for future

deployments. Furthermore, Openreach's knowledge that it will need to publish KPIs (and therefore discrimination that is visible from the KPIs may be easily identified) may, in and of itself, provide an incentive for Openreach to ensure equivalence.

67. The PAG would therefore strongly recommend that Ofcom prepare an upfront direction requiring BT to publish KPIs. In general, we would expect Openreach to report on (i) the raw figures for its performance against the KPIs for DPA customers; and (ii) a comparison of how these figures track against a comparable measure of performance for Openreach's own services. In order to provide assurance that Openreach is not discriminating at *any* point in the value chain, the PAG would suggest that this comparison will need to provide a comparison against both (i) use of passive infrastructure for retail services provided by BT; and (ii) use of passive infrastructure for wholesale services provided by Openreach for another CP.

68. Examples of areas which must be addressed by the KPIs include the following:

a) **Planning**

- Timeframes for availability of the duct information system and of delivery of duct information to DPA customers.
- Timeframes for any step in the process which requires Openreach approval or review (e.g. approval of survey plans, network designs, the specific order).

b) **Provisioning**

- Proportion of orders which are accepted or rejected (disaggregated into the rejection reason).
- Number of surveys and other activities conducted by Openreach, and the time such activities took to complete.
- The extent to which any Openreach actions (such as where Openreach is required to perform enabling work) cause delays to DPA customers' rollouts, disaggregated into each type of action and its step in the provisioning process.

c) **Operations and maintenance**

In relation to fault repair Openreach's KPIs should:

- be based largely on the figures it is required to report for Ethernet. For example, Openreach should be required to report on its mean and median time to repair faults,[31] figures for the upper and lower quartiles, and details of "long-tail" faults; and
- cover the availability of fault reporting systems, Openreach's response times to confirm receipt of fault reports, times for Openreach's confirmation that they have identified the cause of the fault, repair times, times for Openreach

[31] If the reference offer sets out different categories of fault with different response times (e.g. depending on the severity of the impact on PIA customers), Openreach should be required to report separately on each category.

to confirm the fault has been rectified, and details of the frequency and severity of faults.

69. The PAG note that there are good examples from France (which requires duct access to be provided on an EOI basis, but subject to published KPIs) and Spain (which does not require EOI and therefore has a comprehensive list of KPIs). The PAG would warmly welcome an indication by Ofcom that it expects to direct Openreach to implement KPIs similar in nature and detail to those in France and Spain.

KPIs published by Orange in France[32]

Order type	Indicator	Contractual deadline (days)	Volume (month)	Alternative operators	Orange retail
Prior information (plans)	Average delivery time	10	5755	4.7	2.9
	Rate of compliance with the contractual deadline			96%	99%
Prior information (wiring plan)	Average delivery time	15	69	13.7	12.5
	Rate of compliance with the contractual deadline			73%	97%
Declaration/ Statement of studies	Average delivery time	2**	5349	0.5	0.6
	Rate of compliance with the contractual deadline			96%	100%
Accompaniment/escort by Orange's agent	Average delivery time	2**	61	0.8	
	Rate of compliance with the contractual deadline			95%	
	Compliance rate of the date requested by the operator			61%	
Loan of key	Average delivery time	5	4	12.3	
	Rate of compliance with the contractual deadline			0%	

[32] WIK Report page 29.

Process issues

70. This section addresses the process issues addressed in Ofcom's consultation document, under the headings of "planning and surveying", "build and enabling works" and "connecting the customer". Rather than address each point separately, we divide our comments into:

    a) general observations about the DPA provisioning process and how Ofcom can ensure it is fit-for-purpose; and

    b) the SLAs and SLGs which the PAG consider would offer an appropriate starting point for negotiations on the reference offer.

General concerns around process

71. The PAG recognise that Ofcom has sought to address various aspects of the stages of deploying a network in a modular way. This has enabled Ofcom to identify and improve on a number of deficiencies in the current deployment process.

72. However, Ofcom's analysis would be improved if it also took a "birds-eye" view of the process as a whole, from the perspective of CPs trying to put together a business plan for deployment using DPA. Individual areas of ambiguity and potential dispute at one stage of the process already raise the business risk of using DPA and makes business planning difficult. But when these "pressure points" arise at multiple stages of the process, business planning becomes exponentially more difficult. Time and cost uncertainty is particularly difficult to plan around, given the need for careful coordination between Openreach (as a passive infrastructure supplier) and the myriad of other third parties and steps needed, such as:

    a) Suppliers of network equipment such as fibre, active network equipment and consumer devices;

    b) Governmental consents needed for the installation activities;

    c) Third party contractors for laying the fibre and network equipment;

    d) Promotional and marketing activities; and

    e) Customer consents and cooperation for the lead-in and activation process.

73. The DPA process (as Ofcom envisages it with the improvements set out in the consultation paper) still involves many areas of potential dispute and time/cost uncertainty. Much of this uncertainty is caused by ambiguity and Openreach's ability and incentive to either delay the deployment process (through introducing delays while permissions are sought, information is shared or Openreach intervention is needed), or raise disputes – issues which Openreach does not face when it uses its own passive infrastructure.

74. We consider that, given the scope for delays and the uncertainty around costs, the provisioning process Ofcom proposes – while a significant step forward – is not yet workable. We consider that a number of further changes in approach are required to address this issue and set out below some suggestions on how to achieve this:

a) First, we acknowledge that Ofcom will likely wish to have industry participants agree the detail and contractual arrangements connected with DPA processes. However, we consider that Ofcom has a clear role to play in setting guidance about its expectations for the reference offer negotiations in its final determination. Experience has shown that such guidance – if it is legally binding or if it provides a clear indication of how Ofcom is likely to determine an issue in the context of a regulatory dispute – has an important role to play in ensuring that Openreach comes to the negotiating table with a realistic position.[33] For example, this appears to have been important in encouraging Openreach to take sensible positions (or compromised) in relation to the DFA reference offer negotiations. This might include, for example, Ofcom setting its expectation that the reference offer will, where relevant (such as in relation to SLAs and SLGs, and in relation to simplification and automation of processes), draw from other countries where DPA remedies have been successful.

b) We understand that Ofcom considers it unlikely that there will be many disputes in relation to DPA. However, as is evident from the above, Openreach still retains the <u>ability</u> – through its discretion, and the need to grant approvals or to take action at various points in the provisioning journey – to raise a number of separate disputes even for a single order. The cumulative effect of such disputes (both on the DPA customer, and on the whole industry, including on Ofcom) could be enormous and will create significant uncertainty about the time, costs and ability to viably deploy networks using DPA. We would urge Ofcom to consider innovative solutions to address this issue, and create a faster and more simplified dispute process – akin to our suggestions above regarding disputes about "mixed usage". This could include, for example, a specific role for the OTA to quickly arbitrate disputes, and a requirement that Openreach "package up" disputes where possible so that they can be dealt with efficiently rather than using multiple disputes to create lengthy delays to provisioning.

c) We note that Ofcom proposes to continue to give Openreach discretion to withhold consent or approvals in certain cases. We urge Ofcom to limit these steps as far possible. A review of the processes in EU countries where duct access has been most successful shows that they are characterised by a simple ordering and provisioning process, which minimises the number of steps in the process – and in particular the need for ongoing interventions or authorisations by the incumbent. For example, a recent study by WIK demonstrates that the most successful countries – France, Spain and Portugal – are characterised by innovations such as removing requirements to conduct a feasibility analysis

[33] It is therefore important that any comments made by Ofcom are carefully drafted so as not to allow Openreach to take unanticipated and unreasonable positions. For example, in the 2016 BCMR statement Ofcom made a 'comment' seemingly in passing '*while we do not consider it is proportionate to impose a specific requirement relating to the minimum term for the dark fibre remedy we consider that a minimum-term of <u>up to</u> three-years as part of the Reference Offer would not appear unreasonable*.' Openreach took this to its industry negotiations, alleging that Ofcom had endorsed that Openreach was justified in <u>only</u> providing three year contracts in the reference offer, even though this is not what industry wanted. A protracted debate ensued which almost resulted in a formal dispute before Openreach finally acceded to industry's requests for contracts of different duration.

where the incumbent's information shows that there is duct availability.[34] We welcome Ofcom's determination to remove many of these redundant and unnecessary steps, such as the need for field surveys and to submit survey results to Openreach, and encourage Ofcom to streamline other parts of the process as much as possible.[35]

d) Where Ofcom is proposing that Openreach retain discretion or the ability to refuse a deployment, order or request to perform work, Ofcom needs to approach this with a critical eye and with the knowledge that Openreach has the incentive to ensure that DPA is not a success. At the minimum, we would request that Ofcom provide detailed guidance about how such discretion should be exercised and the factors that Openreach is allowed to take into account when exercising that discretion. In relation to steps where Openreach's consent or approval is required, Ofcom should specify an exhaustive list of the reasons why consent or approval may be declined.

e) The PAG has observed that Openreach, in past reference offer negotiations for other products, attempts to include arbitrary restrictions or constraints in its contracts.[36] This is clearly unacceptable, and compromises the broad terms in which Ofcom sets its SMP conditions (indeed, it renders BT non-compliant with those SMP conditions), and yet it is a behaviour that Openreach has consistently and continuously engaged in. We would strongly encourage Ofcom to clearly state in the SMP conditions requiring BT to prepare the reference offer (or, failing that, the final determination) that BT is not permitted to add or seek to add any restrictions or constraints to the DPA remedy, other than those limitations expressly considered by and referred to by Ofcom to address this issue.

f) Finally, we welcome statements by Ofcom which demonstrate that it understands the DPA remedy is likely to require ongoing monitoring and development to ensure its effectiveness. For this reason, we welcome Ofcom's decision to include a direction-making power in the SMP conditions, so that identified issues can be easily addressed. In the past, the threat of regulatory intervention has not always resulted in appropriate behaviour from Openreach, in part (we suspect) due to a perception that there is a high threshold of bad behaviour required before Ofcom would proactively intervene. We consider Ofcom's commitment to devoting ongoing resources to the DPA remedy to be helpful in changing Openreach's attitude, but would also warmly welcome a clear statement by Ofcom that it will use its Direction-making power to resolve issues swiftly if its behaviour warrants it.

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[34] WIK Report page 4.

[35] Condoc para 6.28.

[36] As examples, in relation to the previous PIA reference offer negotiations, BT attempted to include a number of arbitrary constraints which bear no reference to Ofcom's SMP conditions and therefore imposed invalid constraints (which BT was only able to seek to impose by virtue of its SMP). These included minimum numbers of premises and percentages of the addressable market which a rollout was required to cater for; preventing breakouts (i.e. so a CP could not use its own networks, for segments where the CP had an existing network in situ); and prohibition on using PIA if at any point in the network there was a wireless connection.

SLAs and SLGs

75. Wherever appropriate, the PAG recommend that automated processes, set out on an EOI basis, and with the greatest possible scope for DPA customers to autonomously use DPA themselves, offer the best assurance to CPs that the DPA product will be 'fit-for-purpose'.

76. However, there will clearly be a need to set out clear SLAs, especially in a context where BT is not rolling out ultrafast broadband networks which need to use the DPA product (and therefore, despite any equivalence obligations, Openreach may have incentives to provide poor quality service). SLAs should apply to ensure Openreach is as responsive as possible in relation to any step in the process where input or authorisation from Openreach is necessary, such as for the provision of information. These need to be backed by SLG entitlements, which provide appropriate incentives on Openreach to deliver a fit-for-purpose product. The minimum standards and quantum of SLGs should be set having regard to international examples of SLAs/SLGs in countries where passive infrastructure remedies have been successful, and the extent to the standards Openreach adheres to.

77. In addition, SLAs and SLGs will be essential for ongoing maintenance, and should be based on the similar reporting requirements for Ethernet services. Openreach should be required to meet minimum requirements on:

Provisioning

a) the availability of the online duct information and ordering systems;

b) timeframes from acknowledgement and validation of orders;

c) timeframes for each step in the process where Openreach is required to undertake activities, provide a consent or its intervention is otherwise required. This would, include, for example, timeframes for the provision of information about the duct network and for enabling works;

Faults

d) the availability of fault reporting systems;

e) response times to confirm receipt of fault reports, and times for Openreach's confirmation that they have identified the cause of the fault;

f) its mean and median time to repair faults,[37] figures for the upper and lower quartiles, and details of "long-tail" faults; and

g) times for Openreach to confirm the fault has been rectified.

78. International examples also provide a good indication of the appropriate level of SLGs. For example, in relation to provisioning timeframes, in France the incumbent faces a daily compensation payment of €0.34 or €0.69 per duct segment for each working day that a provisioning timeframe is not met; in Spain, the compensation is 5% of the

[37] If the reference offer sets out different categories of fault with different response times (e.g. depending on the severity of the impact on PIA customers), Openreach should be required to report separately on each category.

relevant one-off fee per day of delay; and in Portugal compensation of €50 per day for non-availability of systems and delays in responses applies. There are similar compensation regimes for fault repair, for example in Spain, 50% of the annual charge for the relevant segment suffering a fault is payable as compensation for each hour of delay.[38]

79. While we acknowledge that Ofcom may not specify the comprehensive list of SLAs and SLGs in the SMP conditions, we would welcome guidance from Ofcom in its final statement that the SLAs and SLGs should be developed based on experience from similar successful regulatory remedies overseas, and that the PAG's proposals provide a useful starting point.

[38] WIK Report pages 35 and 36.

Pricing issues

80. In this section, the PAG comment on two aspects of Ofcom's proposals for price regulation: first, its decision to impose a cap rather than a full charge control based on Ofcom's own cost modelling; and secondly, Ofcom's proposal regarding network adjustment charges.

Enabling the option for future cost modelling

81. As Ofcom notes in its consultation paper, DPA rental charges are currently derived from an allocation methodology adopted by Openreach. Openreach retains substantial freedom to revise the methodology, with significant potential impacts on the level of charges. At the same time, as CPs have previously noted, the level of rental charges itself appears unduly high and well above the level seen in countries where DPA has been successful.[39]

82. Given the PAG's concerns about current pricing levels, the PAG is disappointed that Ofcom simply accepted Openreach's allocation methodology as 'given' and opted for a price cap (based around current pricing) rather than obtaining the data and performing its own cost modelling exercise and setting its own methodology (e.g. cost attribution):

    a) Ofcom has already seen, given its recent work in assessing Openreach's cost allocation practices, that Openreach's cost allocations are often subject to obvious errors or clearly inappropriate methodologies. Given this, the PAG has profound discomfort that Ofcom continues to give Openreach the "benefit of the doubt", when Openreach's conduct (as revealed in Ofcom's recent review of its cost allocation practices) is beyond doubt. The PAG firmly believes that – given Openreach's practices over many years, including its demonstrated practice of moving costs in a way which "games" the timing of market reviews – the time for giving Openreach discretion is over.

    b) Ofcom appears to have considered carefully the risk of pricing uncertainty (i.e. future price rises) and whether this is a disincentive for investment. But it has not reviewed or attempted to review whether the current level of pricing is unduly high and therefore provides its own disincentive to efficient investment.

    c) While Ofcom has observed that cost modelling would be dependent on forecasts of costs and values, this is no reason not to conduct the exercise at all. Ofcom has been willing and able to perform appropriate forecasting for other products (including those such as DFA which were entirely new to the market as a regulated remedy) in the past. The fact that costs will come down over time should not be a road block to modelling costs now.[40]

[39] See letter from major CPs to Ofcom of 14 November 2011.
[40] We note in passing that if Ofcom undertakes a proper cost modelling exercise, it will provide it with a rich data set with which it can assist it to assess non-discrimination obligations and develop a road map to EOI.

d) The EU countries where passive infrastructure access is successful all have a much more robust approach to pricing regulation.[41]

83. Despite these reservations, the PAG recognises that Ofcom appears to have no appetite for reviewing the level of Openreach's current prices and/or imposing a full charge control at present. But the PAG considers it essential that Ofcom take action now to ensure that this is a viable option in future, so that Ofcom can respond if it becomes clear that Openreach has adopted an inappropriate pricing strategy which is constraining the effectiveness of the DPA remedy. This may also be a critical step if Ofcom is to keep open the option of introducing a charge controlled DPA remedy in other markets, such as business connectivity, in future.

84. Accordingly, we strongly urge Ofcom to:

a) Establish a project focussed on determining what an appropriate pricing level for DPA should be (by reference to domestic and international indicators) and a DPA pricing methodology in time for the next market review where duct access is considered appropriate.

b) Direct Openreach to report the required cost data to the required level of granularity in future for example, to reflect the different rental charges which apply to different types of duct, and for manholes and joint boxes. We recognise that this may take time to implement but consider that Openreach should be directed to make the required systems changes in time for Ofcom to be better informed and able to set a specific charge control (if it so chooses) at the next market review.

c) Direct Openreach to changes the way it reports on physical infrastructure in its regulatory financial statements, to better enable Ofcom to compare CPs' contribution from services which use DPA to BT's cost recovery, with the contribution to cost recovery made by BT's downstream products.

d) Ensure Ofcom has the power to change prices by implementing a mid-market review if circumstances warrant.

Network adjustment charges

85. The PAG notes Ofcom's proposal that, when a CP requests build and enabling works:

a) Openreach's costs for those works should generally be spread across all users of the relevant infrastructure; but

b) After a certain threshold, those costs should be borne by the CP which requests the works in order to avoid imposing unexpectedly high costs and risks on Openreach and consumers.

86. The PAG agree with Ofcom that the current approach (whereby CPs are forced to bear the entire cost of network adjustments) is inappropriate, and gives BT an unfair advantage (because Openreach recovers its costs for network adjustments across all

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[41] For example, France requires cost-oriented pricing based on a top-down model; Germany adopts a LRIC+ cost model; Portugal adopts a top-down model based on HCA; and Spain adopts a top-down model cross-checked against LRIC. See WIK Report page 25.

users of its infrastructure). The PAG also agree with Ofcom that the current model adds to the costs and risks of using DPA in any large-scale manner.

87. However, the PAG note that Ofcom has not yet identified the specific threshold after which network adjustment charges should be payable by the CP. The PAG observes that certainty is critical to CPs seeking to put together a business plan to use DPA. Therefore, the PAG welcome Ofcom's proposal that any threshold need only cover "exceptional cases" where costs are "significantly higher than the average cost for that particular type of work". As a general point, the PAG believes such circumstances are likely to be very rare, given the locations that DPA will most likely be used and the geographic usage restrictions, and so the PAG queries whether it is proportionate for Ofcom to address these cases. Further, the more often these exceptional costs are likely to be incurred, the less certainty for CPs: especially given that CPs rolling out in particular areas of the UK may face the risk of a proportionally higher incidence of network adjustment charges (whereas BT will be able to "average" its costs across work performed in its whole network). If Ofcom decides to proceed with this proposal, the PAG is not opposed to the limit being set on a different basis for infrastructure up to the distribution point, and for lead-ins in the manner proposed by Ofcom.[42] The PAG looks forward to the opportunity for further comment on this proposal.

[42] Condoc para 7.59.

Timing issues

88. The PAG is eager to ensure that the improvements to the DPA remedy are put in place as soon as possible, so that UK consumers, businesses and CPs do not need to wait for years more before they can enjoy the benefits of an effective DPA remedy. DPA is not a new remedy: it is a remedy which Openreach has been required to supply for several years. Over the past few years, Openreach has been trialling changes to the processes, systems and procedures for DPA. The PAG does not consider that there is any case for delaying many of Ofcom's proposed changes

89. We are therefore very pleased to see that (based on the wording of the draft legal instruments) that it appears that the charge controls, non-discrimination obligations and "mixed usage" rule appear to come into force at the same time as the rest of the legal instrument. We think this is a positive step to ensure that some of the improvements Ofcom is proposing will take effect as soon as possible, providing an immediate boost to CP's confidence in the DPA remedy. We would encourage Ofcom to set out more clearly and expressly its intention that certain items apply from the date the final statement comes into force (eg, pricing, enhanced non-discrimination and relaxed usage restrictions), since this can currently only be inferred from the draft legal instrument.

90. In respect of the process changes, Ofcom's proposal is that Openreach must publish:

    a) a revised draft of the reference offer within four months of the date of Ofcom's final statement; and

    b) a final revised reference offer within one year of the date of Ofcom's final statement.

91. The PAG would encourage Ofcom to consider imposing a more ambitious timeframe, especially given that:

    a) Openreach has prepared entirely new products which did not previously exist (such as DFA) in the same timeframe. In comparison, DPA is a well-established product which Openreach has had a considerable period of time to develop;

    b) Openreach is already trialling and implementing a number of changes which are expected in the reference offer. Much of what Ofcom proposes in the consultation document is therefore not a surprise to Openreach, or indeed only reflects what Openreach already proposes; and

    c) Openreach has early visibility of Ofcom's proposals, and so is in a position to start discussing these (at a provisional level) with industry well before Ofcom makes a final determination, and to put in place the internal changes at Openreach which are required to implement those proposals.

92. Accordingly, we would encourage Ofcom to consider options so that the process changes may be "bedded in" at an earlier point, rather than spending an additional year of negotiations in relation to changes which can either be imposed by way of SMP conditions with immediate effect, or which Openreach could be required to

agree with industry and implement before the end of the 12-month period, when the rest of the reference offer is provided. For example, it may be that at least certain separable aspects of the overall package – e.g. SLAs which do not rely on agreeing fundamental changes to Openreach's processes, such as for fault repair – could be locked down early.

93. Clearly, it will be critical for Ofcom to remain deeply involved in monitoring the success of the DPA remedy, and Openreach's behaviour, to ensure it is a success. The PAG welcome Ofcom's assurances that it will allocate staff and resources for this purpose, and that it will not simply make its final statement and leave it to Openreach to neutralise the remedy once again. But this cannot be a substitute for imposing appropriate legal constraints on Openreach, to remove its ability to stymie the success of DPA.

Responses to consultation questions

Question 4.2: Do you agree with our proposals on the scope of PIA: (1) To broaden usage through a mixed usage generic rule; (2) To modify the PIA condition to define geographic scope by reference to telecoms providers' local access networks. Please provide reasons and evidence in support of your views.

- Ofcom states its preference to impose a general obligation – one without usage restrictions – given the risk of regulatory failure arising from imposing such restrictions. Ofcom's concerns are borne out, in our view, and usage restrictions can cause uncertainty and wasted costs.
- Should Ofcom retain any usage restrictions, compliance should be managed by Ofcom (and not Openreach). If this solution is not adopted, at the very least, a "streamlined" dispute process should be put in place and the burden of proof must lie with Openreach to demonstrate non-compliance.
- The PAG supports Ofcom's decision to define the geographic scope of the DPA remedy as allowing DPA use for providing local access segments by reference to the CP's network, and its clarification that CPs may break in and out of BT's physical infrastructure as required. This will be critical to allow CPs to not be constrained by BT's old (and now sub-optimal) network topology and to innovate to provide consumers and business with services where they are needed.

Question 5.1: Do you agree with our proposed imposition of a no undue discrimination SMP condition on BT? Please provide reasons and evidence in support of your views.

- The PAG acknowledges that Ofcom does not intend to immediately impose EOI. However, Ofcom needs to clarify the meaning of its proposed "strict non-discrimination" approach, and explain the changes this approach will require from Openreach (as compared to the status quo). The PAG understands that Ofcom is proposing strict equivalence – as required by full EOI – for all processes and sub-products, except in specific circumstances where Ofcom has set out defined and transparent exceptions.
- Assuming this is correct, a substantial amount of work will be required from Ofcom and Openreach to (i) set out the entire end-to-end process undertaken by Openreach when it uses passive infrastructure itself, and the equivalent steps in the DPA product process; (ii) identify specific points where the systems, processes, procedures or terms of access are not exactly the same; and (iii) publicly explain and justify those differences, including explaining how overall equivalence and non-discrimination will still be achieved, and how the exception will be removed over time.
- Ofcom must not content itself with a "quick fix", but instead combine the "quick fix" with a plan to require Openreach to deliver EOI in the long term:
    - Ofcom must commit to any new ultrafast rollouts using EOI;
    - the basis on which exceptions will be granted needs to be clearly and narrowly defined. Without much greater rigour and transparency around the exceptions

Ofcom would allow, and the resultant differences between Openreach's internal and external processes for using passive infrastructure, industry will not have confidence in Ofcom's proposed approach; and

- Ofcom must commit now to implementing detailed key performance indicators, to give assurance to DPA customers that "non-discrimination" is delivering results.

Question 6.1: Do you agree with our proposed approach to the processes and systems relating to planning and surveying? Please provide reasons and evidence in support of your views.

- The PAG encourages Ofcom to review the complex DPA provisioning process from end to end, and to recognise that further changes are still required to deliver certainty about time and costs. In particular:
  - Ofcom has a clear role to play in setting its expectations about the content of the reference offer;
  - Innovative solutions are required to address the issue of potential disputes, and ensure that disputes are resolved quickly and efficiently, in a way which does not undermine certainty for the whole industry;
  - Ofcom should provide detailed guidance about how Openreach's discretion should be exercised;
  - The ordering process should be as simple as possible, minimising the number of steps in the process – and in particular the need for ongoing interventions or authorisations by the incumbent;
  - Ofcom should clearly state in the SMP conditions that Openreach may not impose restrictions or constraints on the DPA remedy, other than those set out by Ofcom; and
  - We would warmly welcome a clear statement by Ofcom that it will use its Direction-making power to resolve issues swiftly if its behaviour warrants it.
- Wherever appropriate, the PAG recommend that automated processes, set out on an EOI basis, and with the greatest possible scope for DPA customers to autonomously use DPA themselves, offer the best assurance to CPs that DPA will be 'fit-for-purpose'. There will also be a need to set out clear SLAs. SLAs should apply to ensure Openreach is as responsive as possible in relation to any step in the process where input or authorisation from Openreach is necessary.

Question 6.2: Do you agree with our proposed approach to the processes for build works and enabling works? Please provide reasons and evidence in support of your views.

- See the PAG's response to question 6.1 above.

Question 6.3: Do you agree with our proposed approach to processes relating to the connecting the customer stage? Please provide reasons and evidence in support of your views.

- See the PAG's response to question 6.1 above.

Question 7.1: Do you agree with our proposed form of price regulation for PIA rental and ancillary charges? Please provide reasons and evidence in support of your views.

- Given the PAG's concerns about current pricing levels, the PAG is disappointed that Ofcom opted for a price cap (set at current levels) rather than obtaining the data and performing its own cost modelling exercise
- Despite these reservations, the PAG recognises that Ofcom appears to have no appetite for a full charge control at present. But the PAG considers it essential that Ofcom take action now to ensure that this is a viable option in future – in both the WLA market and other markets like business connectivity, where DPA may become an SMP obligation in future –, so that Ofcom can respond if it becomes clear that Openreach has adopted an inappropriate pricing strategy which is constraining the effectiveness of the DPA remedy.
- We look forward to the more detailed pricing consultation in summer, when we will provide detailed feedback on Openreach's pricing proposals, including the threshold above which network adjustment charges will be payable.

Question 7.2: Do you agree with our proposed approach to the recovery of network adjustment costs? Please provide reasons and evidence in support of your views.

- The PAG agrees with Ofcom that the current approach (whereby CPs are forced to bear the entire cost of network adjustments) is inappropriate, and gives BT an unfair advantage (because Openreach recovers its costs for network adjustments across all users of its infrastructure). The PAG also agrees with Ofcom that this model adds to the costs and risks of using DPA in any large-scale manner.
- However, Ofcom has not yet identified the specific threshold after which network adjustment charges should be payable by the CP. The PAG observes that certainty is critical to CPs seeking to put together a business plan to use DPA. Therefore, the PAG welcomes Ofcom's proposal that any threshold need only cover "exceptional cases" where costs are "significantly higher than the average cost for that particular type of work".
- We look forward to the more detailed pricing consultation in summer, when we will provide detailed feedback on Openreach's pricing proposals, including the threshold above which network adjustment charges will be payable.

Question 7.3: Do you agree with our proposed approach to the recovery of productisation costs? Please provide reasons and evidence in support of your views.

N/A