

Physical Infrastructure Market Review Team  
Ofcom  
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By email only

14 February 2019

Dear Sirs,

**Passive Access Group – 2018 Physical Infrastructure Market Review (PIMR) – PAG consultation response**

1. The Passive Access Group or PAG (TalkTalk, Vodafone, Colt and Sky) write in response to Ofcom's consultation published on 2 November 2018 "Physical Infrastructure Market Review – Access to ducts and poles to support investment" (the '**PIMR consultation**').
2. The PAG is a group of the UK's major alternative communications providers. As fierce competitors, PAG members all have their own, individual ambitions and plans to secure the benefits that passive access will bring to their existing customers – and help them win new ones. PAG members are united in their view that more and better access to BT's passive infrastructure (i.e. dark fibre, ducts and poles) is what is required in order for UK communications providers to meet the current and future demands of consumers and business alike.
3. Duct and pole access (**DPA**) can both speed up and reduce the costs of wide scale deployment of much needed fibre broadband to meet the exponential growth in bandwidth demand and technological advancement. It is right that Ofcom progresses with DPA urgently.
4. It's no surprise then that the PAG fully supports Ofcom's proposals to remove any restrictions on usage of DPA. The PAG has always considered, and submitted to Ofcom on many occasions, that it should not impose blunt usage restrictions on passive access remedies given the potential to create artificial barriers that segment and distort the market unnecessarily, more often than not resulting in further unintended regulatory failures.
5. There are some important issues arising out of the PIMR consultation that the PAG urges Ofcom to address before it reaches its final decision if the PIMR is to withstand scrutiny.

***Product market definition & CLA assessment***

6. Ofcom's appears to make a number of errors in its assessment of the product market, particularly in the CLA, which leads it to propose a flawed product market definition.
7. First, Ofcom has effectively just *assumed* a wide 'supply of wholesale access to telecoms infrastructure' product market without stepping through the necessary process of first considering separate narrower focal markets for leased line and access line passive networks. As Ofcom is well aware, access and leased line markets have very different structures, particularly around break out points. Ofcom should first consider defining markets with these characteristics separately and then consider whether they constrain one another to determine whether narrower sub markets are more appropriate.
8. The PAG considers that, in doing so, Ofcom will find that passive product market definition is most likely to be asymmetric, with access networks constraining dedicated leased line networks, but not vice versa. But by failing to step through this analysis Ofcom has simplistically arrived at a definition which is wider than is supportable by the evidence, leaving its proposed decision vulnerable to challenge. The PAG therefore urges Ofcom to revisit its approach to product market definition and carry out the more granular analysis necessary.

***Treatment of the CLA***

9. As set out in the PAG's response to the 2018 BCMR consultation, the PAG considers Ofcom is wrong to find that Openreach does not have SMP in the CLA even though, for example, Openreach's market share is higher than 50% and it has an extraordinarily high ROCE.
10. The PAG also considers that there is nowhere near the amount of competition/competitive constraints on Openreach in the CLA from other infrastructure operators as Ofcom considers there is. Ofcom has taken an over simplistic view in the PIMR of the competitive constraints on Openreach in the CLA by relying heavily on sheer numbers of other infrastructure operators on which to base its view. However, despite the numbers, given the complexities and costs associated with servicing the CLA, other infrastructure operators do not provide credible or alternative constraints on Openreach:
  - a. This first problem with Ofcom's analysis (as individual PAG members have already said in their response(s) to the BCMR consultation) is due to Ofcom's incorrect assessment in the BCMR that firms are willing to dig to serve leased line customers in the CLA. Digging in the CLA has vastly different characteristics to anywhere else and is hugely more expensive and complicated (and risky).
  - b. Secondly, Ofcom itself recognises that access seekers require wide coverage and that no single alternative infrastructure operator passes more than 30% of all premises in the CLA.<sup>1</sup> It quite obviously follows from this that CLA alternative

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<sup>1</sup> Paragraph 3.125

infrastructure operators will not provide a reasonable alternative or constraint on Openreach's SMP, yet Ofcom has somehow reached the opposite conclusion.

- c. Thirdly, when considering the degree of competitive constraint other infrastructure operators would provide on Openreach offering DPA, Ofcom has failed to take into account that many of these operators (e.g. those focussed on providing leased lines) will not offer sufficient breakout points to be considered a suitable alternative. This further underlines that such other operators are unlikely to be found to be in the same market.
11. In summary, it is clear BT does have SMP in the CLA and Ofcom is correct to impose an unrestricted DPA remedy. However, Ofcom's approach to implementing the remedy seems flawed and the PAG is therefore concerned the remedy could be vulnerable to challenge.

***Ofcom's incorrect modelling of other communications provider (OCP) costs and pricing for access to Openreach will reduce DPA take up***

12. The PAG is concerned that Ofcom's errors in modelling OCPs costs, particularly 'economic network extension costs' overestimate DPA uptake. In particular, Ofcom's modelling appears to include a number of assumptions that are not true in reality and omits a number of costs that OCPs seeking to use DPA would face in carrying out the necessary network extensions – we refer you in particular to Vodafone's responses to the PIMR consultation for examples.
13. The outcome of the PIMR proposals is therefore likely to be that Ofcom's assessment of the uptake of DPA as a remedy is significantly overstated and the objectives of and expectations for DPA and Ofcom will not be met. If that occurs BT will be handed evidence to wave around at Ofcom in future policy and appeals against imposing passive remedies and/or removing the current suite. The PAG therefore strongly urge Ofcom to look more closely at these costs and take a more robust approach to cost modelling in the BCMR/PIMR reviews.

***Ofcom still does not seem to understand the capacity requirements for mobile backhaul for 5G and the enterprise market***

14. The PAG consider that Ofcom's analysis should do more to recognise the equally important yet different needs of mobile operators and the enterprise market. Enterprise customers and mobile operators are already well served by fibre from Openreach. DPA uptake is therefore likely to be of limited use to them except for the few areas where fibre is not available. As enterprise customers have already incurred significant excess construction charges from BT to obtain fibre, they are unlikely to have sufficient incentives to switch to an OCP's 'new' fibre pulled through a duct obtained via the DPA remedy. Ofcom has, however, failed to address the significant demand in the enterprise

market for service competition and innovation that access to BT's dark fibre would enable.

15. As regards to mobile backhaul, Ofcom has again failed to recognise that backhaul represents a separate economic market in which dark fibre access is the most economic solution for MNOs to meet the capacity requirements of 5G. Mobile operators are in desperate need of the ability to upgrade to higher bandwidth backhaul to meet the functionality and device requirements of 5G but are prevented from doing so by a lack of competitive alternatives and Openreach's artificial bandwidth gradient. The PAG considers the most appropriate passive remedy to address competition where BT has SMP with fibre already in situ is dark fibre. Where there are new sites that need to be installed with new fibre there is a greater opportunity for this new fibre demand to be supplied using unrestricted DPA. This approach will promote much greater and more efficient investment by MNO's in their own infrastructure and much more efficient use of BT/Openreach's.
16. If Ofcom and governments' 5G ambitions have any chance of being realised Ofcom needs to undertake a paradigm shift and better understand the symbiotic relationship between mobile and fixed access capacity for 5G. Ofcom has overlooked that, in reality, and in particular the period of this review and the next, there is very strong demand for dark fibre by all operators – not just mobile. Ofcom appears to have substituted its vision for the future (DPA) with what is the most demanded and appropriate remedy in the present period (a combination of dark fibre and DPA) for meeting exponentially increasing bandwidth and service needs and addressing Openreach's SMP.

### **Summary**

17. The PAG urges Ofcom forward with its DPA proposals but with the caution that it should step back slightly from a narrow ambition of 'let's just get DPA out there' to one that is more balanced and responsive to the reality and needs of the market. The PAG strongly encourages Ofcom to reconsider introducing a combined unrestricted DPA and dark fibre remedy together so that passive access remedies can provide a long-term solution to invigorate widespread network competition for the benefit of consumers.

Yours sincerely,

**Towerhouse LLP**