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Ofcom's Proposed Annual Plan 2019/20: Consultation response from CityFibre

CityFibre welcomes the opportunity to comment on Ofcom's draft Annual Plan.

Overall commentary on strategic objectives

In relation to Ofcom's telecoms responsibilities the context for the Annual Plan is the Government's Future Telecoms Infrastructure Review and the accompanying Strategic Statement from Ofcom, both published in July 2018. We anticipate that the Government will shortly publish a Statement of Strategic Priorities that indicates the specific steps it expects Ofcom to take to support the goals set out in the FTIR.

We believe there are some substantial omissions from the Annual Plan as regards the necessary regulatory interventions required to support the FTIR goals and Ofcom's Strategic Statement. These relate both to the supply side of the industry, principally the creation and maintenance of a regulatory 'level playing' field that allows infrastructure competition in the provision of full fibre to develop, and in the demand side, to enable consumers to enjoy the benefits of the new products and services enabled by investment in new full fibre and 5G infrastructure.

On the first, the 'infrastructure competition' model proposed by Ofcom in its July 2018 Strategic Statement necessitates a bold shift in emphasis away from regulating competition in the market downstream of Openreach towards action that prevents BT/Openreach using its market power to foreclose infrastructure competition. In other words a shift from a focus on potential discrimination in downstream markets towards behaviour that has horizontal effects: and from regulating excess profit out of the market (via remedies designed to curb 'excessive pricing') towards precluding the risk of foreclosure via predatory pricing and linked behaviours such as leveraging of dominance from adjacent markets into the full fibre market. In addition to specific regulatory interventions such as regulated Duct & Pole Access, we believe that the focus of ongoing monitoring and compliance work, including the activities of the Openreach Monitoring Unit, needs to shift towards monitoring and if need be taking action against abuses of a dominant position designed to foreclose the market for infrastructure competition.

On the second, demand side measures are required to allow consumers to navigate their way through the complex choices that the shift towards new technologies will entail. We agree with the overall thrust of the Government's Consumer Green Paper that for markets to operate effectively consumers need to be able to make proactive, informed choices between suppliers. Switching rates in telecoms are low, exacerbated by some well-known problems: the plethora of misleading advertising of service capabilities; inappropriate tolerance of "save" activities such as the offering of off-book tariffs to bifurcate the consumer base between active and non-active switchers; penalising consumers for switching by enforcing unfair contract termination penalties; and a continued smorgasbord of different switching models for different combinations of service elements, such that switching remains unnecessarily complex and risky for consumers in many cases, and the 'received wisdom' amongst consumers is that it is not worth the hassle. In addition, the co-existence of differing switching processes is of a nature which could make it significantly easier for ISPs sitting on Openreach's networks to win customers than it is for ISPs taking service from alternative fibre networks. This is an intolerable tilting of the playing field towards the incumbent which needs to be corrected urgently.

The advent of a major technology shift redoubles the case for proactive demand side remedies to address these well-known and chronic industry problems, rather than a reactive model that responds

only when consumer complaints rise to an intolerable level and become a 'post-bag' issue either for Ofcom itself or for Government Ministers.

We also note that the Government has stated its intention to implement the European Electronic Communications Code, including enhanced rights for consumers to switch between networks using a 'Gaining Provider Led' process.

Taking these different drivers together, both the policy goal of creating a competitive market for full fibre and consumers' rights and interests point towards a major focus in Ofcom's work this year being to proactively address problems around switching, consumer contracts and misleading technology comparisons. We urge Ofcom to prioritise this work in the financial year 2019/20. To give comfort to investors in full fibre networks, it is vital that Ofcom publicly commit to reviewing these issues through an explicit inclusion of these activities in its final published Annual Plan.

Goals and project highlights for 2019/20

In this section we provide additional commentary on goals and project highlights identified in the draft AP.

Moving towards universal availability of high quality and secure communication networks

We agree with the focus in paragraph 3.5 of the consultation on promoting investment in fibre networks. We further note that an essential precursor to the large-scale deployment of 5G networks (mentioned in paragraph 3.6) is further densification of fibre backhaul elements, both to existing MNO macro sites but in due course extending to 5G small cells.

We also note that there is an important, emerging tension between the near-term focus on improving Universal Service (as per paragraph 3.4) and the Government's full fibre objectives. For example, it is concerning that Ofcom's approach to USO seems to be narrowly focused on technology solutions to deliver the current 10 Mb USO rather than encourage technology solutions which are future proofed for the inevitable uplift of the USO obligation over time. Moreover, the USO obligations now sit increasingly uneasily with other public interventions to promote full fibre rollout, whether this is the anticipated re-purposing of the Government's Local Full Fibre Network fund to support rural full fibre deployments or interventions such as the Scottish Government's R100 scheme. At present we see a risk that the USO becomes a subsidy mechanism to deploy legacy infrastructure in areas where Government policy is simultaneously or in the near term anticipating a separate public intervention to fund full fibre.

There is clearly a need for greater clarity on what networks are already present and planned to be deployed. Greater transparency around both current and planned deployments is an area where we would like to see Ofcom take a stronger leadership role, as it has both the legal powers to collect such information and the analytical tools to determine the extent to which planned deployments are likely to address public policy objectives that might otherwise require other forms of public intervention such as state aid. Ofcom is also likely in due course to take on further responsibilities for data collection for this purpose if (as we understand to be likely) the Government implements the European Electronic Communications Code and specifically Article 22 of that Code. Therefore we would urge Ofcom to commence proactive discussions with industry on the scope and form of publication of data that it collects on future network deployments.

In addition to the specific activities described in the Work Plan relating to supply side regulation of fixed telecoms, we believe two other significant emerging themes need to be addressed in the work programme (it is possible that these are within scope for the All Access Review, but this is not clear from the draft Annual Plan):

- Reconsideration of separation provisions: The new emphasis on infrastructure competition we believe justifies a further review of separation within BT Group. Openreach as it currently exists is a mechanism designed to prevent discrimination in markets downstream of

infrastructure (implicitly accepting Openreach's monopoly in infrastructure). But Openreach will be both a provider of passive inputs to rival full fibre infrastructure builders and their principal competitor. Hence, the non-price discrimination practices and behaviours that Openreach was initially designed to address will now manifest themselves *within* Openreach. This is more than a theoretical concern, as our early experience of seeking to make use of PIA is highlighting major structural problems: for example, at its most obvious level, the problem that in seeking to elevate our concerns about PIA to the CEO of Openreach, we are in effect forced to share commercial confidences with the CEO of our principal competitor). We believe Ofcom therefore needs to more explicitly recognise this fundamental problem and initiate a strategic programme of work to identify possible options and solutions.

- Symmetrical regulation/Mutualisation: The EECC also would provide, if implemented into UK law, an enhanced regulatory toolkit for Ofcom to intervene to impose symmetrical regulation – what in France is termed 'mutualisation' rules – for fixed telecoms operators, including full fibre builders. Symmetrical regulation constitutes a potential risk to new fibre network builders because of uncertainty about how such rules would be applied. But in France, mutualisation rules have led to a degree of pragmatic fibre infrastructure-sharing where it is clearly uneconomic to replicate that infrastructure. We believe Ofcom should start to examine the economic arguments for forms of 'mutualisation' as an eventual element of the regulatory toolkit to achieve national full fibre coverage by 2033.

Engaging during changes to UK legislation

Whilst we recognise the need for Ofcom to strike a cautious note on matters that fall primarily to Government, on all possible Brexit scenarios a major rethink is likely to be required to determine the future trajectory of UK telecoms regulation relative to the Common Regulatory Framework. We are alarmed that decisions already appear to be being taken by the Government, for instance in relation to the need to replicate the Article 7 scrutiny process, without sufficient debate or analysis. We encourage Ofcom, as we are encouraging the Government, to initiate a public debate about the extent of future regulatory alignment of UK telecoms with the EU Framework and its underpinning guiding principles, as well as the necessary regulatory architecture required to deliver appropriate regulatory checks and balances. Major investments of the kind required to fulfil the Government's objectives for both full fibre and 5G are unlikely to be forthcoming if the UK regulatory model drifts away from the carefully designed checks and balances of the current CRF.

Ongoing work to achieve our goals and fulfil our duties

Protecting consumers from harm

As discussed above, we would wish to see a stronger proactive focus on stopping consumer harms at source rather than address these after the fact. On service quality for instance, it is widely recognised that the transition to full fibre technologies constitutes a step-change in the underlying quality of the network and therefore should, assuming consumers are properly informed of these qualitative differences and able to switch to full fibre networks at tolerable cost, obviate the need for complex interventions to rectify poor service quality in particular as it manifests itself on issues like fault repairs.

As noted above, we believe the time is now right to look again at the issues around consumer-led cross-platform switching, last examined by Ofcom two years ago. For historic reasons with which Ofcom is of course familiar, switching is now subject to a patchwork of different rules depending on the nature of the services being switched and the underlying networks over which the switching is taking place. Switching, under the Gaining Provider Led model, works relatively smoothly within the Openreach fixed broadband environment but Cease and Re-provide remains the only option for cross-platform broadband switches – with consequent process costs to consumers, higher rates of attrition during the switching process, and ultimately a greater risk of service interruption. This, and the fact that asymmetric switching processes and a permissive attitude to "save" activity dramatically favour incumbents over challengers, is simply not consistent with the desire set out by Ofcom in its Strategic Statement to see infrastructure competition as a principal means by which full fibre rollout is expedited.

We also believe that Ofcom will need to make a judgement as to how to implement the enhanced consumer rights to switch established by the new European Electronic Communications Code. Ofcom

will need to consider in particular whether this necessitates (as we believe it does) the imposition of a Gaining Provider Led process for all switches including those between competing infrastructures. In our view, the complexity of mandating GPL for switches that could involve up to four commercial entities (ISP-network-network-ISP) will necessitate close supervision by Ofcom.

Incumbents can also be expected to respond to emerging full fibre competition by seeking other means to lock consumers into their existing contracts, such as seeking to impose longer contract terms, enforcing early termination penalties and (to the extent that this is not precluded by a strong GPL switching process), adopting “save” tactics of offering potential switchers off-book tariffs.

We also note the significant evidence that consumers are finding it difficult to distinguish different broadband products according to quality, a problem that is compounded by the confusing use of terminology by ISPs offering copper-based broadband service. This is an issue that will need addressing of consumers are to be empowered to distinguish between products and choose the one that best meets their needs.

These issues need to be proactively considered in the round by Ofcom to avoid many of the same problems that have arisen in the past being replicated in the nascent full fibre market.

Enforcement

We have noted that the switch in focus to promoting infrastructure competition may require reconsideration of regulatory approaches across the board. In relation to enforcement, the emphasis now needs to be rebalanced towards the strategic objective of promoting a competitive full fibre market.

Previous waves of competitive infrastructure deployment have taken place in a policy framework that protected nascent competitors in their start-up phase. The Government and Ofcom have, however, adopted a different model whereby new competitors are required to compete head to head with a dominant incumbent that has a long track record of successfully stymying the development of a competitive market. Inevitably therefore, this policy places a very high premium on the regulator using its full array of competition powers to curb obvious tactics that the incumbent can adopt at the point where competitors are vulnerable, both in terms of their ability to build and retain market share and in their ability to continue to attract investment for a highly capital-intensive infrastructure deployment programme.

We urge Ofcom to ensure that sufficient resources are available to proactively monitor and police BT/Openreach's response to the threat of infrastructure competition, with regard not just to issues such as non-discriminatory access to passive infrastructure but also attempts to leverage its dominance into new markets or engage in predatory tactics.

We further observe that the range of tactics and behaviours already observable from Openreach tip over into areas that perhaps have not hitherto attracted significant regulatory attention, such as attempts to artificially constrain rivals' access to civil contractors, or use of wayleaves rights as a means to unfairly and unjustifiably constrain competitors' ability to reuse Openreach civil infrastructure.

CityFibre
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