

Response to Ofcom's consultation

Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26

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



colt

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1. Introduction and summary

- 1.1. The Passive Access Group – Colt, TalkTalk and Vodafone – (“PAG”) welcomes the opportunity to respond to Ofcom’s consultation *Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 published on 8 January 2020* (the “WFTMR consultation”).¹ The PAG members are some of the largest investors in network infrastructure and purchasers of access products in the UK. All are fierce competitors with their own individual strategies, though share the common goal of encouraging Ofcom to develop a better regulatory framework to allow them to provide consumers with fast, high quality and affordable communications services.
- 1.2. The coronavirus pandemic has had a catastrophic impact on economies around the world and thrust the digital economy into the commercial front line. The majority of people now working and socialising from home are practically 100% reliant on their home and mobile broadband for staying connected. This has resulted in record increases in demand (and supply) for data and placed network resilience and capacity under unprecedented pressure, impacting on communications providers.
- 1.3. Of course, this has also meant that many plans for investment and expansion are likely to have changed significantly. The Bank of England has forecast the worst recession for 300 years.² As DCMS recognises network roll-out is likely to have slowed significantly in most cases³ as key resources are simply now unavailable. Willingness and ability to pay for broadband services will reduce following Covid-19 as consumers face income reductions or unemployment. As billions of pounds have literally been wiped off operators’ balance sheets overnight, many of the business cases for network expansion and investment are likely to have significantly contracted.
- 1.4. Given these very significant impacts, Ofcom cannot simply tweak its proposals in its consultation to take them into account. It is necessary for Ofcom to go back and assess the impacts and implications that Covid-19 has had on its forward-looking assessment of the regulatory framework that it proposes to put in place. This unavoidably includes, but is not limited to, reconsidering projections of network investment, forecast demand for duct and pole access (“DPA”), access products and likely use cases and demand for dark fibre. Ofcom must then reconsult based on that updated assessment, provide a reasonable opportunity for stakeholders to have input to these revised proposals and properly take that input into account in its final statement.
- 1.5. We want to be clear the PAG is committed to work with Ofcom to ensure that the impacts of Covid are minimised and WFTMR remedies are implemented as close to on schedule as possible. In particular we want to ensure no regulatory lacuna between

¹ Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26: Market assessment, 8 January 2020 (‘WFTMR consultation’) see <https://www.ofcom.org.uk/consultations-and-statements/category-1/2021-26-wholesale-fixed-telecoms-market-review>.

² Financial Times, “BoE warns UK set to enter worst recession for 300 years”, 7 May 2020. <https://www.ft.com/content/734e604b-93d9-43a6-a6ec-19e8b22dad3c>

³ <https://tech.newstatesman.com/business/ofcom-director-full-fibre-broadband-seven-years>. Third paragraph from the bottom.

charge controls so businesses (communications providers and wider) and consumers alike are protected. The PAG also considers this inevitably leads to a significantly more conservative recalibration of Ofcom's ambitions for network competition which currently rely so heavily on DPA and introducing proposals for wider dark fibre access ("DFA").

- 1.6. As Ofcom is already aware, the PAG consider that it is an error for Ofcom not to impose unrestricted DFA and DPA nationally simultaneously due to the similar benefits that DFA brings to DPA, and to fail to impose DFA in the wider area where it is commercially viable for operators to use it. The PAG considers that that due to Covid-19 this conclusion is now inescapable if Ofcom wishes to find a solution that may still deliver most of the benefits that full network competition Ofcom had in mind.

2. The impact of Covid-19 on Ofcom's proposals and consultation

- 2.1. There is no question that Covid-19 has had, and is having, wide ranging impacts across the world and on the UK economy. Ofcom should be no doubt aware that the availability of capital for investment by communications operators is likely to significantly decrease due to Covid-19, undermining operators' plans for investment and expansion in network infrastructure.
- 2.2. Ofcom developed its WFTMR proposals based on information collected and analyses developed prior to publishing the consultation on 8 January 2020, just before Covid-19 hit. Central to Ofcom's proposals based on this information is its objective to "*incentivise network investment and competition*"⁴
- 2.3. Ofcom is, or ought to be, aware that Covid-19 is likely to have had a material impact on its proposals given their basis on economic and financial data. Therefore there now seems to be a significant risk that the evidence Ofcom based its WFTMR proposals on will have changed, and as such that Ofcom's proposals may no longer be supported by evidence.
- 2.4. As a consequence, by continuing to consult on the January consultation proposals Ofcom knows or ought to know may have been undermined by subsequent events, Ofcom may be actively continuing in legal error and vulnerable to challenge.
- 2.5. In order to take into account the impacts of Covid, Ofcom should extend its timelines, including if necessary, the issuing of its final determination, in order to be able to revise its proposals as needed to take the impacts of the pandemic into account. This will require some clarity, particularly about the likely economic circumstances over the next five years, in areas such as altnets' access to capital, businesses' ability to pay higher prices for leased line products, and estimated volumes of all products covered by the WFTMR. Ofcom is also likely to have to revise elements of its proposals including the cost of capital in Area 3, to reflect changes in financial markets. As these changes may be significant, this may require Ofcom to reconsult on revisions to its existing proposals;

sufficient time should be provided in such a re-consultation for stakeholders to comment in full.

- 2.6. We note there is now an extra variable for this decision that needs to be taken into consideration and the situation continues to develop. Ofcom must ensure its final conclusions are robust, 'fit for purpose' and reflect the emerging dramatic economic developments caused by Covid. This is especially important in this market review as the time period covered is now five years rather than three. We appreciate the time between now and March 2021 is short and the market and economic developments are considerable and therefore appreciate Ofcom's challenge and the need for stakeholders to be realistic with Ofcom's proposed timelines and planned publication dates.

3. Appropriately apply dark fibre as a remedy

- 3.1. Ofcom imposes dark fibre for interexchange connectivity and leased lines access services in Area 3 as a market remedy to address certain SMP situations. We consider that this approach is wrong. Instead dark fibre should be considered as part of the market at the product market definition. It is clear that dark fibre is a relevant substitute to active leased lines. The remedy stage should instead be used to set the terms for the dark fibre within each of the geographic markets that Ofcom goes on to define.

4. Alternatively, dark fibre could be considered as an upstream product market.

- 4.1. In the BCM Ofcom started with a focal market of active leased lines and concluded (rightly) that dark fibre will constrain active leased lines so there is an economic market that comprises leased lines and dark fibre. In the PIMR Ofcom explained the approach to market definition required of it, as set out in the SMP Guidelines:

*"In Section 3, we explain that, under the EU framework, we first consider intervention at the **most upstream** level of the value chain, assuming no regulation downstream. Only then we consider what further intervention, if any, is needed downstream in light of the regulation we have imposed upstream."*⁵

- 4.2. Ofcom recognises that the EU Electronic Communications Code will apply to it (though seems to have paid it little attention):

*"We therefore anticipate that the Act may be amended to reflect the EECC's provisions before we reach our final decisions on the matters set out in this consultation (our final statement is currently planned for early 2021). We have therefore also considered whether our proposals are consistent with these provisions of the EECC."*⁶

- 4.3. Of crucial importance to the changes and updates added to the regulatory framework by the EECC, is the additional objective in Article 3(2)(a):

⁵ PIMR 4.30

⁶ WFTMR Vol 1, 2.19

“promote connectivity and access to, and take-up of, very high capacity networks, including fixed, mobile and wireless networks, by all citizens and businesses of the Union;”

4.4. This reflects paragraph 26 of the SMP Guidelines in relation to market definition:

“They should start by identifying and analysing the wholesale market that is most upstream of the retail market in which said competition problems have been found, and defining market boundaries by taking into account demand-side and, to the extent relevant, supply-side substitutability of products.”

4.5. Ofcom considers it has met this requirement by considering PIA as the *most upstream* focal product of a possible market and satisfying itself that it constitutes a separate market to leased lines.

4.6. However, Ofcom has failed to properly consider whether PIA is at the *most upstream* of the retail market boundaries for the practical purpose of discharging its duties and objectives which it is required to do in carrying out its functions.⁷

“to further the interests of citizens and consumers by promoting competition where appropriate”

(by reference to the new EECC objective) requiring Ofcom to do so to:

“promote connectivity and access to, and take-up of, very high capacity networks, including fixed, mobile and wireless networks, by all citizens and businesses of the Union”

4.7. It makes no sense for Ofcom to simply land on PIA as the appropriate level in the value chain as a focal product without also considering dark fibre and which of them will better meet its wider objectives and duties. *Reductio ad absurdum* Ofcom could have taken full infrastructure platform competition as its focal product and determined it was in a separate market, but given it is impossible, it would not meet Ofcom’s objectives to do so and it would be an error not to consider whether other products downstream would achieve them.

4.8. Importantly, Ofcom appears to have ignored that the new objective in Article 3(2)(a) is a mandatory for Ofcom to take all reasonable measures to achieve when carrying out all regulatory tasks and duties, as set out in EECC Article 3(1):

“Member States shall ensure that in carrying out the regulatory tasks specified in this Directive, the national regulatory and other competent authorities take all reasonable measures which are necessary and proportionate for achieving the objectives set out in paragraph 2.

4.9. The Recitals explain further (and quite clearly) how NRAs are required to meet the objective in Article 3(2)(a), which appears to have been overlooked by Ofcom:

“(13) The requirements concerning the capabilities of electronic communications networks are constantly increasing. While in the past the focus was mainly on growing

⁷ *EE Ltd v Ofcom* [2017] EWCA Civ 1873 at 49

bandwidth available overall and to each individual user, other parameters such as latency, availability and reliability are becoming increasingly important. The current response towards that demand is to bring optical fibre closer and closer to the user, and future ‘very high capacity networks’ require performance parameters which are equivalent to those that a network based on optical fibre elements at least up to the distribution point at the serving location can deliver. In the case of fixed-line connection, this corresponds to network performance equivalent to that achievable by an optical fibre installation up to a multi-dwelling building, considered to be the serving location. In the case of wireless connection, this corresponds to network performance similar to that achievable based on an optical fibre installation up to the base station, considered to be the serving location.”

4.10. Crucially Recital 23 actually states how NRAs should “translate” the Article 3(2)(a) objective:

“(23) The regulatory framework should, in addition to the existing three primary objectives of promoting competition, the internal market and end-user interests, pursue an additional connectivity objective, articulated in terms of outcomes: widespread access to and take-up of very high capacity networks for all citizens of the Union and Union businesses on the basis of reasonable price and choice, effective and fair competition, open innovation, efficient use of radio spectrum, common rules and predictable regulatory approaches in the internal market and the necessary sector specific rules to safeguard the interests of citizens of the Union. For the Member States, the national regulatory and other competent authorities and the stakeholders, that connectivity objective translates, on the one hand, into aiming for the highest capacity networks and services economically sustainable in a given area, and, on the other, into pursuing territorial cohesion, in the sense of convergence in capacity available in different areas.”

4.11. The primacy of Article 3(2) is given to NRAs/Ofcom in carrying out all other functions is supported further by Recital 24 sets out that the Commission intends to monitor performance of the objectives of the entire framework as against “*the availability of high capacity networks in all major socio-economic drivers*”. That is, the Commission will measure the success of the entire Directive against NRA’s success or progress towards achieving the new objective.

4.12. Had Ofcom considered dark fibre as a focal product and then weighed whether dark fibre or PIA would be most likely to achieve the objective of *widespread access to and take-up of very high capacity networks for all citizens of the Union and Union businesses* it the answer will almost certainly have been dark fibre. This balancing exercise seems to have been completely ignored by Ofcom in deciding whether to choose PIA and/or dark fibre as focal product for a separate market.

4.13. It seems in choosing PIA over (or ignoring) dark fibre Ofcom has climbed too high and stopped on the wrong rung on the ladder.

4.14. The PAG strongly urges Ofcom to re-take its market definition work as dark fibre either falls in an upstream passive market or falls within the fibre leased lines access market.

5. Ofcom's current proposals

Failure to distinguish between network type

5.1. Ofcom's current proposals prioritise the promotion of network investment over the medium term without any gradation or robust assessment of the detriment caused by its pricing approach to retail and business market consumers of access products. However, this does not permit Ofcom to ignore or deprioritise its duty to promote competition in the interests of consumers – especially under the current market conditions where there is clear conflict with its broader strategy and where there are other options open to Ofcom to achieve its objectives in a more balanced way.⁸ This is particularly the case where Ofcom's proposals promote additional leased line network build which delivers limited additional benefit to consumers given the existence of, on average, two existing networks nationally. This is very different to the situation for FTTP broadband networks where there is little existing network and thus additional networks will deliver significant benefits to consumers through faster speeds and greater quality and reliability. However Ofcom has failed to take any account the critical difference between *types* of networks it is encouraging for build, simply applying the same broad approach to promoting network rollout in the Wholesale Local Access ("WLA") and leased line ("BCM") markets.

Failure to impose dark fibre access

5.2. Ofcom once again proposes to withhold DFA as an access option for operators despite the PAG⁹, which represents operators who control a significant proportion of potential demand, considering it an essential, complementary, remedy in all areas where BT has SMP. Given the limited ability of rival network build (using DPA in part) to constrain BT's market power and the limited benefit from additional leased line networks, the PAG considers this an error which undermines Ofcom's principal duty to promote competition for the benefit of consumers. This error would now be significantly amplified due to the impacts of Covid-19.

5.3. Ofcom's proposals to restrict DFA appear to be based on an unfounded fear of deterring investors in network infrastructure. Network investment inherently has a long time horizon, with most benefits accruing beyond this review period even from those networks currently under construction. There is therefore no rational basis to completely withhold unrestricted DFA over this review period in any event. Curiously, Ofcom has taken a different approach to its own 2019 BCMR with its treatment of the geographic markets and appears to be using two different and conflicting methodologies, seemingly to ensure that it has a basis for restricting DFA in Area 2. Ofcom is obviously fully aware of the benefits of unrestricted DFA having proposed to impose it in the 2016 BCMR and yet proposes to continue to withhold DFA in areas where BT has SMP due to its hope that DPA will support network rollout and competition. Ofcom's change in policy from 2016 to focus on infrastructure competition was heavily reliant on market conditions and

⁸ WFTMR consultation, volume 1 para 1.

⁹ And no doubt other key market participants such as H3G and Telefónica.

investment/ future build taking place. This has now been significantly undermined by the current market conditions. To the extent of certainty Ofcom had that such network build would have taken place previously (e.g. through business plans and ‘discussions’ with stakeholders) Ofcom can assume nothing and must redraw its proposals to include far less investment reliant remedies, such as DFA.¹⁰

- 5.4. The PAG supports both forms of Passive Infrastructure Access, DPA and DFA; however, Ofcom is placing far too much reliance on DPA in the physical infrastructure market as the ‘panacea’ to the competition issues in other markets. Whilst we agree DPA should be available, it has considerable implementation issues and hurdles – not least cost and time – and is far from being a product that can be used simply, efficiently and effectively at scale by network builders and operators.
- 5.5. Ofcom has reached conclusions on the future of these markets, seemingly, based on little or no evidence and appears to ignore PAG members’ submissions on the commercial realities surrounding Ofcom’s proposals. Ofcom’s error seems to stem from the fact it has adopted its approach to assessing competitive conditions, including the underlying data, from the 2019 BCMR.¹¹ However, that approach is fundamentally flawed, as the PAG has repeatedly pointed out.¹²
- 5.6. The PAG represents a significant proportion of the major competitive communications providers currently operating in the markets most likely to undertake the kind of investment that Ofcom is trying to promote in the right regulatory and economic environment. Yet Ofcom’s proposals currently only cater for a small number of unrepresentative operators, by reference to objectively weak evidence (press releases, statements made in meetings by such operators about their aspirations that rehearse and feed their own strategies) that do not all reflect the realities of network building network in the UK. Ofcom should adopt a sceptical approach to such evidence, and rely much more closely on business plans and concrete investment proposals for which operators already have funding on their balance sheets.
- 5.7. The fundamental principle behind passive access remedies is to enable operators to encourage purchasers of PIA to develop their own innovative solutions for active products by making ‘achievable’ investments. That would, in turn, drive a more competitive retail market (including higher quality and lower prices for consumers) that was not damaged by a dominant incumbent that currently has fibre and duct to of the majority of locations.¹³
- 5.8. Ofcom’s proposals will also remove cost based regulation in products serving 70%¹⁴ of UK premises which will have a significant impact on the retail market because:

¹⁰ WFTMR consultation, volume 2 table A8.12.

¹¹ WFTMR consultation, volume 2, paragraph 8.78.

¹² As Vodafone and TalkTalk pointed out in their appeal of the 2019 BCMR, see TalkTalk and Vodafone v Ofcom [2020] CAT 8 paragraph 194

¹³ This is based on Virgin Media’s current coverage of premises passed of 14.7 million <https://www.virginmedia.com/corporate/investors-overview> WFTMR consultation table 1.2.

¹⁴ WFTMR consultation, volume 2, paragraph 7.45 -gives the postcode areas that Area 2 represent, where Ofcom are proposing to restrict a Dark Fibre Access (“DFA”).

- 5.8.1. Ofcom's proposals over-estimate the scale of the prospectively competitive areas;
- 5.8.2. Given the limited DFA remedy that Ofcom proposes, economies of scale on developing products are lost as DFA is confined to minority volumes;
- 5.8.3. Ofcom's proposals fail to support DFA or DPA with facilitating co-location products and pricing;
- 5.8.4. Ofcom's proposals fail to support DFA with facilitating migration options enabling current active services to readily move to DFA;
- 5.8.5. Ofcom has ignored the realities of network extension and build costs in favour of a desktop produced model.

6. Responses to consultation questions

- 6.1. In this submission the PAG responds to relevant consultation questions raised by Ofcom and identifies the key areas of concern in relation to Ofcom's proposals and seeks to encourage Ofcom to re-consider its approach. Individual PAG members may be providing their own responses, and in the event of any conflict between this letter and individual responses, individual responses will take precedence

Ofcom's assessment of geographic markets competitive conditions

Question 7.1: Do you agree with Ofcom's provisional conclusions on geographic market definition for wholesale networks¹⁵?

- 6.2. In light of the coronavirus pandemic the PAG's view is that Ofcom needs to reassess its proposals against the latest evidence it has about market conditions. Given the EC SMP guidelines require Ofcom's review to be forward looking, it therefore cannot reasonably stand that Ofcom's postcode sector evidence used to underpin the 2019 BCMR statement (notwithstanding it was already then out of date) can be used as a sufficient proxy upon which to base its forecasts given the changes in the market that are being currently experienced.¹⁶ Ofcom should therefore re-assess the market conditions and reconsult on the WFTMR. The PAG requests that when reconsulting Ofcom take the following issues into account.

- 6.2.1. Ofcom's proposals systematically fail to reflect the level of heterogeneity of supply conditions, which would be revealed to it if it undertook a more granular and commercially based analysis.¹⁷ In the recent BCMR appeal, the Tribunal noted that it:

"...saw evidence pointing to there being different conditions in different parts of the CLA, including aspects of the NRA results, the postcode data analysis, the detailed maps of ducts and connections and the evidence on digging costs and distances."

¹⁵ WFTMR consultation, Vol 2.

¹⁶ EC SMP Guidelines paragraphs 17 this is also known as the Modified Greenfield Approach

¹⁷ See TalkTalk and Vodafone v Ofcom [2020] CAT 8 paragraph 230 and WFTMR consultation, volume 2, paragraph 8.91.

This suggests that the markets are not as ‘sufficiently homogeneous’ as Ofcom claims to discharge its regulatory duties. Where competitive conditions are different, it is incumbent on Ofcom to inquire further and undertake a deeper analysis particularly, for example, in cases where it expects competitive pressure to be stronger (according to the network reach criteria it has applied), but where in practice there is little evidence of competitive constraint, meaning Openreach is able to maintain high and/or increasing market shares and prices.¹⁸

6.2.2. The PAG disagrees with Ofcom’s proposals to use two different approaches to define the relevant geographic markets. Inexplicably, Ofcom uses the same approach as it applied to the 2019 Business Connectivity Market Review (“BCMR”) to delineate the “High Network Reach” (“HNR”) and Central London Area (“CLA”) geographic markets,¹⁹ but relies on current and projected Multi Service Networks (“MSNs”) roll-out to define the geographic markets in Area 2 and Area 3. This market definition change gives even less effect to the DFA remedy as this will result in the DFA being available to only 30% of [leased line] circuits.²⁰

6.2.3. There is no evidence to support this novel approach to market definition. The evidence Ofcom has put forward fails to provide sufficient support for actual build taking place which could sufficiently constrain BT in Area 2.²¹ Ofcom has instead relied on an *expectation* of network build taking place across all of these areas during the review period as a basis to find that BTs SMP in HNR areas is ‘finely balanced’.²² The ‘plans’ of potential MSN builders— many of which are little more than press releases— contain no detail over issues such as whether CBDs and business parks will have dense network development, and do not recognise complexities around wayleaves and building access.

6.3. Ofcom’s proposals for Area 2 are particularly concerning, given that they are based on grouping together operators’ *expected* build plans for MSNs which are largely irrelevant to the business connectivity market. In addition, these build plans were drawn up at a time when market conditions were very different to those now. The output from this is a proposal for regulation over 69% of the UK.²³ This is particularly concerning due to the significant increase in risk of policy failure if expected FTTP investment does not take place; a risk which will be magnified by the new extended 5 year review period. This may leave consumers vulnerable to price increases due to the lack of competitive constraints in areas where rival networks do not build in line with Ofcom’s expectations.

¹⁸ WFTMR consultation, Vol 2 4.12 and See paragraph 48 of the EC SMP Guidelines.

¹⁹ Ofcom’s network reach analysis found that where 65% of business sites were located within 50m of at least two rivals Ofcom considers there to be HNR and [effectively or prospectively?] competitive. WFTMR consultation, volume 2, paragraphs 7.78 -7.80 and 8.81-8.83. See also paragraph 6.147 of Ofcom’s Promoting competition and investment in fibre networks: review of the physical infrastructure and business connectivity markets Volume 2: market analysis, SMP findings and remedies for the Business Connectivity Market Review (‘BCMR consultation’), published on 28 June 2019.

²⁰ WFTMR consultation, volume 3, paragraph 7.40-7.41

²¹ WFTMR consultation, volume 2, paragraphs 8.100-8.104.

²² Table 8.3 and paragraphs 8.100-8.104 of volume 2 WFTMR consultation shows BTs market shares.

²³ WFTMR consultation, volume 2, 7.42-7.44 & 7.48-7.52 Annex 8, table A8.12.

The overall consequences of which are made worse by Ofcom's proposals to restrict DFA in these areas.

- 6.4. Given that these areas (a) form the majority of the UK and (b) are where the bulk of FTTP investment needs to happen, it is crucial that Ofcom gets regulation right and appropriately balances the need to incentivise investment with the need to protect consumers from BT's SMP. We welcome Ofcom's confirmation that it will revisit its SMP findings before its final statement. We presume this includes Ofcom's assessment of whether its decision is 'finely balanced' in light of 'actual or potential competition' and, if actual or potential competition is no longer as likely, that Ofcom will revisit its proposed remedies accordingly.

Dark Fibre and Duct and Pole Access

Question 1.1: Do you agree with Ofcom's proposed approach to remedies?²⁴

- 6.5. The PAG disagrees with Ofcom's proposals to limit DFA to areas where BT is not likely to face competition at any point in the review period, principally based on some weak evidence of proposed build which may (or may not) utilise DPA. Ofcom says there are benefits from competing networks²⁵ yet Ofcom's own position in the 2016 BCMR and this review is that the vast majority of these benefits can be gained from dark fibre (given the majority of innovation is in the active layer).²⁶ In the absence of dark fibre any additional network competition will be restricted to a few areas and a few customers and will only come at the penalty of significant cost duplication and inflated Ethernet prices.
- 6.6. Ofcom continues to deny UK operators an effective remedy in areas where BT has SMP because it has decided to 'attach significant weight on its strategic objective' to encourage network investment.²⁷ In Area 2 and the HNR area, Ofcom has concluded that BT has SMP due to its high market shares yet has not imposed DFA because it considers that if DFA is available, it will be more attractive than active services and imposing it risks undermining network build investment plans.²⁸ This approach is at odds with Ofcom's duties as the regulator; Ofcom is bound to impose remedies that will be effective in areas where it has made an SMP finding and further the interests of consumers. In this instance, Ofcom appears to be deliberately not choosing an option specifically because it would better meet consumers' demand. Ofcom itself recognises the effectiveness of DFA as an appropriate remedy for this area; but proposes to restrict it because if both

²⁴ WFTMR consultation, Volume 3.

²⁵ Ofcom's approach to the WFTMR is based on an expectation that during this review period investment in networks will bring benefits to consumers in the form of better services and greater and competition – see WFTMR consultation, volume 2, paragraph 1.15.

²⁶ WFTMR consultation, volume 3, paragraphs 6.7-6.9.

²⁷ WFTMR vol 2 para 6.19 Ofcom restricts DFA in Area 2 due to 'evidence of significant build plans'. The PAG notes that Table A7.1 listed planned build based on publicly available FTTP network builder's data. Table A7.2 shows planned usage of PIA by three FTTP network builder's but as the figures are redacted it is not possible to identify planned usage using PIA.

²⁸ WFTMR consultation, Volume 3 paragraphs 6.11 -6.20.

remedies were available, telecoms providers would be more likely to use DFA.²⁹ This is not a sufficient basis on which to restrict DFA to areas where BT does not face effective competition that has the ability to constrain BT's SMP. An alternative approach, consistent with Ofcom's duties would be impose DFA in Area 2 but with prices slightly above cost.

- 6.7. Ofcom also fails to consider, and refuses to carry out, any quantitative analysis of the significant benefits that having both unrestricted DPA and DFA available at a regulated price will provide to other CPs, which will in turn lead to benefits for consumers. The arguments made by PAG members and other stakeholders (and itself³⁰) have consistently highlighted the demand for and advantages of DFA and the risks that Ofcom are opening the market to by restricting this remedy to non-competitive areas.³¹ At this crucial period, where investment and planned build is now extremely uncertain, Ofcom should allow market participants options between various remedies, utilising those that they consider will be the most beneficial to their competitive position until tangible evidence of actual build capable of addressing BT's SMP in these areas is obtained.
- 6.8. Ofcom cannot ignore actual demand and evidence of benefits that would flow to business and consumers from DFA just because it fears that taking this into account will undermine its objectives for rival network investment, especially now that such investment is less likely to happen.³² Ofcom has still not provided any evidence that the costs of imposing DFA in Area 2 will outweigh the benefits of existing regulated wholesale products.
- 6.9. The PAG supports the implementation of the unlimited DPA remedy and acknowledges the potential that this product has in reducing the economic barriers to enabling increased infrastructure-based competition. However, many implementation hurdles and difficulties with DPA still remain. For example, the process for ordering and verifying DPA is both cumbersome and labour intensive. Additionally, Openreach is currently only providing postcode data of valid BT wayleaves to CPs (instead of full addresses) which will serve to act as a serious impediment to CPs deploying their networks efficiently using DPA.³³ Such practical barriers will make it difficult for CPs to make use of DPA at scale, which will in turn make it harder for CPs to meet the various Government and Ofcom initiatives focused on hastening the delivery of FTTP throughout the UK. In the world changed by Covid we find ourselves in – in which many previous expectations are now unknowns – DFA provides a much simpler way forward for Ofcom to achieve its objectives for competition and consumers, not least in practical terms of being far less hands on and requiring less resources from operators.

²⁹ WFTMR consultation, volume 3, paragraphs 6.10-6.12 6.18-6.20.

³⁰ *Op. cit.* 15.

³¹ See the PAG's response to Ofcom's consultation on its approach to remedies:
https://www.ofcom.org.uk/data/assets/pdf_file/0029/158537/passive-access-group.pdf.

³² WFTMR consultation, volume 3, paragraphs 6.20-6.24.

³³ Under the UK Electronic Communications Code.

- 6.10. DPA has more limited applications where single connections to business premises or single mobile base stations are required, especially where there are fixed costs associated with breaking into Openreach's duct and where 'linking' an operator's network to Openreach's requires civil infrastructure work. This fixed cost work can be spread between many connections when rolling out FTTP; this is not the case in the business or mobile backhaul market.
- 6.11. A DPA remedy in itself will not go far enough as there appears to be no real evidence that building networks will make a real difference to leased lines access services. Further, Ofcom's evidence for DPA's rollout appears to be largely based on FTTP network builder's planned rollout which presents significant risks in areas where it is restricting effective remedies such as DFA. Ofcom does not seem to have considered what it will do if FTTP network builder's planned build does not happen during the review period and the impact that this regulatory failure would have on the future of the telecoms market.³⁴

Ofcom's proposals relating to Equivalence of Input ("EOI")/No Undue-Discrimination ("NUD")

Question 4.1: "Do you agree with our proposed specific PIA remedies"?³⁵

- 6.12. The purpose of the no undue discrimination obligation is to ensure equivalence between BT's use of its own network and CP's use of the same asset. However Ofcom's proposal to impose a NUD requirement on Openreach is insufficient and in the absence of imposing an EOI, more detailed monitoring and reporting is required to prevent Openreach from unduly discriminating against anyone other than BT seeking to use DPA.³⁶
- 6.13. Ofcom has been made aware of instances where Openreach has not built to its own engineering standards but has required CPs to do this. This is a form of discrimination as it allows Openreach to build cheaper and faster networks, whilst holding CPs to the higher, more onerous standard. For example, there have been instances where Openreach has attached poles as part of its network build in a way that is inconsistent with its own engineering principles, which DPA CPs are contractually bound to follow. CPs are also constrained by Openreach's systems and process issues, for example the 'whereabouts delay', in the case of new build results in a 48 hours delay — delays which are not applicable to Openreach once the assets have been accepted.³⁷
- 6.14. CPs have previously raised several concerns about whether Openreach was properly discharging its no undue discrimination obligation and that the current PIA product is not compliant and consistent with Ofcom's NUD statements and intent. This must be

³⁴ See WFTMR consultation Annex 7.

³⁵ WFTMR consultation, Volume 3.

³⁶ CP's have said previously that they are open to suggestions as to how this test would be best measured (and it could perhaps take the form of an 'end to end' comparator which measures whether BT can roll out their fibre network more quickly than CPs can using PIA. That should be step one of the acid test in determining whether Openreach is discharging its NUD obligation. (Step 2 would then consider whether any differences can be justified.) see email from Michael Wixen from Towerhouse to David Murray at Ofcom sent 09 July 2019.

³⁷ Letter sent from Towerhouse to Ofcom dated 10 January 2019.

explored and, if necessary, rectified as a matter of priority if the PIA product is to play the significant role in nationwide fibre deployment, intended by Ofcom and the Government. The only way to measure whether the PIA product is compliant is through high level end-to-end KPI measures.

6.15. These are some examples of serious concerns about the current PIA product. Given that the key focus of the WFTMR consultation is on PIA being used to rollout fibre networks, Ofcom should be proposing much closer scrutiny of Openreach. We consider this should include:

- 6.15.1. Requiring full transparency of Openreach's process for using its own ducts/poles (i.e. 'internal PIA') and publication of performance metrics (e.g. time to respond, error rates). This will, absent EOI, allow CPs to identify where the (external) PIA process is inferior to what Openreach itself experiences and can therefore justify improvements (given Openreach's non-discrimination obligation).
- 6.15.2. Stronger and wider SLA and SLGs which will create a greater incentive for Openreach to improve the PIA product.
- 6.15.3. Organisational separation of the unit providing PIA within Openreach.
- 6.15.4. More involvement by Ofcom and use of soft power and hard power (e.g. using Direction-making powers).
- 6.15.5. Greater oversight and audit by the Openreach Board Audit Risk & Compliance Committee coupled with Ofcom developing a reporting and monitoring programme.

6.16. Ofcom needs to have measures in place which are able to assess whether the cumulative effect of Openreach being able to operate in ways that would constitute a breach of contract for other CPs (for example, by building networks that do not comply to its own engineering standards) means that Openreach are unduly discriminating against other CPs.

6.17. If meaningful progress is not proposed, Ofcom should impose an EOI requirement on all PIA products/processes or parts – and Ofcom should be explicit now that it is minded to do so. A credible threat of EOI being applied should 'sharpen' Openreach's focus on improving the product.