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CONSULTATION: PROMOTING INVESTMENT AND COMPETITION IN FIBRE NETWORKS – WHOLESALE FIXED TELECOMS MARKET REVIEW 2021-26

I welcome the opportunity to respond to this Ofcom consultation on plans for regulation, from April 2021, of the fixed telecoms markets that underpin broadband, mobile and business connections.

As my recent response to Ofcom's proposed plan of work highlighted, the Scottish Government's ambition is for Scotland to become a truly digital nation; one underpinned by high quality digital connectivity which is a critical enabler of innovation and growth, and essential to enabling the people of Scotland to fully participate in a digital economy. The developing COVID-19 situation only serves to emphasise the critical importance of access to good quality, high speed broadband which has never been more essential than it is right now.

It is for this reason, despite relevant legislative and regulatory powers being reserved to UK Ministers, the Scottish Government has developed programmes to extend access to future-proofed digital infrastructure and services. Delivery of these programmes will be a key driver of our economic recovery post COVID-19, and the work of Ofcom will be crucial to such recovery in supporting both public and commercial programmes of work. I see the proposed regulations as having a key role in this regard.

For some time, the Scottish Government has urged Ofcom to consider new approaches to regulation, particularly calling for a framework that more clearly aligns national regulation with needs at a regional level. Having reviewed the consultation provisions, it is clear Ofcom is committed to improving the telecoms market in this regard.

While the proposed regulation represents a significant development, the Infrastructure Commission for Scotland's recommendation on regulatory reform, presented in their key findings report, indicates there may be scope to go further and, regardless, serves to highlight the continued need for Ofcom to proactively consider new regulatory approaches. As we adapt to, and emerge from, COVID-19, it will even more important that the regulatory regime is able to respond to the challenges that arise as a result.

To this effect, I would be interested in jointly exploring the feasibility of this recommendation and any further actions, allowing us to ensure that the regulatory framework extends as far as possible in supporting Scotland.

Beyond that, I consider the approach outlined - one predicated on incentivising commercial investment while promoting competition where possible for the benefit of consumers – not only supports the Scottish Government's own ambitions, but will provide a platform for realising the recent recommendation from the Infrastructure Commission for Scotland, seeking a full-fibre network by 2027.

Throughout the development of these provisions, the Scottish Government has made clear that any approach must support publicly funded programmes aimed at extending commercial networks, namely the Reaching 100% (R100) programme. In general, investment from commercial suppliers is critical to achieving our R100 target, and so the focus on incentivising and encouraging competition where possible is welcome.

The Scottish Government has committed significant levels of public investment in this programme, with BT plc securing contracts for two of the three lots. It is paramount that the interaction between regulation and public subsidy is established in such a way that service users and consumers in relevant areas do not, ultimately, support BT's deployment twice. With this in mind, I welcome the provision which ensures that the RAB charge control proposed for non-competitive areas, or Area 3, cannot be used by BT to recover costs that have already been paid for through Scottish Government intervention.

My officials will provide any details required around the design of the R100 network to ensure the charge control is enacted appropriately. I am, however, conscious that any increase in pricing at wholesale level also has the potential to impact costs associated with the R100 programme. It is important that we continue to work together to consider such issues as Ofcom moves towards implementation, ensuring regulation and public subsidy dovetail, where possible, so that those in the hardest to reach areas are not left behind.

It is essential that overall pricing for these remedies does not result in significant variations across different regions and geographies. It is clear that, in developing proposals for each market, Ofcom has endeavoured to balance competitive entry and fibre deployment with the potential impact on consumers, having due consideration of impacts in the shorter and longer term. I recognise that, by promoting fibre network competition, consumers are more likely to benefit from more competitive pricing and services. I understand that, in non-competitive areas, Ofcom considers that competition at the retail level will drive down prices, ensuring consumers in rural areas are not adversely impacted.

Nevertheless, I remain concerned that some consumers may not be adequately protected from excessive charges, reinforced by engagement with stakeholders, particularly where a post-build approach is adopted by BT meaning the time frame for recovery is condensed.

I would, therefore, welcome details of how pricing levels between markets will be monitored accompanied by a commitment from Ofcom to take swift action should cost disparities begin to emerge.

In relation to the treatment of non-competitive areas, a telecoms operator has highlighted a concern that the proposals could disincentivise investment by those operators who have yet to finalise deployment plans, particularly given the lack of clarity around the UK Government's planned investment of £5 billion in the deployment of Gigabit-capable infrastructure across the UK. It is our view that aspects of Ofcom's pricing proposals in non-competitive areas, through the forecast approach, support access to fibre infrastructure for those in remote and rural areas while providing operators some opportunity to extend deployment into this area. I would, however, look to ensure that this will be monitored and facilitative action be taken where necessary.

I welcome the introduction of a separate physical infrastructure access (PIA) product, and consider unrestricted access to Openreach infrastructure as a necessity to transform the commercial case for rival operators, enabling cheaper and easier deployment of new networks, with the consequent benefits for consumers that competition enables.

It is, however, crucial that the PIA product works effectively and has due regard for the unique challenges faced in Scotland to underpin and enable large scale commercial deployment. We have received representations from operators highlighting the inherent challenges of utilising this product in Scotland, notably in light of the location of relevant infrastructure and associated wayleave restrictions. The conduct of Openreach in supporting access is crucial and, in a similar vein, feedback indicates elements of the underpinning process are not effectively supporting ease of use by access seekers.

It is clear to me that further enhancements are required in this area to maximise the provisions in potentially competitive areas in Scotland. Whilst I appreciate that Ofcom considers redress for particular components of this remedy to be within the gift of the UK Government, I would call on Ofcom to demonstrate leadership on this issue and facilitate the collaborative working required to deliver a positive outcome from operators in Scotland.

Similarly, the proposals to introduce dark fibre in Area 3 is a positive one and will provide crucial support to mobile network operators as the industry moves to be a leader in 5G, particularly in light of the limitations surrounding PIA. Whilst we are aware of calls for unrestricted access to BT's dark fibre, I appreciate the potential to undermine wider ambitions to support rival fibre deployment. We consider that access in non-competitive areas is likely to be critical in helping to support the deployment of mobile infrastructure, in creating competitive leased line provision, and in helping smaller alternative operators to push their own networks further. That being said, some practical difficulties have been highlighted, namely that the location of existing dark fibre is not necessarily well known. I would appreciate detail on how Ofcom views the way forward on this matter.

Lastly, reflecting our own view that future-proofing our networks is a key priority, I welcome Ofcom's measures which support the phased transition from copper to fibre networks. It is essential that those who remain on legacy copper networks are protected where there is no alternative available. I am aware that Ofcom are actively considering how our most vulnerable citizens can be protected during this transition, and that pilot projects will be undertaken. I would ask that my officials are appropriately engaged as this work is undertaken.

The regulatory proposals set out represent a key step in delivering regulation that takes into consideration Scotland's unique needs, with the aim of ensuring fairness for customers in Scotland. Our work together has never been more vital, and it is crucial we explore all available opportunities for further enhancements, to ensure the universal and ubiquitous access to future-proofed digital infrastructure across Scotland and to support our economic recovery following these challenging times.

Kind regards

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