

Digital and Broadband

Purpose

1. This paper updates members on the recently launched EU consultations around regulation of digital communications, geo-blocking, ICT standards and internet speed/quality post 2020 and addresses similar issues as raised by COSLA in the Ofcom Strategic Review of Digital Communications.
2. The paper also provides an update on the progress with the modelling and proposed deployment of Phase 2 of BDUK Superfast Broadband funds.

Recommendations

3. Members are invited to:
 - i. Note the number of EU Digital Single Market consultations recently launched by the European Commission;
 - ii. Mandate the COSLA DES Spokesperson to respond to the consultations building upon the proposed positions within the paper and any comments made at the meeting;
 - iii. Agree that the DES spokesperson should also write to the EC Vice President of Digital Single Market Andrus Ansip outlining the key political priorities for Scottish Local Government as part of the EU Digital Single Market agenda;

Background

4. One of the key priorities of the current European Commission is the Digital Single Market, an ambitious proposal to eliminate the existing barriers to free trade across the EU by removing the barriers that exist on issues such as Data Protection, Broadband expansion, common EU-wide consumer rules for online purchases, digital skills, starting up digital companies or copyright.
5. This is a vast and sensitive area of work. Only in the last few weeks the EU Court of Justice overturned the EU-US agreement on data storage (“Safe Harbour”) that enabled business to transfers customer data to the other side of the Atlantic. Also recently the EU Council of Ministers agree that from 2017 there will be no roaming charges when calling from elsewhere in the EU. Local Government is specifically concerned on issues such as the Data Protection Regulation, which we have been working with our peers as to avoid that Local Authority citizen personal data held on statutory grounds or public interest is subject to the same standards as customer data held or reused by private companies.
6. The current set of European Commission consultations¹ cover proposals for new EU rules on digital communications, geo-blocking, ICT standards and internet speed/quality post 2020. The below responses mirror issues already raised by COSLA in the Ofcom Strategic Review of Digital Communications, copy attached at Annex 1.

¹ <https://ec.europa.eu/digital-agenda/en/digital-me/consultations>

Review of EU Regulatory Framework

7. The review of the regulatory framework for electronic communications is one of 16 key actions of the Digital Single Market Strategy adopted by the European Commission in May 2015 and is seen as a key element for creating the right conditions for flourishing digital networks and services across Europe. The consultation itself is highly technical with over 200 questions, and the following paragraphs seek to summarise the key political issues from a Scottish Local Government prospective.
8. Since the last review by the Commission in 2009, digital networks and services have been undergoing a period of extensive and significant coverage across the EU single market. Notable changes have been a slow but steady transition from copper to fibre based networks, more complex competition through vertical and horizontal convergence of a number of telecommunications firms as well as a raise of new online operators. These factors and more have had a significant impact on consumer expectations and requirements. With society in general becoming increasingly dependent on broadband networks and demand for capacity growing rapidly year on year.
9. The consultation document raises a number of key challenges that the review of the regulatory framework needs to address:
 - Relative little full “infrastructure competition” has emerged in the fixed-line networks, except in very densely populated areas, where cable networks were already present, or where local authorities have been active;
 - Progress towards more integrated telecommunications markets is slow and the provision of connectivity to consumers and business remains highly divergent across the European Union;
 - Significant differences remain with regard to approaches to spectrum governance and strategies to make spectrum available which cannot be justified solely by differing national circumstances;
 - Online services are increasingly seen by end-users as substitutes for traditional electronic communications services such as voice telephony, but are not subject to the same regulatory regime; and
 - Technological and economic developments, such as fixed/mobile operator convergence are likely to profoundly change the functioning of the sector.
10. The Commission believes that major additional benefits can be derived from a European market with genuinely common rules on key parameters, where players of different scale and business models can seek comparative advantage from economies of scale or from local focus and market knowledge.

COSLA draft response

11. It is proposed that given the Commission’s consultation is focussed on a number of similar areas to the recent Ofcom response, that COSLA utilising the final response in Annex 1 as the basis of our response to this consultation. A covering political letter, if agreed, will be sent to the EC Vice President for the Digital Single Market by the COSLA DES Spokesperson.
12. However, there are a number of additional issues members may wish to raise, with the following initial officer suggestions. The consultations asks about the ongoing relevance of the EU Regulatory framework, given discussions at previous Executive Groups, it would be important to respond directly to this section and emphasise the continuing need for regulation and potentially even greater regulation in digitally remote areas to require a universal service obligation and a greater penetration of lack fibre into geographically

remote areas. Certainly, members who want to strongly agree with the suggestion that the regulatory framework should indicate more clearly the absence of effective retail competition is the justification for regulatory competition.

13. Also, in regard to competition regulation there is a debate as to whether continuing with a “before the event / ex-ante” system allows alternative operators to deploy Next Generation Access (NGA) networks in the future, promote effective competition and given dominant operators, provide enough incentives to act within realistic timescales for consumers to benefit. Also, whether in digitally remote areas, there needs to be greater regulatory measures and/or incentives to the first mover to encourage investment in more challenging coverage areas. Albeit, would need to balance these incentives against an outcome where consumer potentially gets infrastructure but reduced competition. Certainly delivering service via a universal obligation may continue to be favoured by members rather than a process of offering “concessions” to operators for certain geographical areas.
14. Also, given the relative lack geographically of fibre-based backhaul in Scotland and figures emerging from Ofcom surveys of the greater use of mobile broadband/devices in Scotland the regulation of backhaul access could emerge as a significant issue. The Commission highlight that wireless, including mobile, networks can contribute to a more cost-efficient network roll-out, especially in less dense areas but backhaul links for wireless without sufficient capacity could become a barrier to the delivery of non-fixed broadband systems.
15. As the Commission highlights one of the most important trends in digital markets over the next ten years could be fixed-wireless convergence followed by post 2020 the commercial deployment of 5G networks. It will be crucial in such a network environment that such regulatory matters will need careful pre-consideration to ensure 5G delivers the ultimate outcomes of reducing the digital divide for those who won't benefit from fibre deployment.

EU internet speed quality post 2020

16. Safe, fast and reliable access to services including local public e-services relies on having a broadband infrastructure that is able to cope. Demand for such services is increasing and becoming more complex, including access via mobile devices, the need to reliable video streaming, internet of things (i.e. interoperability of devices), big data, etc. This is by definition one issue that needs to be tackled on an international scale. For that reason the EU Digital Agenda for Europe launched in 2010 set the target of basic broadband for all citizens by 2013, Next Generation Networks (able to carry 30 Mbps –Megabytes per second- or more) accessible for all by 2020 and 50% of EU-wide households having 100Mbps subscriptions of higher by 2020.
17. The present EU consultation aims to plan the infrastructure needs post 2020. Latest available data show that as of 2014 only 68% of EU households enjoy access to 30Mbps and only 6% of homes having access to 100Mbps. This is just the EU average with a huge variation across countries and local areas, particularly the rural and most remote ones.
18. In the UK context, the report highlights that Ofcom estimates a typical household will need 10Mbit/s speed to benefit from the most popular online services. Today only 92% of UK premises benefit from download speeds of plus 10Mbps – the minimum necessary for the most popular online services- , with around 2% (½ million households) unable to receive the most basic 2Mbps service. There is also a need to scrutinise upload as well as download speeds as this can be a critical issue for a number of internet service users especially SME, with many households having a much lower level of upload speed.

19. This EU consultation cover all sectors including public authorities and rural areas and considers the EU regulatory framework, broadband deployment plans and funding requirements. The below COSLA proposed policy position reflect the submission to the Ofcom Strategic Review of Digital Communications, as issues such as broadband extension will remain a domestic competence, with the EU role being that of supporting national policies, including funding and preventing that there are not EU-wide gaps and inconsistencies and ensuring compatible standards are applied.
20. COSLA has welcomed the pledge from previous UK Governments and the EU that no one, or area, will be left behind in the rollout of superfast broadband, whether in rural or urban areas. However, we would welcome autonomy over the solutions to be used to reach the hardest to reach areas in terms of infrastructure and participation in future, it will be key that the regulatory environment fits with this request for greater autonomy. Solutions need to be found that match local circumstances.
21. Leaders have previously argued that further funding should reflect the cost of providing a minimum level of outcomes, a minimum tolerable threshold for broadband, reflecting the costs of this infrastructure implementation the length and breadth of the UK and not allocated on a pure population basis.
22. While COSLA has already outlined that public sectors interventions need to continue into the future until all communities have been provided with the minimum tolerable and future-proofed standard of digital, broadband and telephony services. In that respect we believe that given the strategic nature of broadband extension for local communities and services any issue that might be raised in terms of compatibility between national or local broadband schemes and EU State Aid Rules on Broadband or EU procurement rules be waived provided proper justification is made of these domestic programmes being aimed to meet the EU Digital Agenda 2020 targets.
23. Concerning the role of market dominant commercial providers of broadband rollout. COSLA has concerns that even in the case that they receive significant amounts of public subsidy, more stringent requirement need to be set at national and EU level to ensure that they actual deliver their commitments. In Scotland there are significant concerns that this is not the case, not just in digitally remoter communities such as far isles but even in the Central Belt of Scotland were most population lives. In fact in many parts all across Scotland the minimum reliable broadband of 10Mbps is not available and many constituents are still struggling to get beyond dial-up speeds or basic broadband speeds of 2 Mbps. Indeed, the UK average makes some of the digital inequalities within Scotland. The availability of superfast broadband is still below average in Scotland in Scotland (73%)
24. In the UK, the regulator Ofcom has remarked in its strategic review consultation document that the current ownership structure of BT means that it still has the incentive to discriminate against competing providers. The organisation boundary for BT and BT Openreach, who are responsible for operating the “last mile” of BT’s access network on behalf of all communications providers, was drawn at a time when broadband was delivered from telephone exchanges over the existing copper network. With the unbundling of local loops and fibre being taken closer to the home, potentially leads to new models of competition especially in regard to the delivery of 4G and subsequently 5G mobile and broadband coverage. There is also a concern that the market dominance of certain operators also reduces the opportunity for community-led innovation such as Community Broadband Scotland.
25. We call for a national, and as appropriate, EU minimum tolerable standard for broadband that prevent future changes in service provision (such as switching off the copper phone

lines and rely exclusively on next generation broadband) cause real problems for our digitally remote communities and also present resilience issues for the provision of emergency service transmissions in remote areas, if a 4G successor to the “airwave” system does not provide full and reliable coverage across the UK.

26. Such minimum standard should not only cover broadband but also mobile internet given the increased reliance of mobile devices to access both public and commercial services. Albeit we recognise the clear relationship between the roll-out of fibre broadband providing the necessary digital data backhaul to allow high capacity 4G and in future 5G broadband to be deployed into digitally remote areas as a substitute to fibre to the cabinet or premise.
27. In that respect this minimum standard, should ensure, notwithstanding the changes in technology and service providers that Communities enjoy digital connectivity, safe and reliable access to public services at all times. Otherwise it would not be possible to provide more integrated and tailor-made services that can improve reliable access to citizens and reduce cost of service provision.
28. Furthermore, lack of broadband access creates digital exclusion, both in terms of access to services such as health and social care from the most disadvantaged groups in society or the development of their digital skills that are increasingly needed to be part of the employment market. The risk of exclusion could be on the basis of geography due to lack of network infrastructure in rural areas and/or because of prohibitive costs due to vulnerable circumstances.
29. Accordingly, COSLA seeks further social inclusion obligations on the private sector be included in the conditions of future rounds of public policy and funding initiatives. As the telecom market and key operators do so in an EU-wide scale the European Commission, as watchdog of the EU Single Market need to introduce such requirements in their future Digital Single Market legislation as well as when authorising mergers between EU telecom giants.
30. Minimum standard of broadband is also necessary in terms of local economic development: business, particularly start-ups, start-ups, who may operate from home and need a minimum standard of a range of telecommunications: broadband and mobile coverage.
31. Funding needs to take account of geography in the allocations. In this respect while the bulk of the investment will need to come from national budgets the EU has an excessively restrictive approach to EU broadband funding. Currently EU Structural Fund Rules are very restrictive about the possibility of using EU funds for broadband extension outside less developing and transition areas (such as the Highlands and Islands area) though it is welcome that the Rural Development Fund can now be used for that purpose as well.
32. While it is unlikely that existing rules and allocations are changed in the short term COSLA would support the idea that unspent EU funds are earmarked towards broadband extension across the EU rather than simply transferred back to central government budgets. Given the delay of launch of many EU programmes and the forthcoming Mid Term Review of the EU budget there is an opportunity to consider the EU added value of retargeting these unspent EU monies before they are lost.
33. Equally COSLA welcomes the recently launched European Fund for Strategic Investments (EFSI), commonly known as the “Juncker Fund”, that plans to make available €315bn or public and private loans to major infrastructure projects including broadband. At present however we are still lacking (in spite of the calls of COSLA and others) specific guidance

from the Commission on conditions in which these loans could be made specifically available to Local Authorities, in terms of minimum size of loans, requirements of joint bids and cluster projects (be that among several Councils, and or with national governments or private bodies).

34. Out of our meetings with EU and national officials COSLA had indeed received a range of informal guidance on those issues (and circulated to officers) however it is unlikely that Councils would engage with EFSI unless formal EU guidance is provided. It is equally necessary that clear guidance the risk profile and added value of EFSI compared with other EU loans namely those of European Investment Bank is provided as to enable Councils to make informed choices about EU loan instruments for broadband extension that are available to them.

EU consultation on ICT Standards

35. The Commission is consulting on the existing EU wide standards that ensure the interoperability of internet providers and the access of services. It is as such a large set of EU legislation that is being reviewed, from technical matters access to and interoperability of networks, radio spectrum allocation to others of specific interest to public authorities such as Universal Service and User Rights in electronic communication and services and processing of personal data and the protection of privacy in the electronic communications sector. Give the scope of this consultation the COSLA response will focus on the issues of more direct concern to local government.

Draft Response

36. COSLA welcomes the Commission plans for the harmonisation of access to the 700 MHz bands, in order to ensure the supply of broadband services in rural areas. However this should be a minimum as access to the 800 MHz bands will be necessary in order to accelerate the development of the latest 4G technology. This process will also have specific issues in terms of existing radio spectrum allocation in certain local areas and regions that need to be looked at in detail.
37. A particular issue of interest for local government is the development of standards for e-government. COSLA very much support the extension of e-public services as to increase their accessibility and reduce cost or provision. On grounds of subsidiarity, however COSLA would be against the establishment of mandatory EU standards on e-government beyond what is already foreseen for issues that have a clear EU-wide dimension. In that respect COSLA notes that EU rules on e-procurement are being developed as to enable that bidders from other Member States are not discriminated against in tendering contracts. Equally the EU Services Directive has detailed requirements that Councils already have to comply to enable citizens and business from other EU countries to comply with local licensing rules, as well as their linkage of their services to the EU internal market virtual portals.
38. Beyond that we would see as premature the development of uniform EU-wide e-government standards. Local Authorities are autonomous to define how to provide e-services suiting local circumstances ; the only role the EU rules should play is to prevent that citizens or businesses accessing them from outside the UK are not unduly discriminated against .Equally, as COSLA has said in response to other consultations (e.g. the Intelligent Transport Systems consultation) COSLA sees the role of the EU not in providing an uniform standard but to ensure that whatever standard a local authority chooses to operate under, that they can be interoperable with those in use in other public authorities.

39. Because of this COSLA cautiously notes the eGovernment Action Plan 2016-2020 that will be tabled next year which has recently been announced. We are in that respect that the development of EU standards might be reduced to technical discussions with the EU standardisation professional bodies and government experts. Furthermore we would be cautious against the undue influence of commercial technology providers in shaping these standards as it could give them unfair advantage when they are deployed. Considering the interest of major technology companies in shaping EU agendas such as the Smart Cities and Communities Initiative this is an issue that the Commission should remain particularly vigilant.
40. The development of EU rules for local e-government must be the result of the direct involvement of experts from local government. For that reason rather than leaving it to technical committees COSLA would welcome that the recently launched EU Regulatory Fitness (REFIT) pilot projects which brings local authority experts in assessing the impact of future EU legislation and effectively help the Commission draft the EU rules is applied to the eGovernment Action Plan.
41. Finally, in terms of data protection, COSLA insists, that the provisions regarding the gathering and storage of data by Councils on the exercise of public authority or statutory requirements are clearly distinguished in EU rules from those private providers using and reusing customer data. In that respect we regretted that the EU Data Protection Regulation now being finalised did abolish that clear distinction. This resulted in arduous negotiations with MEPs and national government to introduce a minimum set of provisions in the new EU Data Protection rules. Clearly this is not a precedent that COSLA would like to be repeated in future EU Data Protection rules, instead, they should recognise the specific nature of public authorities holding and storing data and their right (often a statutory obligation) not to make it available to outside commercial operators, particularly not storing data outside the EU.

EU Geo-blocking Consultation

42. The European Commission is currently consulting on Barriers to the Single Market from Geo-blocking and other geographically-based restrictions. In essence this consultation aims to address the unjustified restriction of access of commercial websites from one EU country in another, or even if access is enabled to apply different terms and conditions to those accessing or purchasing services of that website to those accessing or living in other EU country.
43. While clearly there will always be reasons for different standards to apply (notably different taxation, or the fact that one company may not have the infrastructure to deliver the purchase abroad) the Commission finds that some of the existing restrictions based on nationality or resident are very similar that used to exist in the EU free Market of Goods and Services (and are illegal under EU law). It took the Commission, as watchdog of the Treaties, sixty years to bring down most recently via the Services Directive. Thus the Commission will table early 2016 (with the explicit supports of national governments including the UK) a new draft EU legislation to end unjustified geo-blocking. This consultation will feed into the drafting of such Directive.

COSLA draft response:

44. Geoblocking is mainly a feature of commercial websites. It is often related to the existing different broadcasting rights, taxation or copyright issues across each Member States. Therefore the proposed COSLA position is that as regards to public authorities they are bound to national standards of transparency and access to information. These rules do reflect national legal frameworks and reasons of public interest. In terms of EU legislation it

is appropriate that it guarantees an individual accessing local authority websites or e-government services is not prevented to do so.

45. However the EU legislation should recognise that actual access to such e-services will be dependent of existing national rules tied to citizenship or place of residence, and thus the new EU Geoblocking legislation should not confer any right and benefit that is not granted by the existing domestic legislation regulating such rights and benefits. Equally this new geoblocking legislation should not be used as a way of harmonising the format and content of local authority websites. While national legislation foresees that they meet a number of accessibility standards it is currently up for each local authority to define their websites and e-services in the way that suits their circumstances. Finally as we said for the EU Data Protection Regulation provisions specifically affecting public authorities should be clearly marked out in the legislation and not merged with those applicable for commercial sites.

Phase 2 - BDUK Superfast Extension Programme

46. The allocation of these Phase 2 broadband monies has been the subject of recent discussion with Scottish Government officials, and more formally through the Infrastructure Action Plan Programme Board (IAPPB), with COSLA repeatedly stressing that there should be no assumptions made regarding further voluntary contributions from councils, or fundamental decisions taken without further joint political discussion and decision.
47. In line with previous consideration of this matter at Leaders in February & April, COSLA officers has also restated that in any further distribution of funds, those councils who previously voluntarily contributed should not be disadvantaged. At a previous IAPPB, Scottish Government officials confirmed that councils who had provided voluntary contributions would not be disadvantaged by the distribution of Phase 2 monies.
48. Since the Executive Group last received an update on this matter in May 2015, Scottish Government have been negotiating the modelling of the distribution of Phase 2 monies with BT. It is unlikely that the modelling will be in place to allow decision-making on distribution of monies until early 2016. The modelling has been complicated by the "gainshare" monies from Phase 1 and a degree of in-contract movement by BT from fibre-to-the-premise (FTTP) to Fibre-to-the-cabinet (FTTC) in certain areas so without further modelling and audit, requiring more time, it wont be possible for the contractor to demonstrate transparently best value to the client.
49. There is also the added complication of the UK Government not having State Aid clearance yet from the European Commission to extend the current block grant exemption. EC are pushing hard for greater open access to networks funded by public monies and BT pushing back hard against this, as a red line matter for them in the UK market context.

Conclusion

50. Members are invited to mandate the DES Spokesperson to sign off responses to the above submissions to the EU Single Digital Markets consultations. Members will be informed in future meetings on the progress over these issues.

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