

Openreach's response to Ofcom's consultation

"Wholesale Local Access Market Review: Promoting network competition in superfast and ultrafast broadband"

NON-CONFIDENTIAL VERSION

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Foreword

On 1 December 2017, Ofcom published a further consultation, entitled “Promoting network competition in superfast and ultrafast broadband” as part of its Wholesale Local Access (WLA) Market Review.

This response is provided by Openreach, a functionally separate line of business within British Telecommunications plc (“BT”),¹ in response to proposals related to Openreach’s business.²

This document should be read in conjunction with Openreach’s other responses to consultations relating to the WLA Market Review.

Any comments on this response should be sent to James Tickel, Head of Operation Regulation and Economics, Openreach, at james.tickel@openreach.co.uk.

¹ As part of BT’s implementation of its formal notification dated 10 March 2017 under section 89C of the Communications Act 2003 (“the Act”), the Openreach business will be operated by Openreach Limited, which was incorporated as a separate legal entity on 24 March 2017, following the fulfilment of certain conditions set out in the notification.

² BT, as parent company of Openreach, fully supports and endorses this response: BT shares all the views expressed by Openreach on the issues under consultation.

1 Executive Summary

1. In this new consultation, Ofcom proposes that any geographic differentiation in the rental prices of any superfast or ultrafast Virtual Unbundled Line Access (VULA) service offered by Openreach - other than those provided over full fibre connections – will be deemed to constitute undue discrimination (“Proposal”). Such geographic differentiation, regardless of whether it can be objectively justified through differences in underlying costs or otherwise would be compliant under competition law, would therefore be prohibited unless Ofcom gave prior written consent. It is not clear from Ofcom’s consultation under what circumstances such consent would or would not be given and the timeframe or mechanisms by which such consent would be obtained.
2. The Proposal would require Openreach to set a single national rental price for each relevant VULA service meaning that Openreach would be prevented from introducing any offers that discounted rental charges in certain geographic areas. Such offers have been and are being used to support our wholesale customers, for example, in driving take-up in areas with low utilisation of superfast cabinets. The Proposal would therefore constrain Openreach’s ability to work with its customers on such initiatives in the future to allow them to meet the evolving needs of, and pass on cost savings to, their end-customers.
3. Openreach has serious concerns about the Proposal which we consider inappropriate and unnecessary to address any clear and quantified competition concern. Ofcom appears to be seeking to protect Openreach’s rivals from competition in order to make market conditions for them more certain. But it has not given adequate consideration to the adverse consequences of the Proposals for competition in the market and ultimately the short term and long term interests of consumers. Rather Ofcom seeks to protect (and promote) market entry from nascent FTTP operators at all costs, ignoring the adverse impacts that the Proposal will have in terms of inhibiting or distorting legitimate competition between Openreach and network rivals. Ofcom’s role is not to dampen competition where it chooses or, at the request of competitors, provide shelter from the competitive process.
4. We consider that the Proposal would be wrong in law. First, Ofcom seeks to extend unlawfully the scope of the undue discrimination condition permitted by section 87(6) (a) of the Communications Act 2003 (“the Act”). Ofcom only has the power under section 87(6) (a) to impose a condition that prevents undue discrimination. The proposed condition will intentionally prohibit justifiable, lawful differences in treatment of customers that cannot be characterised as “undue”. The proposed restrictions are also inconsistent with EU law and BEREC Guidelines.
5. Secondly, the Proposal is unwarranted and not objectively justifiable. Under existing remedies introduced under section 87(6)(a) of the Act, which Ofcom was proposing to retain in its March 2017 WLA consultation, Openreach is already prevented from unduly discriminating in relation to the provision of network access in the WLA market, including VULA. Nothing in Ofcom’s consultation provides an evidential basis for Ofcom to seek to establish that any geographic differentiation in price levels for VULA services – regardless of the nature of the differentiation (i.e. scope and magnitude), the duration for which the differentiation may apply and/or any objective justification for such differentiation – would constitute undue discrimination. The Proposal will exclude any assessment of the potential effects that such geographic differentiation might have on

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efficient competition, which has to reflect the specific underlying circumstances. Ofcom's own assessment identifies that not all geographically targeted discounting would deter competition and may actually be beneficial to consumers. Existing remedies (including the undue discrimination obligation and price notification requirements³) which operate alongside its sectoral competition law powers, allow Ofcom the opportunity to consider all relevant circumstances and take action where appropriate.

6. Thirdly, the Proposal is an unlawful and disproportionate interference with Openreach's right to conduct its business. Ofcom has not clearly defined and quantified a "competition concern" against which it can appropriately consider the necessity and proportionality of the Proposal compared to alternative approaches, including reliance on competition law and/or the set of remedies proposed in the March 2017 WLA Consultation. Ofcom's stated "competition concern" amounts to no more than a general observation that Openreach has the ability to introduce 'geographically targeted wholesale price discounts. No analysis is made of when or how Ofcom considers that such discounting might give rise to distortions in competition that could "undermine investment in nascent competitive networks". Even on Ofcom's own identification of a "competition concern", Ofcom's proposed remedy goes beyond what is necessary to meet its stated objectives – i.e. it does not limit the prohibition on discounting to areas where alternative investment in "nascent competitive networks" has been announced and/or recently taken place; the prohibition applies in all circumstances, even where Openreach might be using discounts to meet competition from an established network provider. Even if it is considered desirable (and lawful) to use a non-discrimination condition to protect new market entry, it is clear that Ofcom's proposal goes far beyond this as it prohibits *lawful* differentiation not just *undue* discrimination.
7. The Proposal produces discriminatory effects in imposing a competitive disadvantage against Openreach and a corresponding competitive benefit not just on "nascent competitive networks", but also on the established and growing Virgin Media network which currently has greater capabilities to supply ultrafast services over DOCSIS3 technology in competition to potential investors in alternative full fibre networks as well as to Openreach and its existing superfast broadband wholesale customers. It is particularly notable that despite Virgin Media's current and expanding capabilities to supply ultrafast services, the Proposal would introduce a "national" pricing requirement on the price Openreach can charge for ultrafast services supplied via g. fast even though the commercial roll-out of such services has not yet begun. In contrast. Virgin Media would face no ex ante constraint on its ability to vary prices.
8. Finally, the proposed restrictions on VULA prices would be inconsistent with proposals elsewhere in the WLA market review to adopt an 'anchor pricing' approach where average prices for 40/10 VULA access services would be regulated based on the costs of supplying those services via VDSL technology while Openreach would retain price flexibility for all other VULA services.
9. Overall, therefore, the geographic pricing constraint Ofcom proposes to introduce is unlawful, unnecessary, inappropriate and inefficient: it will prevent competition delivering benefits, through lower prices and more choice, to customers; it will protect new entrants from legitimate competitive pressures and risk encouraging inefficient and unsustainable business models and will not be in the long-term interests of consumers.

³ . Openreach gives industry 28 days' notice of all pricing proposals, including discount schemes.

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Restricting Openreach's ability to compete fairly on the merits would also give rise to unintended consequences in that inefficient utilisation of Openreach assets will increase unit costs of supply and require higher prices to be set – including for customers in geographies where no alternative infrastructure may be built.

10. Openreach also has concerns about the consultation process itself. The consultation on the Proposal was unexpected and comes at an extremely late stage of Ofcom's WLA market review process. We are concerned that there will be limited time to reconsider the Proposal and responses to the Consultation before a finalised set of remedies for the WLA market are notified to the Commission and would urge Ofcom to carefully consider the necessity, proportionality and lawfulness in general of imposing this new remedy at this stage. We consider that Ofcom has not justified the Proposal or consulted on its wider impact for all market participants. In particular, Ofcom's cursory discussion of the costs and benefits of the Proposal lacks any foundation and it has not considered any alternative, potentially less onerous and more appropriate options.
11. We note the specific concerns raised by Vodafone and CityFibre about Openreach's pricing strategies which they claim could undermine their investments in full fibre networks. We can reassure Ofcom and all stakeholders that Openreach is, at all times, mindful of the obligations it owes under existing competition law and SMP remedies not to act in ways that unfairly distort and/or seek to foreclose competition. On this basis, Ofcom should not rush to introduce such a wide-ranging and ill-considered measure.
12. It is clear from the analysis set out in this submission that the proposed consent mechanism will not provide sufficient speed or flexibility for Openreach to operate its business efficiently if its everyday commercial decisions are effectively subjugated to Ofcom's prior written permission (and could result in Ofcom having to micromanage Openreach pricing decisions). Given the pro-competitive drivers of such offers we believe this provides clear evidence of the flaws in the Proposal.
13. We expand on these concerns in this response:
 - a) In Section 2, we summarise the market context for this review and set out details of various offers we have introduced to drive take-up and support our objective of earning a reasonable return on risky investments. We believe we would be prevented from introducing many, if not all, of these offers if Ofcom introduced the proposed remedy;
 - b) In Section 3, we set out our assessment of the Proposal, in particular by reference to Ofcom's stated competition concern and the significant adverse negative consequences of the Proposal; and
 - c) In Section 4, we conclude why, building on the evidence and assessment in Section 2, the Proposal is unlawful.

2. Market context

15. In this Section, we provide important context for the issues Ofcom is considering in this consultation:
- a) First, we consider the nature of competition – both existing and future – in the supply of access services, noting that, despite the headline finding that Openreach has Significant Market Power (“SMP”) in the Wholesale Local Access (“WLA”) market, conditions of competition vary significantly by geography and by access line capability. We do not believe Ofcom can assume that Openreach is able to deter and/or undermine investments in ultrafast capabilities by its competitors – whether established providers such as Virgin Media or other network infrastructure providers – and rely on the general finding of SMP in the defined WLA market as a sufficient basis to seek to constrain Openreach’s responses to ultrafast competition.
 - b) Second, we summarise details of geographic price discounting we have offered and/or are currently offering and explain why the ability to offer such discounting is important in extracting value from our investments in the face of differences in demand and supply conditions. We believe that the Proposal would have the effect of prohibiting any discount offers on rental prices for VULA services, removing our ability to respond to the needs of our wholesale customers and compete fairly with established and new infrastructure providers.

Competition in the supply of access lines

16. Ofcom’s key objective in the WLA market review, reflecting its conclusions in the Strategic Review of Digital Communications, is to promote greater network competition. In this context, this consultation focusses on the overarching concern that Openreach, with its position of SMP on the defined WLA market, “*might respond to entry in ways that could undermine investment in nascent competitive networks.*”⁴
17. The WLA market is defined ‘broadly and deeply’:
- it is broad in its geographic scope (i.e. UK excluding Hull) with no distinction made for areas where Virgin Media or other entrants have (or plan to have) network build; and
 - it is deep in the fact it encompasses:
 - i. services at different levels of the value chain – i.e. ducts, poles, unbundled subloops and full fixed access links between customer sites and Openreach local exchanges – and
 - ii. fixed access links (both physical connections and virtual paths) with a wide range of capabilities based on different access technologies (copper, VDSL, cable, fibre) and headline access speeds delivering different levels of customer value.
18. The finding that Openreach has SMP within this WLA market is primarily based on analysis of the number of fixed copper connections to UK homes Openreach supplies (whether these copper connections are used to support narrowband only, ADSL broadband or VDSL superfast broadband) compared to the number of fixed connections supplied by other infrastructure providers, such as Virgin Media⁵. The SMP finding on the ‘broad and deep’ market does not therefore, in itself, capture geographic differences in supply or the differing capabilities of connections supplied by different providers.
19. However, in the context of the WLA market review and the Proposal, it is important to take account of the extent to which – within the WLA market as defined – conditions of supply differ across geography and by line capability. The table below provides an estimate of the split of fixed lines provided by Openreach and by Virgin Media across the UK (excluding Hull) by reference to the capabilities of the line supplied to the customer:

⁴ Paragraph 2.5

⁵ See figure 3.17, March 2017 WLA Consultation, Volume 1.

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| | Total volume (m lines) | Openreach | Virgin Media |
|---|------------------------|-----------|--------------|
| Fixed lines with capability to provide at least narrowband services | 35 | 8<% | 8<% |
| Fixed lines with capability to provide at least standard broadband speeds | 30 | 8<% | 8<% |
| Fixed lines with capability to provide superfast speeds (i.e. above 30MB) | 13 | 8<% | 8<% |
| Fixed lines with capability to supply broadband at speeds above 100MB | 3 | 8<% | 8<% |

20. This shows the extent to which Virgin Media supplies a higher share of lines with the highest broadband speed capabilities. As Virgin Media’s network footprint covers around 45% of UK premises (currently expanding under Project Lightning), it follows that its share of lines within that footprint is much higher. We estimate, for instance, that Virgin Media supplies 8<% of all broadband enabled lines within its footprint and around 8<% of all superfast broadband lines.
21. Virgin Media is therefore a strong and established player that is currently supplying more superfast and ultrafast access services within its footprint than Openreach. It is also expanding the capability and geographic scope of its access network. It faces no *ex ante* regulatory constraints in how these services are provided: it is not obliged to offer wholesale access and can introduce retail discounting on a geographic or customer-specific basis.
22. New investment by alternative access providers is expected to focus on the provision of full fibre access connections capable of ultrafast speeds of up to 1GB and above. Ofcom’s proposals on DPA regulation are designed to further promote these investments. Again, those providers will face no *ex ante* regulatory obligations on the terms of supply: they can strike exclusive wholesale deals or discriminate in charges offered to different wholesale customers in different geographic areas as they roll-out their networks.
23. We therefore start from a position where non-Openreach infrastructure suppliers are in a stronger position than Openreach to meet the needs of customers requiring access lines capable of delivering ultrafast access speeds. As demand for faster speeds grows over time, all current and potential infrastructure access investors need to consider their strategies: where to invest, how to invest (underlying access technology and deployment options), when to invest and how to design access services and structure prices to maximise value based on the capabilities of the deployed network.
24. As Ofcom notes, these strategies are being developed and established in real time. Openreach has a stated ambition to extend the provision of ultrafast broadband services via the provision of FTTP and G.fast and is consulting with industry on options. We believe that under the right conditions, we could build FTTP connections to ten million homes and businesses by the mid-2020s and are working closely with our wholesale customers, Ofcom and Government to build a viable business case, Ofcom also notes developments in the network ambitions of CityFibre, Hyperoptic, Gigaclear and Virgin Media in the Consultation. We expect all these investments will involve some degree of network overlap in certain areas, particularly between the Virgin Media network and new full fibre networks. The success of individual strategies – and the business plans underpinning investments – will depend on a range of factors as these access networks compete on the merits.
25. Despite this evolving and complex competitive outlook, the finding that Openreach has SMP on the defined WLA market establishes a binary regulatory framework: *every* access service supplied by Openreach falls within the scope of SMP regulation while *any* access service supplied by other providers falls outside the scope of SMP regulation. As soon as Openreach invests in the capability to supply an ultrafast service to an area – whether by installing G.fast equipment or a full fibre connections – it must offer a wholesale connection on fair and reasonable terms to all downstream customers on equivalent terms, even if Virgin Media or another infrastructure provider is already supplying a much larger volume of services of similar or superior speed in that same area.
26. To date, Ofcom has reflected differences in the conditions of competition for different services by applying a

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reduced set of SMP remedies on Openreach's provision of certain access services – most notably, by allowing freedom on most VULA price levels (subject to margin squeeze constraints and general competition law). Ofcom's March 2017 WLA Consultation proposed to introduce controls on Openreach's charges of 40/10 VULA services, but retain pricing flexibility for other VULA services. The Proposal fundamentally changes the nature of that flexibility and does not appear to have regard to the differences in underlying dynamic conditions of competition highlighted above.

27. We recognise that the WLA market definition reflects a belief that demand-side constraints act as a link between different fixed access technologies and capabilities, but the precise nature of that evolving relationship will be shaped by relative customer valuations of the different access connections on offer over time. We are concerned that the Proposal overlooks this important detail. It should not be inferred that the finding of SMP on the defined market means Openreach has the capability to use its provision of existing access services – i.e. copper lines and predominantly superfast connections – or investments in G.fast capabilities to unfairly deter and/or undermine investments in ultrafast networks as they are being planned and/or rolled out. Nor should it be inferred that other existing suppliers do not have equally strong capabilities to react to entry (or the threat of entry) in ways that may change the value and attractiveness of potential investments by other providers.
28. In light of the fast-evolving technological changes and rollout of superfast broadband (“**SFBB**”) and ultrafast broadband (“**UFBB**”), we believe that in future market reviews Ofcom will need to consider disaggregating the ‘broad and deep’ WLA market to establish a clearer framework for considering current and prospective competition and identifying enduring market power at different levels of the value chain, different geographies and for different access line speed capabilities. Given the nature of the Proposal, we believe Ofcom needs to conduct a more detailed assessment of competition in the supply of UFBB lines. If it identifies concerns, it will need to conduct a proper competition impact assessment in quantifying its competition concerns and fully considering the need and proportionality of its Proposal by reference to the comparative merits of less intrusive alternatives.

The importance of price flexibility in supporting new investment

29. Openreach began investing in superfast broadband network capabilities after 2008 mainly using FTTC VDSL technology. Investments were made ahead of identified levels of demand – i.e. aggregate customer willingness to pay a premium on copper broadband access speeds to receive faster headline access speeds. The constraint that the availability of copper access connections was expected to have on demand for VDSL superfast access services was a key reason why Ofcom allowed Openreach a degree of freedom over product development, technology choice and price levels. It was logical to allow Openreach flexibility to test prices on the market in terms of bandwidth tiers, price premia, etc.
30. Our experience has been that take-up of superfast services differs by geography, shaped by socio-economic factors, the capabilities of existing ADSL-based services and the availability of alternative access services, particularly from Virgin Media. Given the level of fixed costs involved in standing up VDSL cabinets and the ongoing need to ensure we maximise returns on those investments, there are clear commercial drivers to consider ways to drive take-up on underutilised cabinets. We have therefore looked to work with our wholesale customers, in response to requests, to find ways to incentivise migration of their copper broadband end-customers onto our VDSL platform at a faster pace. This has resulted in a number of offers being run at various points.
31. Details of offers are set out at **Annex 1**. These are summarised below:
 - **GEA-FTTC Discounted SIM Provide Rental offer** (from February 2016): this offer gave 6 months' free rental on VULA services provided with new copper lines or 'start of stopped' lines. The offer was only available from eligible cabinets, namely c.30,000 ☒.
 - **GEA-FTTC Discounted SIM Provide Rental and Connection offer** (from April 2017): offered 12 months' discounted rental and connection provided CP met a volume commitment on VULA. The offer is available for: (i) VULA services provided with new copper lines or 'start of stopped' lines ordered from eligible cabinets, namely c.30,000 cabinets ☒; and (ii) “slow” performing ADSL lines regraded to VULA with the same CP (although this element of the offer was available nationwide).

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- **GEA-FTTC 18/2 offer** (from June 2016): as part of the 18/2 product trial, we offered a cheaper entry level VULA product where a single CP ordered 3 or more connections at the same cabinet on the same day. The offer was only available from c.15,000 eligible cabinets, primarily to test market dynamics and for operational reasons.
 - **Chelsea exchange closure** (from July 2016): offered reduced VULA FTTC rental as part of the planned closure of the Chelsea exchange as customers were migrated onto the South Kensington exchange to mitigate potential customer experience issues.
32. Each of these offers reflect customer-driven outcomes designed to stimulate take-up and were not designed to target nascent network competition. However, as each of these offers involves geographic differentiation of rental charges, Ofcom's proposed remedy would mean that each of these offers would constitute "undue discrimination". Our ability to replicate similar offers in the future would, therefore, be dependent on Ofcom giving written consent under proposed condition 4.1 to introduce such prices. As we expand upon in Section 4, we have serious concerns about the any consent process, especially given that the consent process could have distortive effects, it is unclear what criteria Ofcom would apply in considering whether such consent was appropriate and how consent would be obtained.⁶
33. The commercial and strategic priority for Openreach is, in the face of fast-changing demand and evolving supply for access services that we need to ensure we can continue to our wholesale customers' needs in serving their end-customers and meeting their expectations. Restricting our ability to design special offers involving some degree of geographic discounting with no clarity about when such offers might be allowed will fundamentally obstruct our ability to engage effectively.

⁶ See paragraphs 108 to 109 below.

3. Assessment of Ofcom's proposals

34. Ofcom proposes that the undue discrimination remedy applying to the provision of Network Access in the defined Wholesale Local Access (WLA) market (condition 4) is amended to explicitly state that Openreach:
- "... will be deemed to have shown undue discrimination if it charges different prices in different geographic areas for rental services used to provide network access to VULA other than VULA that is provided over GEA-FTTP".*
35. As such, Ofcom is effectively introducing a wide-reaching national pricing obligation on Openreach's supply of all VULA services except those provided over full fibre connections – i.e. the default requirement, against which the onus would be on Openreach to seek permission to depart from, would be to set a single national price for each and every service provided for all current superfast FTTC access services and all future ultrafast access services supported by G.fast investments, where available.
36. In Section 4, we set out why we believe this approach would be unlawful. In this Section, we consider the nature of the competition concern Ofcom details in the Consultation and set out why, reflecting on the issues raised in Section 2 above on the Market Context, we believe the Proposal will give rise to considerable negative commercial and regulatory consequences, which will ultimately lead to worse outcomes for consumers.

Ofcom's concern and its desired outcome is not clear

Ofcom's stated competition concern is not clearly defined and quantified

37. Before setting out our concerns about the ramifications of the Proposal, we observe that Ofcom has not clearly defined and quantified a "competition concern" against which it can appropriately consider the necessity and proportionality of the Proposal compared to alternative approaches, including reliance on competition law and/or the set of remedies proposed in the original March 2017 WLA Consultation.
38. On the face of it, Ofcom indicates that its competition concern is that we "*might respond to entry in ways that could undermine investment in nascent competitive networks*"⁷ with the specific risk that "*... competition may be distorted, and new competitive investment undermined by a geographically targeted price response*".⁸
39. But Ofcom also accepts that geographically targeted discounting *could* be beneficial to consumers and might not deter entry⁹. It is not clear whether Ofcom is suggesting, therefore, that:
- It is specifically concerned that Openreach might introduce differentiated pricing that would not be ordinarily be considered inefficient and/or otherwise inappropriately harmful to competition unless it involved pricing beneath an efficient cost benchmark¹⁰; or
 - It views the risks that *some* geographically targeted discounts *might* give rise to adverse effects as justifying a default prohibition on any geographic differentiation even though this would then prevent full competition on the merits.
40. Without clarity on the nature of the competition concern and some quantification of the risks to competition Ofcom believes this raises, meaningful analysis of options to address the concern is impossible and there is no basis to assess the risks faced if no additional intervention was introduced versus the costs that would arise as a result of the Proposal. Our view is that no case has been made that our ability to introduce geographically targeted pricing constitutes, in and of itself, a *distinct* competition concern – i.e. creating additional concerns over and above general concerns about distortion to competition and foreclosure of entry

⁷ Paragraph 2.5.

⁸ Paragraph 3.9.

⁹ Paragraph 4.10

¹⁰ See, for instance, paragraph 4.11 where Ofcom states that "While rival networks to BT are becoming established we consider that it is appropriate to limit BT's ability to react as it sees fit, including reactions that might normally be regarded as commercial reactions to competition."

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– that requires a specific regulatory remedy, let alone the specific prohibition set out in the Proposal.

Ofcom's focus appears to be on protecting individual competitors, not the efficient competitive process

41. As we set out in Section 4, regardless of how Ofcom intends to define its concerns, it is not legitimate to, on the one hand, accept that not all geographically differentiated pricing would be harmful and, on the other, seek to define any geographically differentiated pricing as "undue discrimination". In general terms however, it strikes us that the stated competition concern and the underlying policy objective reflected within the Proposal (i.e. the desire to prevent all such differentiation), in effect, seeks to protect individual competitors from legitimate competitive pressure. This is contrary to the principles of ex ante regulation and competition law¹¹ that should ultimately frame Ofcom's consideration of the need for intervention.
42. Action should be focussed on preventing harm to the process of competition rather than harm to competitors (or rather than protecting/promoting individual competitors). This is for the ultimate benefit of end consumers. Ofcom's regulatory powers are framed in terms of furthering the interests of end-consumers in (inter alia) the price, range and choice of services, and not in terms of individual competitors.¹² It is through protecting competition that the long-term benefits of competition are promoted and protected. In contrast, protecting individual competitors can lead to significant market distortion, especially, for example, when inefficient competitors are protected.
43. By way of example, recognising the economics of competition law and regulation are the same, the Article 102 enforcement guidelines puts it as follows: "*what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.*"¹³
44. Competition law (in particular Article 102) implements this principle by limiting intervention in cases of price-based exclusionary conduct to circumstances where conduct by a dominant player "*has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.*"¹⁴ (Emphasis added)
45. In this case, there is no suggestion that Openreach's discounts have excluded or are even capable of foreclosing competitors from the market or are on a predatory below-cost basis. If an equally efficient competitor can compete effectively with the prices set by the dominant player then it may be inferred that the conduct is unlikely to have an adverse impact on effective competition and ultimately consumers. Such conduct should not be prohibited, neither by ex ante regulation nor competition law.
46. Indeed, Ofcom reaches the extreme view that Openreach's legitimate recourse to fair competition on the merits should be limited, thereby acceding to the request of specific competitors (CityFibre and Vodafone) for entry assistance.
47. In fact, not only is Ofcom seeking to protect particular competitors, but also the specific technology these competitors plan to adopt (namely FTTP) which Ofcom is concerned will struggle to compete with an alternative technology (namely G.fast) because "*G.fast uses Openreach's existing network*" and therefore "*could enable millions of households to access ultrafast speeds earlier than if they had to wait for an FTTP connection.*"¹⁵
48. This is not consistent with the principle of intervening to protect competition rather than specific competitors. In fact, without allowing for competition on the merits (policed by applying the principle of the "as efficient competitor"), there is a risk of promoting entry and expansion for their own sake even where it leads to worse outcomes for consumers.
49. Expanding on the above, it is clear from the Consultation that, although Openreach may be responding

¹¹ The underlying economic rationale for ex ante regulation and competition law is the same.

¹² Act, Sections 3 and 4.

¹³ Paragraph 6, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XC0224\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XC0224(01)&from=EN). Emphasis added.

¹⁴ Paragraph 23, *ibid.*

¹⁵ Paragraph 4.16.

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commercially and without any intention to deter investment, Ofcom would still be concerned where rivals are nonetheless made less certain about market conditions, and their incentives to invest accordingly dampened.¹⁶

50. As previously noted, Ofcom agrees that its Proposal may inhibit a normal competitive response by Openreach and that, where this does not dissuade entry from occurring in the first place, such price competition would normally have benefits for customers, which will be lost.¹⁷
51. Ofcom asserts that such short term costs are likely to be limited over the next review period (because only a small proportion of premises will have a choice of networks) and will be outweighed by the longer term benefits of establishing enduring competition. No further analysis is provided that would provide a basis for such an assertion. As discussed in more detail below, the Proposal is likely to have significant negative consequences and costs that have not been sufficiently assessed in this consultation; both in the short term in terms of consumers missing out on more attractive prices, as well as in the long term in terms of inefficient entry by network competitors and a loss of economies of scale if Openreach suffers a downward spiral of lower take up volumes which result in higher roll-out costs and higher prices for consumers.

Ofcom's stated concern with foreclosure of "nascent competitive networks" is not reflected in the proposed prohibition on any geographic differentiation in pricing

52. Despite Ofcom's stated concern about geographically targeted pricing distorting competition by undermining investment in "nascent competitive networks", the Proposal would introduce a far reaching constraint that goes well beyond addressing such a concern (notwithstanding our view that such a concern has not been appropriately established). The Proposal would not be limited to restricting discounting in areas where alternative investment in "nascent competitive networks" has been announced and/or recently taken place.
53. Rather the prohibition applies: (i) in areas with established alternative infrastructure providers such as Virgin Media; or (ii) in areas with no alternative infrastructure providers in place where Openreach needs to drive demand and take up to make its rollout viable; or (iii) in mixed areas that included a combination of locations with new providers, established providers and no alternative providers.
54. Furthermore, it seeks to restrict all geographic discounting, even where that might reflect underlying cost savings from higher volumes or is otherwise being deployed as a pro-competitive and legitimate response to meet competition. i.e. the prohibition on discounting at a sub-national level applies regardless of:
- the level and duration of the discounting;
 - whether it exclusively targets areas where new infrastructure build is planned/underway or more generally;
 - the relative shares of competing network providers in the geographic area in which discounts may apply; and
 - the fact that discounted prices may remain above cost and reflect local efficiencies or demand conditions.
55. This means that, unless Ofcom gives consent in writing,¹⁸ Openreach would not be able to introduce discounts to rental charges even where these were not targeted at the nascent competitive networks Ofcom is concerned with and/or were not likely to foreclose entry.

¹⁶ Paragraph 4.11 "we would be concerned about BT responding to competition on a targeted basis in this instance because even if it is BT's best commercial option – and is not directly motivated by BT's incentives to choke off additional investment in other areas – these commercial reactions could themselves be sufficient to undermine potential entrants' incentives to invest in the first place."

¹⁷ Paragraphs 4.10.

¹⁸ See paragraphs 108 to 109 below.

The proposed remedy carries significant risks of negative consequences and costs which have not been addressed by Ofcom

56. There are three main negative consequences that arise from the Proposal and that Ofcom has not satisfactorily addressed. They include:

- promoting inefficient entry;
- distorting competition whereby one major competitor (Openreach) is prevented from meeting competition from Virgin Media and other existing and new network competitors; and
- artificially pushing Openreach into a downward spiral of lower volumes and higher unit prices to the harm of our wholesale customers and the end-users they supply.

Promoting inefficient entry

57. Vodafone asks for a regulatory constraint on Openreach's pricing to *"enable new entrants to entice customers away from existing contractual commitments and to build a customer base of sufficient scale in order to offset at least some of the investment costs."*¹⁹ But giving such entrants a holiday from competitive pressure may mean that the investment costs are inefficiently incurred. Entrants should entice customers away from rivals by offering better services and/or pricing, not because they are shielded from legitimate competitive pressure by regulatory intervention.

58. Investors should make decisions about whether to support such an investment based on an assessment of risk and return that reflects normal competitive dynamics (which is inherently uncertain). If that uncertainty is significantly reduced by Ofcom, the risk/return assessment may be inappropriately tilted resulting in entry which is not sustainable in the long run. It is not in customers' interests for entry to be encouraged where business cases are weak and based on unrealistic take-up/volume assumptions which don't reflect normal competition on the merits. Ofcom's duty is to promote competition "where appropriate"; propping up ineffective competitive is not appropriate nor compatible with Ofcom's wider legal obligations to ensure undistorted competition.²⁰

59. The harm to consumers caused by inefficient entry would be twofold:

- In the short term, prices would be higher than necessary as entrants are protected from fair and reasonable competitive reactions from Openreach (indeed, in addition new entrants might price their services higher than they would have otherwise safe in the knowledge that Openreach would not be able to respond by reducing prices);
- In the longer term, protecting inefficient entrants may squeeze out scope for efficient entry, again keeping prices higher than necessary.

Openreach is prevented from meeting competition from existing competitors

60. As set out in Section 2, competition in the provision of ultrafast services is evolving and complex. As noted above, the Proposal would have the effect of artificially skewing the market against Openreach to the benefit not just of "nascent competitive networks", but to the established and expanding Virgin Media network. This network currently has greater capabilities to supply UFBB services over DOCSIS3 technology in competition with potential investors in alternative full fibre networks as well as with Openreach and its existing SFBB wholesale customers. We expect that much of the investment planned by "nascent competitive networks" will overlap with Virgin Media's build and the capabilities of that network will present a more immediate competitive threat to the ambitions of entrants.

¹⁹ Vodafone letter to Ofcom, October 2017, available at https://www.ofcom.org.uk/data/assets/pdf_file/0020/108371/vodafone-letter.pdf.

²⁰ As stated at paragraph 4.25 of the Consultation, "Our principal duty when carrying out our functions is to further the interests of citizens in relation to communications matters and consumers in relevant markets, where appropriate by promoting competition". (Emphasis added)

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61. Virgin Media would remain free to respond to network competition by introducing targeted geographic discounts at the retail level. Openreach's wholesale customers may be placed at a competitive disadvantage in certain geographic areas unless they also reduce their retail prices. Openreach may then be forced to address this squeeze on downstream margins by lowering wholesale prices nationally, thereby running the risk of under-recovering the costs across its entire network. Both would amount to unnecessary distortions of market dynamics.
62. In these circumstances, it is particularly notable that despite Virgin Media's current and expanding capabilities to supply ultrafast services, Ofcom's proposals would introduce a "national" pricing requirement on the price Openreach can charge for ultrafast services supplied via G.fast even though the phased geographic commercial roll-out of such services has not yet begun. Ofcom suggests that it believes constraints on G.fast prices are appropriate because these could be quickly deployed, but, again, there is no distinction made between when such deployment may be targeted at nascent access networks, established networks or elsewhere. G.fast will be deployed in a phased geographic way. Different phases will have different cost profiles which might make it commercially preferable to set different prices in different areas. By prohibiting such behaviour, and discriminating against G.fast technology in favour of FTTP technology, Ofcom's remedy might dampen incentives and limit the extent and/or pace of Openreach's roll-out of ultrafast services to the detriment of consumers' long term interests.

Preventing geographic discounts can lead Openreach into a downward spiral of lower volumes and higher unit prices

63. In circumstances where costs vary by geography, a national price will tend to involve a degree of cross subsidy (e.g. higher margins in low cost areas balanced by lower margins in high cost areas). Ofcom acknowledges this and states "*We recognise that there are variations in costs by geographic area. It is possible that areas where entry occurs are relatively low cost.*"²¹
64. Local entry in low cost/high margin areas under the umbrella of a national Openreach price may be highly effective in moving volumes from Openreach customers to the new entrants. If volumes on the Openreach network drop in low cost areas, national average unit costs across the Openreach network would tend to rise, leading (everything else being equal) to increased national prices in the future. Higher national prices would in turn provide an even greater umbrella to local new entrants, leading in turn to further volume losses on the Openreach network as our wholesale customers are unable to compete on a level playing field for retail customers in lower cost areas. A downward spiral ensues. To the extent that Ofcom were addressing a material issue, the loss of sales in lower cost areas would eventually force the cross subsidy to unwind, at the expense of our wholesale customers competing in the higher cost, less competitive areas to supply end-users. At this point a single national market held together by a national Openreach price would no longer be tenable.
65. In summary, Openreach should retain the freedom to price by reference to local cost and demand conditions in order: (i) to be able to compete on a level playing field with entrants and meet the competition from existing competitors in lower cost areas; and (ii) to ensure that market prices in these areas send the appropriate signal to network rivals to ensure efficient investment.

The proposed remedy would be inconsistent with proposals elsewhere in the WLA review

The anchor pricing approach explicitly sought to preserve pricing flexibility for higher SFBB and UFBB speeds; this flexibility would now be reduced

66. Ofcom's March 2017 WLA Consultation proposals on VULA price regulation were clearly based around a belief that an appropriate 'regulatory balance' could be struck between protecting consumers and promoting competition by adopting an 'anchor pricing' approach. Under this, average prices for 40/10 VULA access

²¹ Footnote 24. Ofcom also appears to recognise the variations in costs in serving a broad customers base (which we take to mean a geographically dispersed customers base) at para 4.27 where it states "*as long as the rollout of G.fast is not closely aligned with the rollout of rival networks in this review period, BT's pricing incentives will be influenced by incentives across a broad set of customers, raising the costs of setting artificially lower prices for G.fast merely to target entry during this review period.*" Put simply, Ofcom is saying that, the national G.fast prices set by Openreach if G.fast is deployed widely will be higher than if G.fast is targeted at areas where rival are likely to deploy (i.e. the lower cost areas).

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services would be regulated based on the costs of supplying those services via VDSL technology while Openreach would retain price flexibility for all other VULA services. Ofcom's own rationale was that allowing flexibility around the 40/10 anchor would promote efficient investment decisions and encourage technical and commercial innovation to extract value from the provision of higher bandwidth services, including full fibre.

67. Among other things, Ofcom's approach requires that, where Openreach supplies a full fibre line, it must offer a 40/10 access service at a price equivalent to the sum of the regulated MPF price plus the regulated 40/10 FTTC price. Ofcom positions this approach as "consistent with our technology neutral approach". The clear implication here is that we will be incentivised to deploy whatever technology is deemed more commercially attractive to meet the customer's needs based on a view of the efficient costs of deployment and the long term value that can be extracted from customers from the technical capabilities of the line (e.g. for full fibre lines, the scope to drive higher revenues from higher speed connections). This positioning in the March 2017 WLA Consultation was clearly considered to be consistent with the stated policy objective of promoting investment in full fibre networks. That is, 'promotion' of investment was focussed on facilitating what Ofcom considered to be efficient investment and purchasing decisions (notwithstanding our concerns with the way Ofcom proposed to design charge controls to meet this aim).
68. The Proposal, however, is in conflict with the above. Flexibility on pricing around the regulated anchor price will be reduced by the need to set uniform national prices in all cases. This removes the ability to commercially test different pricing structures – e.g. bandwidth tiers, price gradients, rebalancing connection and rental charges – and to base investment decisions and commercial strategies on a view of local conditions. For instance, Ofcom is limiting Openreach's ability to deploy G.fast in different regions to reflect potential cost differences for each phase even where this may be the most efficient and quickest way of providing ultrafast services to customers. The effect will not necessarily be to skew investment decisions towards the deployment of full fibre but to leave customers to be provided with SFBB with no access to UFBB.²²

The combination of the 40/10 charge control with a prohibition on geographically targeted discounts contrasts with Ofcom's stated preference for a market-led approach to investment choices

69. Ofcom's proposed constraint on Openreach's geographic pricing flexibility sits alongside a very significant mandated price reduction of GEA 40/10 services and (through the anchor constraint) higher speed prices. Network rivals (actual and potential) have indicated to Ofcom that these proposals would have a significant adverse impact of their investment incentives. However, when setting the charge control, Ofcom considered that the short run price benefits to customers were great and any potential dynamic efficiency losses from deterred or delayed entry were small, because competition from new network build will take time, and may not be viable in all geographic areas.
70. In contrast, in justifying the proposed restriction on targeted wholesale price cuts by Openreach, Ofcom considers that the dynamic gains from third party investment and competition far outweigh the foregone short run benefits to customers from actual price competition in order to protect incentives to invest and the long-term gains from promoting efficient investment. In this case, Ofcom considers that short term costs are outweighed by longer term gains from more (albeit potentially inefficient) investment and network competition.
71. In both cases, Ofcom is, in effect, rejecting a market-led outcome: in the former case because it does not consider that constraints from SFBB and Virgin Media will prevent excessive wholesale pricing; in the latter because it does not consider that price competition will deliver an appropriate investment signal to emerging network rivals.
72. The two assessments sit uneasily alongside each other. Ofcom is seemingly unconcerned about the impact of a mandated 40% price reduction on third party investment incentives. Yet it is concerned about the possibility that Openreach might lower prices somewhat further below the price cap in select areas, even where lower prices would reflect local demand conditions and/or lower local costs.
73. It follows that Ofcom must believe it can identify the optimal price at which prices are not excessively high

²² Which may compromise their ability to access and distribute information and make use of applications and services of their choice (contrary to Framework Directive, Article 8(4)(g)).

(harming customer in the short term) nor excessively low (harming customers in the long run). It is highly unlikely, however, that Ofcom will outperform the market in achieving these multiple objectives in a single set of prices (nor is this degree of regulatory intervention consistent with the market-led philosophy that Ofcom espouses). As discussed above, the risk of harming long term investment incentives by setting the price too low or of harming consumers in the short term by prohibiting pricing flexibility is considerable.

Removing pricing signals risks obstructing the identification of competitive local markets in future market reviews

74. As Ofcom states in the March 2017 WLA consultation “*The current model relies primarily on access to VULA and LLU whereas in the future we expect that in some parts of the UK the model will be competition between ultrafast networks, in part relying on physical infrastructure access.*”²³ In other words, the costs and competitive conditions in the WLA market are not homogenous and this will become clearer as entrants emerge in specific areas. Virgin Media’s geographic presence already confirms the different economics which underpin network provision in urban and semi-urban areas as compared to rural areas.
75. Ofcom accepts that different regulatory arrangements may apply in the future in different parts of the country to reflect this. For example, Ofcom suggests there may be less reliance on access obligations such as VULA and LLU in parts of the UK with the highest prospect of investment in competing networks.²⁴
76. Ofcom rejects moving to this model now because it cannot yet identify the areas where network competition is economically viable and those where it is not. But the strong pro-competitive case for doing so (sooner rather than later) must be obvious to Ofcom. In particular, without VULA and LLU access obligations, there would be a strong incentive for access takers to invest in their own networks where this is viable. The addressable market for rival network providers would be more attractive (at the retail and potentially wholesale level) improving business cases, and bringing forward entry and expansion. Equally, Openreach would be able to compete on a more level playing field with network rivals.
77. An obligation on Openreach to price nationally for products where it is facing local competition works against the grain of this market (and regulatory) evolution. More importantly, it removes a key indicator of differentiated local competitive conditions which Ofcom has previously relied on in order to establish geographic market boundaries.
78. Following Ofcom’s reasoning, and in light of the specific requirement to impose ex ante obligations only where there is no effective or sustainable competition and to lift them as soon as effective competition emerges²⁵, we would expect Ofcom in the future to have lighter touch or no regulation where network rivals emerge and compete. We consider that, in fast evolving conditions like SFBB and UFBB, there is a strong case for doing this prospectively in order to drive investment incentives and recourse to innovative technology (as seen in countries like France, Spain and Portugal with greater FTTP penetration).
79. If pricing signals are removed (or are more muted) as a consequence of this intervention, we are concerned that the dynamics which might otherwise lead to a change in market definition and market power determinations will be distorted. In other words, there is a risk that Openreach will remain regulated on a national basis by default because it is prevented from responding to competition via price discounts. Whilst other indicators of distinct competitive conditions may be used – e.g. infrastructure presence – the opportunity to roll back regulation ahead of substantive presence, in order to strongly drive investment incentives, may be lost.

²³ Ofcom, WLA consultation – Volume 1, March 2017, para 4.17.

²⁴ Ofcom, WLA consultation – Volume 1, March 2017, para 4.19: “Increased network competition may also reduce the need for the VULA and LLU access obligations in those areas, with a greater reliance on PIA. In other areas, it may become apparent that the prospects for rival investment are limited, and the need for VULA and LLU access obligations will be greater.”

²⁵ Framework Directive, Article 8(5)(f).

Ofcom's proposed approach is inconsistent with previous regulatory decisions

In business markets, Ofcom chose not to intervene to address the same competition concern for fear of limiting BT's ability to compete

80. In business markets, Ofcom considered (as part of the most recent Business Connectivity Market Review) the risk to competition if we were to respond to local entry with discounts which targeted new entrants (i.e. precisely the same competition concern as in this case). However, Ofcom decided against a requirement for us to maintain uniform national prices or a 'predation test' because: (i) our ability to compete should not be limited given differences in cost and competitive conditions; and (ii) other tools provided sufficient protection, namely a case by case investigation by Ofcom of alleged undue discrimination as well as competition law.
81. Ofcom explicitly acknowledged that geographically targeted discounts could be efficient given the variations in local cost and competitive conditions identified by Ofcom. Ofcom stated:
- "... some freedom to charge in a way that reflects more accurately the costs incurred and to respond to the local characteristics of competition that exist in these markets could be efficient. Moreover, given the level of cost differences that may exist and the extent of competition in some areas, BT's ability to compete could be limited if it were required to maintain nationally uniform prices. Hence, geographically differentiated prices may reflect BT responding legitimately to cost differences in the face of competition."*²⁶
82. Ofcom concluded that geographic discounts may or may not be unduly discriminatory "*depending on the circumstances*". Ofcom preferred, therefore, to consider an alleged breach of the general undue discrimination obligation "*on a case by case basis*".
83. Ofcom also ruled out a predation test (as suggested by CityFibe) in relation to geographic discounts because "*Competition Law provides a well-established framework for addressing any allegations of anti-competitive predatory pricing and no case has been made for an additional test.*"²⁷
84. The facts are comparable in the WLA market: cost and competitive conditions vary in different parts of the UK. Ofcom acknowledges this and that local entry will occur where costs are relatively low. Openreach should not be limited in its ability to compete even if this competition is, to some extent, prospective. In any event, competition from Virgin Media is actual not prospective, and a pricing response to an established rival does not have the same risks as those identified in the consultation document.

The concerns in 2006 over the ability to harm LLU investors through targeted discounting did not lead to a prohibition of geographic price variation

85. Ofcom refers to the period when CPs began rolling out LLU infrastructure in 2005/6 as comparable to the present situation in which third parties are considering FTTP investments. Ofcom states that "*LLU operators were concerned about the threat of unpredictable margin erosion by BT which would foreclose competition based on LLU.*"²⁸
86. The same concern did not, however, lead Ofcom to impose a blanket ban on geographic price variation. In April 2005, local discounts had already been introduced in "dense cells" (which were exchanges that served, in general, the most homes and businesses), reflecting the distinct cost conditions in these areas.²⁹ Ofcom noted that the cost per user was likely to be lowest in the most densely populated areas, and that these areas were therefore likely to be those targeted by LLU investors.³⁰ In other words, under normal competitive conditions it was to be expected that the areas in which discounts were given (which were based on lower

²⁶ Ofcom, Business Connectivity Market Review – Volume I, 28 April 2016, paragraph 8.93, available at https://www.ofcom.org.uk/_data/assets/pdf_file/0015/72303/bcmr-final-statement-volume-one.pdf.

²⁷ Ofcom, Business Connectivity Market Review – Volume I, 28 April 2016, paragraph 8.97, available at https://www.ofcom.org.uk/_data/assets/pdf_file/0015/72303/bcmr-final-statement-volume-one.pdf.

²⁸ Paragraph 4.3.

²⁹ Ofcom, November 2006, Review of the wholesale broadband access markets 2006/7, paragraph 3.22, available at https://www.ofcom.org.uk/_data/assets/pdf_file/0028/28666/wbamr.pdf.

³⁰ Ibid, paragraph 3.24.

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costs) coincided with areas in which LLU investment was taking place.

87. The voluntary commitments given in November 2006 did not reverse the existing geographic discounting, or prevent any further geographic discounting. The commitment made reflected (emphasis added) "*BT's need to be competitive in the wholesale broadband market, whilst recognising that emergent LLU investments require a period of stability*".³¹
88. The price floor commitment for IPStream and WBBC services was set for the period May 2007 to July 2009, following a brief period in which BT committed not to lower its existing prices further once Openreach had achieved 1.5m LLU lines. The price floors were minimum prices³² and critically they were differentiated by "*relevant exchange bands*". The exchange bands were based on the likely backhaul bandwidth costs for the exchange, distance to planned metronode from the exchange and number of households and businesses served by the exchange. This allowed for some variation in the price floor for different types of exchanges.
89. In other words, the floors did not prohibit further geographically differentiated discounts, as long as these remained above the defined minimum price floors. They also allowed for lower price floors in exchange areas in which the cost of providing broadband access services was lower.
90. At no stage was Ofcom minded to disallow geographically differentiated prices outright. On the contrary, it accepted that differentiated prices were a signal that competitive conditions differed between geographic areas, and actively considered in its WBA market review whether it should define geographic markets on the basis of geographic pricing boundaries. Ofcom saw as the main advantage of this method that the geographic market boundaries would be determined by market dynamics.³³
91. What this case actually shows is that a solution was found to address the same competition concern which was more proportionate than the proposed blunt ban on geographic discounting, as it allowed BT to continue to compete on the merits in areas in which cost and demand conditions were different.

Conclusion

92. Overall, we do not believe that Ofcom has defined and quantified a clear competition concern that goes beyond a general concern about behaviour that may distort competition and/or foreclose market entry. As such, Ofcom has no clear basis to assess whether its Proposal is necessary and proportionate given competition law and SMP remedies already in place and to justify the introduction of a default prohibition on all geographic differentiation. Ofcom's assessment has then not taken account of the risks of negative consequences arising from its Proposal and the harm these may cause consumers in the short and long term. It follows that we consider the Proposal to be unlawful as set out in Section 4.

³¹ BT letter to Ofcom, 10 November 2006, available at <https://web.archive.org/web/20080906165711/http://www.ofcom.org.uk/telecoms/ioi/bbpricing/floors.pdf>.

³² The Commitments defined minimum Average Revenues per User (ARPU) that BT had to earn in each individual exchange area.

³³ Ofcom, November 2006, Review of the wholesale broadband access markets 2006/7, paragraphs 4.194-97, available at https://www.ofcom.org.uk/data/assets/pdf_file/0028/28666/wbamr.pdf.

4. The Proposal is unlawful

Introduction

93. In this section we explain why the Proposal is wrong as a matter of law. Specifically, we set out the legal framework and then explain in turn why:
- a. the Proposal goes beyond the scope of an undue discrimination obligation and therefore unjustifiably prevents Openreach from engaging in legitimate commercial behaviour;
 - b. the Proposal is not objectively justified;
 - c. the Proposal is disproportionate;
 - d. the Proposal is discriminatory; and
 - e. Ofcom's imposition is outwith and inconsistent with the objectives of the European Union Common Regulatory Framework ("CRF") and Ofcom's obligations under the Communications Act 2003 ("the Act") and EU law more generally.
94. In addition, we also have concerns about the manner in which the Consultation has been undertaken.

Legal Framework

95. Ofcom proposes to impose an undue discrimination SMP condition that specifies that differential geographic prices for non-FTTP VULA rental products will, by itself and without more, amount to undue discrimination.
96. Under section 45(2)(b)(iv) of the Act, Ofcom has the power to set SMP service conditions only as authorised or required by sections 87 to 91 of the Act. In accordance with section 87(6)(a) of the Act, the SMP conditions that Ofcom is authorised to impose include "*a condition requiring the dominant provider not to discriminate unduly against particular persons, or against a particular description of persons, in relation to matters connected with network access to the relevant network or with the availability of the relevant facilities.*"
97. Section 87(6)(a) of the Act implements Article 10 of the Access Directive, which authorises national regulatory authorities to impose non-discrimination obligations in relation to interconnection and/or access. Under Article 10(2), a non-discrimination condition shall, in particular, ensure "*that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.*"
98. Section 47(2) of the Act provides that Ofcom may only set an SMP condition if it is (a) objectively justifiable, (b) not unduly discriminatory, (c) proportionate to what the condition is intended to achieve and, (c) in relation to what it is intended to achieve, transparent.
99. In addition, in exercising its legal powers under the Act, Ofcom is subject to a range of legal duties, including:
- a. pursuant to section 3 of the Act, when carrying out its functions Ofcom shall:
 - i. further the interests of consumers,³⁴ and more specifically in response of choice, price, quality of service and value for money;³⁵

³⁴ The Act, section 3(1)(a).

³⁵ The Act, section 3(5).

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- ii. have regard to principles that regulatory activities should be transparent, accountable, proportionate, consistent, targets at cases in which action is needed and, more generally, best regulatory practice;³⁶
 - iii. have regard to the desirability of promoting competition³⁷ and the desirability of encouraging investment and innovation;³⁸
 - iv. promote self-regulation;³⁹ and
 - v. promote the different interests of persons in different parts of the United Kingdom and of persons living in rural and urban areas;⁴⁰
- b. pursuant to section 4 of the Act, Ofcom must act in accordance with EU requirements, which incorporate the policy objectives and regulatory principles in Framework Directive, Article 8, including:
- i. promoting competition;⁴¹
 - ii. not favouring one form of communications network over another or one form of providing or making available a network or service;⁴² and
 - iii. addressing the needs of particular groups of users⁴³ encouraging network access for the purpose of securing efficiency, sustainable competition, efficient investment and innovation;⁴⁴ and
- c. pursuant to section 6 of the Act, Ofcom must carry out its functions with a view to securing that regulation by Ofcom does not involve the imposition of burdens which are unnecessary.⁴⁵
100. These legal duties implement Article 8 of the Framework Directive, which also specifically requires national regulatory authorities to:
- i. address the needs of particular groups of users⁴⁶ and taking due account of the variety of conditions relation to competition and consumers that exist in the various geographic areas within a Member State;⁴⁷ and
 - ii. promoting the ability of end-users to access and distribute information and make use of applications and services of their choice.⁴⁸
101. Ofcom can only resort to the imposition of ex ante SMP regulatory conditions in circumstances where competition is ineffective and must relax such obligations as soon as there is sustainable competition.⁴⁹
102. Ofcom is also required to carry out an impact assessment in relation to any important proposal unless the urgency of the matter makes it impractical or inappropriate for them to do so.⁵⁰ A proposal is important if its implementation would have a significant impact on persons carrying on businesses in the markets for any of the services or facilities in relation to which OFCOM has functions. The principles governing Better Regulation and detailed competition impact assessments for governmental policy and

³⁶ The Act, section 3(3).

³⁷ The Act, section 3(4)(b).

³⁸ The Act, section 3(4)(d).

³⁹ The Act, section 3(4)(c).

⁴⁰ The Act, section 3(4)(l).

⁴¹ The Act, section 6(3).

⁴² The Act, section 4(6). See also, Framework Directive, Article 8(1).

⁴³ The Act,

⁴⁴ The Act, section 3(7)-(8).

⁴⁵ The Act, section 6(1).

⁴⁶ Framework Directive, Article 8(4)(e).

⁴⁷ Framework Directive, Article 8(5)(e).

⁴⁸ Framework Directive, Article 8(4)(g).

⁴⁹ Framework Directive, Recital 27 and Article 8(5)(f).

⁵⁰ The Act, section 7.

regulatory interventions in markets are set out in the CMA 50 Guidelines.⁵¹

The Proposal is Unlawful and Unreasonable

The Proposal goes beyond the scope of an undue discrimination obligation and therefore unjustifiably prevents Openreach from engaging in legitimate commercial behaviour

103. Ofcom proposes to use its powers under section 87(6)(a) of the Act to impose an undue discrimination SMP condition that specifies that differential geographic prices for non-FTTP VULA rental products will automatically amount to undue discrimination.⁵² That condition would be unlawful, perverse and irrational for a number of reasons:
- a. Section 87(6)(a) only imposes on Ofcom a power to set a SMP condition prohibiting undue discrimination. The Proposal goes beyond the scope of that provision because it purposefully prohibits conduct which is not undue discrimination, i.e. it prohibits perfectly legitimate, pro-competitive conduct. As discussed in Section 3, Ofcom itself acknowledges that the Proposal has this effect.⁵³
 - b. Secondly, the Proposal conflates the concepts of different treatment and undue discrimination without appreciating that the concept of equal treatment does not insist on identical treatment. There may well be objective differences between two classes of customers which mean that they are not in an equivalent or comparable situation. Indeed, to treat them the same *in spite of those differences* would equally amount to discrimination.⁵⁴
 - c. Thirdly, there may well be legitimate and objective considerations that justify a difference in treatment which mean that any apparent discrimination is not undue at all. For instance, Openreach is entitled to have recourse to legitimate means to defend its market share from being eroded by competitors and to engage in fair competition on the merits⁵⁵. Secondly, provided its prices are not exclusionary in any way, it should be free (indeed encouraged) to set its prices to pass on cost savings and efficiencies to its customers and strike a fair balance between the divergent interest of different classes of customers in different geographic areas within the UK. In that way, the benefits of effective competition are passed on and the interests of consumers (both collectively and individually) are promoted.
 - d. Fourthly, the imposition of a formalistic *ex ante* condition that treats differentiated pricing as automatically wrong, without regard to the underlying factual circumstances, means that Ofcom is fettering its discretion and failing to have regard to materially relevant considerations. In particular, the SMP condition will exclude all assessment of the capability of Openreach's pricing behaviour to foreclose or otherwise adversely affect competition in fact (referred to for short as "restrictive capability"). The Court of Justice of the European Union has held that the analysis of restrictive capability must be conducted in the light of all relevant circumstances, which includes the examination of all rebuttal arguments and evidence submitted by the accused.⁵⁶ Ofcom cannot carry out that assessment merely by resorting to formalistic presumptions which rely on hypothetical or theoretical assertions but has to look at the likely anticompetitive effects of the conduct. The Proposal would be tantamount to a presumption of harm which limits Openreach's opportunity to call the presumed restrictive effects into question and test the actual or likely extent of the restrictive capability of its pricing or other justifications for its conduct.⁵⁷

⁵¹ CMA Guidelines on Competition impact assessment Part 1 and 2.

⁵² Consultation, paragraph 4.21

⁵³ For example, Consultation, paragraph 4.10.

⁵⁴ It is also contrary to Ofcom's explicitly duty in the Act, section 3 to have regard to their different interests, particularly customers in urban and rural areas, where their interested in cross subsidies may not be aligned.

⁵⁵ Hoffman La Roche

⁵⁶ Case C-413/14 P *Intel v Commission* [2017] ECR (not yet published) at [138] to [146].

⁵⁷ For the reasons set out in paragraphs 107 to 108, Openreach does not believe the mention of a vague consent process is sufficient to allay this concern.

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104. For the above reasons, imposing a condition that treats any difference in treatment as undue discrimination without regard to the underlying factual circumstances would be tantamount to a blanket refusal by Ofcom to have regard to relevant circumstances and a fetter of its discretion.⁵⁸
105. Further, the Proposal is an unwarranted interference with Openreach's legitimate rights to conduct its business.⁵⁹ The effect of the Proposal is to sanction Openreach for engaging in lawful, legitimate commercial behaviour. Openreach would not be able to defend its commercial interests by responding to local competition and conditions by lowering prices because this would place it in breach of the Proposal.⁶⁰ However, there is nothing wrong from an economic, regulatory or competition law perspective with Openreach reducing its prices in this way so long as the prices are not so low as to become predatory or exclusionary. Indeed, charging in a manner that reflects local conditions of competition and consumers' needs within in specific geographic area is consistent with the specific policy objectives in the CRF.⁶¹
106. This is reflected in the provision made in Article 10 of the Access Directive. Consistent with the principle of non-discrimination under EU law, Article 10 requires that equivalent conditions must be applied in equivalent circumstances to other undertakings providing equivalent circumstances: where geographic pricing differences, based on different geographic circumstances, apply equally to all downstream providers, differential pricing is not discriminatory at all, let alone "unduly" discriminately. Ofcom appears to have recognised this its previous consideration of the scope and meaning of undue discrimination, noting in the 2017 Consultation that it is intended "*principally to prevent the dominant provider from discriminating in favour of its own downstream divisions and to ensure that competing providers are placed in an equivalent position*".⁶²
107. However, rather than preventing the kind of discrimination envisaged by Article 10 (and, previously, by Ofcom itself), the effect of the intervention is in fact to handicap Openreach's ability to compete and to require Openreach to act in a way to facilitates it competitors, i.e. going beyond ensuring there is a level playing field.⁶³ In conjunction with the notification and transparency measures, the SMP condition allows other providers to identify the lower-cost and so most profitable parts of the network to target their network expansion, while inhibiting Openreach's ability to compete at the network level and BT's ability to respond to retail competition. This will distort the structure of competition in the market in favour of Openreach's network competitors by allowing them a competitive advantage whilst imposing a commensurate unfair competitive disadvantage on Openreach.
108. For completeness, Ofcom's reference to a potential "consent" process⁶⁴ does not address Openreach's concerns about the "blanket" nature of the Proposal:
- a. The consent process unjustifiably places the burden on Openreach to convince Ofcom that particular pricing should be permitted. This is unacceptable: the burden is and should remain on Ofcom to demonstrate with cogent evidence that geographic pricing amounts to unjustified price discrimination or unwarranted foreclosure. The Proposal presumes that Openreach has committed some violation without affording it any meaningful opportunity to submit rebuttal evidence to justify its approach. Openreach must be given a chance to explain and justify its legitimate commercial strategies before an adverse finding is made. It should not have to seek specific authorisation to run its business in the absence of any adverse finding.

⁵⁸ This is notwithstanding Ofcom's reference to a consent process, see paragraphs 107 to 108 below.

⁵⁹ Such interference is only unjustified where such measures are necessary and proportionate having regard to the alleged demands of the public interest.

⁶⁰ See paragraphs 107 to 108.

⁶¹ Framework Directive, Article 8(5)(e).

⁶² March 2017 Consultation, Vol. 1, paragraph 5.61.

⁶³ In this regard, the proposed intervention by Ofcom goes far beyond the broadest reach of competition law. Under competition law, Openreach is not under any special responsibility as a dominant provider to facilitate entry by its competitors into the market.

⁶⁴ Paragraph 4.11.

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- b. No detail has been provided on how this consent process would work in practice, nor has Ofcom provided any indication about what type of geographic pricing strategies would qualify for consent. There is therefore a possibility that consent may be withheld unreasonably.
- c. It is not clear to Openreach that any consent process would be feasible. Any consent process would hamper Openreach's ability to respond in a timely manner to meet competition and customer demand: by the time consent has been sought, and granted (if it is indeed granted), Openreach may already have lost significant ground. This interference would be exacerbated if the consent process included a consultation process or was public.⁶⁵ Moreover, by its very nature, a consent process will provide a strong disincentive for Openreach to try to adopt pro-competitive geographic pricing strategies since significant internal resource is likely to be required in order to obtain consent and there would be no certainty as to whether the consent would be granted.

109. As the relevant markets become increasingly competitive, as they have consistently over time, the scope of geographic pricing offers could be expected to increase. On this basis, Ofcom could find itself in a position of effectively micro-managing Openreach pricing decisions.
110. Viewed in totality, the Proposal therefore amounts to an unwarranted interference with Openreach's ability to conduct its business and the rights of its shareholders to participate in infrastructure investment.

No objective justification for the Proposal

111. There is no evidence to objectively justify the Proposal as required by sections 47(2) and 87 *et seq* of the Act.⁶⁶
112. First, *ex ante* SMP regulatory conditions can only be used when competition is ineffective.⁶⁷ Recital (27) to the Framework Directive provides in this regard that:

"It is essential that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and competition law remedies are not sufficient to address the problem." (Emphasis Added)

113. This means that Ofcom must establish a lack of effective competition as a necessary pre-condition for the imposition of a SMP condition. Ofcom does not do this. Rather, the Proposal is based on a vague theory, which is unsupported by any hard evidence. Ofcom has not clearly defined and quantified a "competition concern" against which it can appropriately consider the necessity and proportionality of the proposed remedy compared to alternative approaches.
114. Ofcom's stated "competition concern" is broadly framed and amounts to no more than a statement that Openreach has the ability to introduce 'geographically targeted wholesale price discounts' and a summary of concerns raised by third parties without any reference to evidence substantiating those concerns.⁶⁸ While reference is made to the specific risk that such geographic targeting could adversely affect new entrants and could, therefore, deter investments, no analysis is made of when, why or how this could occur – for example Ofcom makes no reference to the level at which Openreach's pricing of VDSL services could raise concerns.
115. The result is that Openreach may be acting legally from both a competition law and regulatory perspective, and the particular form of geographic price discounts might not deter efficient entry and yet Ofcom would still perceive a need to intervene. The implication is that Ofcom's "concern" is not just about unfair distortion and/or an unjustified difference in treatment and/or foreclosure of competition but that new access investors providing full fibre connections might have to compete against Openreach on a level playing

⁶⁵ If this was public, it would provide Openreach's infrastructure competitors advance notification and the opportunity to protect themselves from legitimate competition by regulatory gaming.

⁶⁶ The Act, section 47(2).

⁶⁷ Framework Directive, Article 8(5)(f).

⁶⁸ See Consultation, paragraphs 3.4 to 3.8. For example, there is no suggestion that Ofcom has obtained historical briefing papers from the complainants to

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field, on the merits.

116. Without clarity on the nature of the competition concern, the underlying conditions of competition and costs which are relevant to a proper counterfactual analysis and some quantification of the risks to competition Ofcom believes this raises, there can be no meaningful analysis of the need or suitability of the options to address the perceived concern.
117. Ofcom's approach is therefore inconsistent with regulatory best practice,⁶⁹ including, for example, the CMA 50 guidelines which requires an evidence-based and risk-assessed approach.⁷⁰ We are unaware of any investigations undertaken by Ofcom to assess the magnitude of the potential concern⁷¹ and the likely effects of differentiated pricing in the relevant markets. Openreach, which Ofcom should have expected to have significant relevant evidence, was not approached, or more specifically asked to provide relevant evidence, in advance of the Consultation on these issues.⁷²
118. It appears that insofar as Ofcom's has evidence, that evidence does not support the existence of a material competition concern, whether structural or behavioural in nature. As set out by Ofcom itself in the March 2017 Consultation and this Consultation, a range of competing infrastructure providers have already announced, and are undertaking investment in ultrafast networks in competition with Openreach, thereby suggesting that competition is dynamic and effective (or at the least, the competition concern is not as significant as implied by the Consultation):
- a. significant growth since 2011 in take-up for SFBB within-footprint (from 5% in 2011 to 47% in 2016);⁷³
 - b. forecasts that the SFBB take-up will reach over 70% in 2020/21;⁷⁴
 - c. the fact that the business case for investment in new networks have improved in recent years and therefore there are good prospects for investment by infrastructure providers in SFBB;⁷⁵
 - d. "*recent significant interest in new network investment from telecoms providers other than BT*", specifically Virgin Media, TalkTalk, CityFibre, KCOM, smaller providers such as Hyperoptic, Gigaclear, and B4RN;⁷⁶ and
 - e. "*BT itself has announced its ambition to reach 12 million homes and businesses with faster broadband services by 2020, through a mix of two million premises with FTTP and ten million premises with G.fast technology*".⁷⁷
119. In addition, this competition will be supported by Ofcom's drive for co-investment and shared infrastructure as set out in Ofcom's Strategic Market Review and its DPA proposals, both of which can be expected to stimulate new entry at the infrastructure level. Further, in paragraph 3.2 of the Consultation, Ofcom refers to developments since March 2017 suggesting there is increased appetite for ultrafast network deployment.
120. These developments have occurred, and are expected to occur, notwithstanding there is no current condition explicitly prohibiting Openreach from engaging in geographic pricing.
121. The Proposal is also particularly unnecessary given that Openreach is already subject to a range of

⁶⁹ The Act, section 3(3).

⁷⁰ CMA Guidelines on Competition impact assessment Part 1 and 2.

⁷¹ In this regard, we would note that Ofcom should be cautious about assertions from competing infrastructure providers who have incentives to limit Openreach's ability to compete legitimately with them.

⁷² There is also no reference to actual contemporaneous evidence acquired by Ofcom from third parties (including from competing infrastructure providers) to support the vague allegations in their complaints.

⁷³ March 2017 Consultation, Volume 1, figure 3.2.

⁷⁴ March 2017 Consultation, Volume 1, figure 3.3.

⁷⁵ March 2017 Consultation, Volume 1, paragraph 4.9. Ofcom specifically refers to changes in demand and reduction in costs.

⁷⁶ March 2017 Consultation, Volume 1, paragraph 4.10.

⁷⁷ March 2017 Consultation, Volume 1, paragraph 4.11.

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regulatory conditions which increase transparency regarding its pricing and prevent unfair discrimination. For example, the Proposal would be in addition to the broad general condition that already exists which prevents Openreach from unduly discriminating against particular persons, or against a particular description of persons, in relation to the provision of network access. Ofcom does not take adequate account of the existing non-discrimination condition in its counterfactual analysis as part of its assessment of the need for and proportionality of its Proposal. Given that the Proposal will directly affect Openreach's ability and incentives to compete, Ofcom is required to carry out a detailed impact assessment in accordance with the CMA50 Guidelines.⁷⁸ It has not appeared to have conducted any qualitative, let alone quantitative, analysis.

122. Further, in assessing the need for intervention, Ofcom should consider whether it should exercise its competition powers first before it resorts to exercising its ex ante regulatory powers.⁷⁹ Ofcom pays no regard to the very material consequences of breaching competition law, including fines of up to 10% of turnover, damages actions and significantly reputational damage. These are all very significant deterrents to engaging in anti-competitive behaviour.
123. Ofcom has not undertaken a proper analysis to determine whether the combination of the remedies proposed in its March 2017 and September 2017 Consultations, and competition law more broadly, are sufficient to address the concerns identified. Ofcom asserts that this combination would not be effective because its objective is broader than preventing anticompetitive foreclosure: it wants actively to promote competition.⁸⁰ However, for the reasons set out above, the Proposal could impede competition and deprive customers and end-users of the benefits of cost savings and efficiencies generated by price competition. In any event, Ofcom's purported explanation is contradicted by its Ofcom's own description of the concerns of CPs that gave rise to the Proposal, namely that "*BT could target price cuts for superfast and ultrafast services to foreclose competition*";⁸¹ in other words Ofcom is concerned with the absolute level of the wholesale prices and the impact of these prices on the viability of alternative network build. This is a concern about a risk of predatory or exclusionary pricing conduct more generally. These are precisely the kind of issue that Ofcom's sectoral competition law powers are designed to address.
124. Indeed, competition law is much better placed to deal with these issues because, in order to understand whether the conduct is pro-competitive or anti-competitive, the conduct needs to be assessed by reference to the factual context. That analysis is not undertaken when ex ante regulation applies (and indeed no such analysis is set out in the Consultation). More specifically, the following conduct (which overlaps significantly with Ofcom's competition concern) by a dominant player would risk an Article 102 investigation and fine: (i) pricing beneath long run average incremental cost (LRAIC)⁸²; and (ii) predatory conduct which might influence the expectations of potential entrants and thereby deter entry⁸³. Dominant companies who are constrained by Article 102 will also be aware that, in assessing conduct, a competition authority would take a dynamic view of efficiency (i.e. the scope for entrants to benefit over time from demand related advantages which improve their efficiency).⁸⁴
125. The cursory reasoning given at paragraph 4.4 of the Consultation is not adequate to justify Ofcom's apparent conclusion that existing regulation and competition law do not already provide adequate protection. Ofcom simply states that "*ex post enforcement, which may take longer to conclude in the event of enforcement activity, would not provide the same degree of regulatory certainty, which is itself an important factor in any investment decision*". This is insufficient. Openreach and its parent company, BT, have not been found in breach of Article 102/Chapter 2 prohibition in the UK. The imposition of this new requirement seems to be founded on an implicit, and unwarranted, assumption that Openreach

⁷⁸ CMA Guidelines on Competition impact assessment Part 1 and 2.

⁷⁹ Framework Directive, Recital 27.

⁸⁰ Consultation, paragraph 4.4.

⁸¹ Consultation, paragraph 4.3.

⁸² Determined, in accordance with the as efficient competitor test, on the basis of the dominant entity's costs.

⁸³ Paragraph 68, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XC0224\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XC0224(01)&from=EN).

⁸⁴ Paragraph 24, *ibid*.

would infringe competition if given an opportunity to do so. There is no basis for this pre-judgment.

126. Ofcom should also be cautious about placing too much weight on the supposed weaknesses of competition law. CPs are well-advised and have sophisticated understanding of competition law. They have a number of competition law-based options, including private direct actions, complaints to Ofcom and/or the Competition Markets Authority as well as regulatory pricing disputes. They can also ask Ofcom to intervene on an ex ante basis to remedy behavioural or structural concerns through its market investigation regime. If serious concerns are raised, complainants and enforcement bodies are able to act quickly. We note in this regard that both the courts and regulators can take advantage of, for example, powers to impose interim measures.
127. Further, the type of conduct that Ofcom is concerned about is most likely to be of concern where a dominant provider can hide its discounting practices and therefore competitors and competition authorities may not have sufficient information to raise a complaint until the conduct has been taking place for a period of time. Those concerns do not apply here. Importantly, Openreach is, and will continue to be as per the remedies proposed in the March 2017 Consultation, subject to notification obligations⁸⁵ which require Openreach to notify price changes in advance. Therefore, there is complete transparency about Openreach pricing for all CPs, competing infrastructure providers and Ofcom. This means that CPs, Ofcom and competing infrastructure providers can take action before any selective/geographic price reduction is implemented. Ofcom does not consider this at all in the Consultation or include it in any counterfactual analysis as part of its impact or proportionality assessment.
128. The totality of these alternative regulatory and competition powers are much more appropriate for dealing with a perceived competition problem than the imposition of an ex ante SMP condition. Ex ante regulation is a very blunt intrusive tool that can have significant distortive effects. In contrast, competition law has developed specifically to address the foreclosure issue Ofcom is attempting to address. Further, competition law is more effective because each scenario will involve an assessment of the facts and that can be undertaken as part of a properly conducted competition assessment.

The Proposal is disproportionate and not targeted at the specific alleged competition concern

129. There is no evidence that Openreach has or will engage in unjustified price discrimination, simply bare assertions by Ofcom that there is a “*risk*” that BT could respond to the competitor investment through geographic price differentiation. Further, Openreach observes that Ofcom itself considers that the new network footprint which it is seeking to protect via this Proposal will be limited over the period of the forthcoming market review⁸⁶ and states that it does not have evidence to show, nor an expectation that, Openreach’s rollout of G.Fast will be targeted at areas in which rival investment was being developed.⁸⁷ It is therefore clear that the supposed benefits of the proposal are uncertain and potentially very small, in particular over the forthcoming period during which the obligation will apply (April 2018 to March 2021).
130. Even then, it is not possible to conclude that a mere difference in pricing does constitute discrimination and gives rise to anti-competitive risks per se without Ofcom conducting a proper analysis of likely anti-competitive effects or objective justification. The analysis set out in the Consultation is an insufficient basis for ex ante regulation as it fails to identify and target a substantiated risk of harm.
131. Further, and in any event, in order for the proposed SMP condition to satisfy the requirement of proportionality (as required by the Act, EU law and the ECHR), the alleged “*risk*” that Openreach could engage in unjustified price discrimination must be balanced against an assessment of the risks and disadvantages of the proposal. As discussed in Section 3, the obvious problem with the breadth of the proposed SMP condition is that it goes beyond what is necessary to prevent anti-competitive foreclosure and imposes an excessively intrusive intervention that prevents Openreach from operating its business

⁸⁵ FAMR 2014 Condition 9 and proposed WLA Condition (from March 2017 Consultation) Condition 9.

⁸⁶ Consultation, paragraph 4.12.

⁸⁷ Consultation, paragraph 4.18.

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in a lawful manner but will harm competition, third parties, market participants and consumers.

132. In brief summary and as discussed in more detail in Section 3 above, it is clear that the Proposal risks a range of negative consequences:
- a. promoting inefficient entry through artificial protection of individual entrants with harm to consumers in the short and long term;
 - b. distorting competition whereby one major competitor (Openreach) is prevented from meeting competition from Virgin Media and other existing and new network competitors; and
 - c. preventing geographic discounts can lead Openreach into a downward spiral of lower volumes and higher unit prices.
133. Ofcom has not addressed itself to these matters in this Consultation at all or conducted any kind of proportionality assessment, either in general terms of assessing whether there are less restrictive alternatives to the proposed SMP condition that could achieve its objectives or in the more detailed impact assessment recommended by the CMA50 Guidelines. Absent careful consideration of these factors, Ofcom has not demonstrated that the proposed SMP condition is necessary or proportionate or in line with the principles of better regulation. Once these factors are taken into action, it quickly becomes clear that the Proposal is wholly disproportionate and therefore contrary to section 47(2)(c) of the Act.
134. For the same reasons, the Proposal does not comply with Ofcom's obligation under Article 8(4) of the Access Directive to ensure that the intervention is based on the nature of the problem identified. It is evident from the matters discussed above that the Proposal will prevent lawful pricing behaviour. In addition to being wholly disproportionate, it is also not targeted at the specific alleged competition risks identified by Ofcom.

The Proposal is discriminatory

135. The Proposal is also unduly discriminatory in breach of section 47(2)(b) of the Act.
136. First, the proposal will provide an unjustified advantage to the established and growing Virgin Media network which currently has greater capabilities to supply ultrafast services over DOCSIS3 technology (and in light of Virgin Media's strong market position in relation to the supply of SFBB and UFBB. This will be the detriment of both Openreach and its wholesale customers which purchase inputs from Openreach in order to compete with Virgin Media.
137. Secondly, the Proposal will provide an unjustified advantage to new network infrastructure providers, who might not provide access for competing CPs to their new networks. This will be to the disadvantage of Openreach and Openreach's wholesale customers which purchase inputs from Openreach and will be competing against new investors (where those new investors have a vertically integrated business model).
138. Ofcom' has failed to consider this discriminatory effect in the Consultation.

Ofcom's imposition is inconsistent with the objectives of the CRF and Ofcom's own obligations under the Act and EU law

There is no evidence that the Proposal will encourage efficient and sustainable competition and investment and further the interests of consumers overall

139. The purpose of the CRF, as with all measures to encourage competition and improve the function of

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markets, is to benefit consumers.⁸⁸ This objective is matched in Ofcom's obligation under section 3 of the Act to further the interests of consumers. In order to achieve this, Ofcom is not simply required to consider how to ensure the entry of *more* providers into a relevant market: choice is only one aspect of competition. Ofcom must specifically seek encourage *efficient and sustainable* competition,⁸⁹ and efficient investment and innovation. This goes to other aspects of competition such as price, quality and, importantly, value for money.

140. As set out in Section 3 above (see also paragraph 132), the Proposal is likely result in a range of anti-competitive outcomes. The effect of the Proposal is thus to promote just one aspect of competition – promotion of new entry (regardless of the efficiency of that entry) – at the expense of efficient, sustainable investment, innovation and price competition. The net result is that consumers may be forced to pay more (and in some cases for less). This is contrary to Ofcom's obligations under the Act⁹⁰ and the purpose of the CRF.⁹¹
141. There is no evidence that Ofcom has considered, let alone properly weighed, the negative effects on efficiency, sustainability, innovation and on consumer prices against the positive outcomes that it says will be generated by network competition. Ofcom has not fulfilled its obligation under section 7 of the Act to carry out an impact assessment of the Proposal: contrary to its vague assertion, the analysis in the March 2017 Consultation and this Consultation does not constitute a proper impact assessment of the Proposal.⁹² Ofcom has not identified the potential adverse effect of the Proposal on competition, nor the key risks associated with the Proposal; nor has Ofcom identified, let alone quantified the costs flowing from the impact of the Proposal.⁹³
142. Further, the net effect of the Proposal is indicative of Ofcom's failure to not favour one form of communications network over another.⁹⁴ The Proposal clearly has the effect of favouring FTTP over G.Fast (and other FTTC technologies) by constraining Openreach's ability to price provision of those services to reflect sub-national cost and demand conditions in the face of geographic market entry by FTTP providers.

Failure to have proper regard to the BEREC Guidance

143. In accordance with Article 3(c) of the Access Directive, Ofcom is required to take utmost account of opinions and common positions adopted by BEREC when adopting its own decisions. Although it appears that Ofcom is purporting to take certain statements and recommendations by BEREC into account, they bear no relationship to the Proposal and appear to have been misunderstood by Ofcom.
144. In the Consultation Ofcom refers first to a discussion in the BEREC Common Position on best practice on the market for wholesale networks about ensuring a level playing field so that providers with SMP cannot discriminate "*in favour of their own group business*" or "*between its own wholesale customers*".⁹⁵ This reinforces the point made above that the non-discrimination SMP condition envisaged under Article 10 of the Access Directive is concerned with discrimination as between downstream entities, not about facilitating entry for network competitors.
145. Second, OFCOM refers to two BEREC recommendations for best practice: (i) the imposition of a *general* obligation of non-discrimination; and clarification of how the non-discrimination obligation is to be interpreted on a *case-by-case basis*.⁹⁶ As to the recommendation for a general obligation of non-discrimination: Ofcom has already imposed such a condition, and the Proposal goes far beyond that

⁸⁸ That is not just the interests of consumers collectively but also the divergent interests that different consumers may have in different geographic areas within the UK (see Framework Directive, Article 8(5)(e) and the Act, section 4(i)).

⁸⁹ Act, section 3(7)-(8).

⁹⁰ See paragraph 99 above and specifically, for example, Act sections 3(1)(a), 3(5),

⁹¹ Framework Directive, Article 8. See specially Article 8(2)(a) and 8(5)(a)(c)(d)(f).

⁹² Consultation, paragraph 2.8.

⁹³ This is contrary to Ofcom's "Better Policy Making" guidance and to the CMA's guidelines for policymakers on competition impact assessments.

⁹⁴ The Act, section 4(6).

⁹⁵ Consultation, paragraph 4.29.

⁹⁶ Consultation, paragraph 4.30.

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approach (without justification). As to the recommendation for clarification, Ofcom could have chosen to provide clarificatory guidance on the specific circumstances in which geographic pricing would be considered to be discriminatory under the general non-discriminatory obligation. That approach would have been in accordance with the Common Position. Instead, however, Ofcom has chosen to impose a blanket prohibition on geographic pricing without any assessment of the underlying factual circumstances regarding likely effects or objective justification: this is the very opposite of the clarificatory case-by-case approach recommended by BEREC.

146. Further in relation to the recommendation on clarification, Ofcom has omitted to consider the detail of the Common Position. After the text quoted by Ofcom at paragraph 4.30 of the Consultation, the BEREC Common Position continues:

*“In cases where a general non-discrimination obligation (imposed under BP17) proves not to be sufficient to the particular issues faced by a specific market and / or product, NRAs could attempt to clarify, as far as possible, how a non-discrimination remedy will be interpreted in practice, via identification of forms of behaviour which will be considered to be discriminatory (e.g. providing lines at minor technical quality to alternatively operators). NRAs could implement such clarifications in various ways, for example either through explicit wording of the SMP obligation or via explanatory guidance which provides clarity as to the NRA’s interpretation of the obligation.”*⁹⁷

147. Two important points can be derived from this. First, BEREC considers that a more specific non-discrimination obligation may only be implemented where the general condition has been proved to be insufficient: there is no evidence to suggest that the general condition has been insufficient in this case as discussed above. Imposing a more specific obligation is therefore contrary to the BEREC Common Position. Further, Ofcom has not explained why explanatory guidance – setting out the circumstances in which it considers that geographic pricing would be discriminatory – would not be sufficient to remedy the alleged competition concerns that have given rise to the Proposal.
148. Finally, Ofcom refers to a further recommendation in the BEREC Common Position that NRAs should ensure that discounts are not discriminatory, and that volume discounts comply with the margin squeeze test. It is apparent from the description that accompanies this recommendation that this recommendation is concerned with predatory pricing which would not enable other operators to compete on a level playing field. Once again, however, the Proposal goes far beyond a prohibition on predatory pricing. Rather, it prohibits entirely legitimate pricing practices, interfering with Openreach’s ability properly to compete. The BEREC Common Position gives no support to this course of action.

Concerns about the Consultation

149. In addition to the concerns about the substantive lawfulness of the Proposal as set out above, Openreach also has concerns about the way in which Ofcom is consulting on the Proposal.
150. Openreach is concerned that the Consultation is deficient because it fails to set out all the information necessary for interested parties to comment meaningfully on the Proposal. More specifically, Openreach is disappointed that Ofcom did not liaise with Openreach in advance of the Consultation in order to investigate the extent of the competition concerns being alleged, possible solutions to address that alleged concern, and the impact of a geographic pricing ban. If Openreach had been consulted with in advance (in the same way that Ofcom was liaising with other CPs, including CityFibre and Vodafone), the Consultation could have included more evidence on the nature of the competition concern and the negative effects of the Proposal. This would have been important information for respondents. Absent this information, the Consultation does not set out the range of negative consequences. These consequences would be relevant to respondents and might have affected the views on the Consultation. In addition, there is no information on how the consent process will operate and in which circumstances

⁹⁷ BEREC Common Position, BP18a.

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consent will be granted.⁹⁸ Ofcom simply refers to “*appropriate circumstances*” where it might take a “*benign view of commercial reactions*”⁹⁹ to emerging competition but no further detail is presented to suggest weight might be given, among other things, to evidence of cost differentials, geographic demand characteristics, variation in cabinet utilisation, duration of offers, geographic focus of offers, etc.

151. In addition, Openreach is concerned about the Consultation being undertaken so late in the WLA market review process.¹⁰⁰ The Consultation was announced and published on 1 December 2017 and responses are due on 12 January 2018. In order to ensure that the new WLA market regulatory obligations are in place by 1 April 2018, and requirements to consult with the European Commission are complied with, a draft WLA Statement will need to be published mid-February, if not before. This draft will need to be finalised internally at Ofcom (including the necessary internal governance) before then. It therefore appears that Ofcom only has a handful of weeks to consider responses to the Consultation and undertake the further analysis Openreach considers is necessary. Openreach considers Ofcom has insufficient time to consider fully and take into account responses to the Consultation. This concern is particularly acute given the other ongoing moving pieces in the WLA market review which Ofcom continues to consider, including the fact that Ofcom is still requesting (using its formal information gathering powers) and obtaining significant new evidence on a range of other issues.
152. Against this background, and in light of concerns about the lawfulness of the Proposal, if Ofcom is nonetheless minded to proceed with the Proposal, Openreach would urge Ofcom to undertake a full and proper analysis of the risk and benefits of the Proposal, including gathering the necessary information to evidence the alleged competition issue that Ofcom is seeking to address and the assumed benefits that the Proposal will yield.
153. It strikes Openreach that there is no need to rush through this additional, novel and untested obligation so that it is implemented alongside the general WLA conditions to apply from 1 April 2018. Ofcom should take additional time to consider all submissions in full and collate the necessary evidence to support this additional regulatory obligation and potentially re-consult. In this regard, there is nothing in the Consultation or indeed the Vodafone/Cityfibre representations to suggest that there is an urgent need to have this remedy in place on 1 April 2018. Indeed, Openreach sees no potential negative consequences of delaying introduction of the Proposal.

⁹⁸ Indeed, given the lack of detail on the consent process, and further the concerns raised (in particular in relation to the uncertainty over the actual competition concern Ofcom is seeking to address), Openreach is concerned that the Proposal is not sufficiently transparent (see also the Act, section 47(2)(d)).

⁹⁹ Consultation, paragraph 4.11.

¹⁰⁰ Especially given that the concerns Ofcom seeks to address were raised with Ofcom as early as September 2017, see Consultation, footnotes 17 and 18.

Annex 1: Openreach discount schemes

The table below provides details of Openreach discount schemes from 2016 and 2017 that introduced geographically differentiated charges for VULA services. Links to notifications have been provided for 2017 briefings. As 2016 briefings have been archived, soft copies are embedded

| Offer | Notifications |
|---|--|
| <p>GEA-FTTC Discounted SIM Provide Rental Offer (3 months from February – April 2017)</p> | <p>15 December 2016:</p>  <p>NGA04216 GEA-FTTC PCP Only I</p> <p>List of eligible cabinets:</p>  <p>List of Eligible Cabinets_SIM Provid</p> |
| <p>GEA-FTTC Discounted SIM Provide PCP Only / Managed Install Offer (12 months from CP signing up to offer T&Cs - earliest start April 2017 and latest end June 2018)</p> | <p>28 March 2017 (initial notification): https://www.openreach.co.uk/orpg/home/updates/briefings/super-fastfibreaccessbriefings/super-fastfibreaccessbriefingsarticles/nga00917.do</p> <p>13 April 2017 (update to offer): https://www.openreach.co.uk/orpg/home/updates/briefings/super-fastfibreaccessbriefings/super-fastfibreaccessbriefingsarticles/nga01317.do</p> <p>List of eligible cabinets:</p>  <p>List of Eligible Cabinets_NGA offer.</p> |
| <p>GEA-FTTC Special Offer for slow lines regraded to 18/2 Mbps as part of 18/2 product trial (June 2016 – March 2017)</p> | <p>14 April 2016 (initial notification):</p>  <p>NGA01216 GEA - FTTC 18_2 Mbps SPE</p> <p>11 October 2016 (adding more eligible cabinets, expanding speed criteria and extending duration of offer)</p>  <p>NGA03216 GEA-FTTC 18_2 Mbp:</p> |
| <p>Chelsea Exchange Closure – GEA-FTTC Geographical Commercial Offer (July 2016 – May 2018)</p> | <p>19 May 2016 (initial notification):</p>  <p>gen03016 Chelsea Exchange Special Of</p> |