
Wholesale Local Access Market Review

Promoting network competition in superfast and ultrafast broadband

CONSULTATION:

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Closing Date for Responses: 12 January 2018

About this document

On 31 March 2017, we published our proposals for the regulation of the Wholesale Local Access (WLA) market, which is used to provide telephone and broadband internet services (including superfast broadband) to residential and business consumers. In this consultation, we set out further proposals for promoting competition for superfast and ultrafast services by preventing BT from targeting reduced wholesale charges in areas where rivals are starting to build new networks.

Our proposals are designed to encourage investment in new ultrafast networks, promote competition and deliver benefits for consumers.

We have set a deadline of 12 January 2018 for responses to this consultation.

We will take responses to this further consultation into account before reaching our final conclusions and publishing our statement on the review in early 2018, with new measures taking effect on 1 April 2018.

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1. Executive summary

- 1.1 On 31 March 2017, we published a number of documents setting out our proposals for the regulation of the Wholesale Local Access (WLA) market in the UK, excluding the Hull Area, from 1 April 2018 (March 2017 WLA Consultation).¹ We set out our view that BT continues to have significant market power (SMP) in that market, and we proposed a set of remedies designed to address our concerns arising from BT's SMP.
- 1.2 As part of our long-term strategy for digital communications markets, and in order to address the competition concerns arising from BT's SMP, we have designed our proposed remedies with a view to promoting greater infrastructure competition. One important way that infrastructure competition can deliver substantial benefits to consumers is by promoting greater innovation, particularly faster deployment of new ultrafast broadband networks.
- 1.3 We are starting to see signs of more investment in new ultrafast networks. BT has launched a consultation on fibre to the premises (FTTP), or 'full-fibre', deployment. CityFibre and Vodafone have announced a plan to roll out FTTP to cover one million homes by 2021, with a possible extension to five million homes. Hyperoptic and Gigaclear have each announced plans to expand their networks. In addition, Virgin Media continues with its Project Lightning investment.
- 1.4 Some respondents to our March 2017 WLA Consultation identified a concern that BT might seek to prevent or reduce competitive rollout of new ultrafast networks by reducing its wholesale prices in the areas where others are starting to roll out new networks.
- 1.5 We believe that this is a cause for concern, as such targeted behaviour by BT could weaken competitors' business cases for the deployment of new networks. This creates a risk that competitors cut back on their investment plans in geographic areas targeted by BT, and may be deterred from investing in other areas in anticipation of the threat of similar targeted responses by BT. The benefits to BT from reducing competitive pressures could be substantial and therefore we consider it may have an incentive to engage in such behaviour.
- 1.6 We recognise that BT might wish to vary its wholesale prices between different areas for reasons other than seeking to limit competition, although in general BT has maintained uniform national prices for the rental of superfast broadband. We believe that in circumstances where BT's competitors are only just beginning to deploy new networks, the risk of harm from deterring that investment is greater than any potential costs which might arise from constraining BT's ability to introduce targeted discounts. We consider that wholesale price variations by geographic area would constitute undue discrimination in these circumstances.

¹ We refer to the Ofcom, 2017. *Wholesale Local Access Market Review – Consultation on the proposed market, market power determinations and remedies – Volume 1* <https://www.ofcom.org.uk/consultations-and-statements/category-1/wholesale-local-access-market-review>.

- 1.7 Accordingly, we are consulting on a proposal to introduce a new clause in the draft SMP conditions to specify that such targeted discounting will amount to undue discrimination. In effect, this would impose a restriction on BT's ability to vary its wholesale rental charges, in its fibre to the cabinet (FTTC) footprint, between different areas.

Consultation and next steps

- 1.8 We invite comments from stakeholders on the proposal in this consultation. The deadline for responses is 12 January 2018. Annexes 1 to 4 set out the process for responding to the consultation.
- 1.9 The proposals set out in this consultation form part of our overall proposals for the WLA market in the UK excluding the Hull Area. We have not at this stage taken any decisions in relation to other aspects of the proposals set out in our March 2017 WLA Consultation. We are currently considering all consultation responses and undertaking further analysis and information gathering before deciding on appropriate next steps. We therefore invite comments from stakeholders on the proposals in this consultation and their impact on our March 2017 WLA proposals. We are not in this document seeking further representations on the broader proposals set out in our March 2017 WLA Consultation.
- 1.10 We expect to publish our final decision in a statement in early 2018, with new measures taking effect on 1 April 2018.

2. Introduction

Greater network competition has the potential to deliver significant consumer benefits

- 2.1 We set out in our March 2017 WLA Consultation how greater network competition has the potential to deliver significant consumer benefits in retail services.²
- 2.2 We consider that there are significant benefits to consumers from competition based on rivals investing in their own networks, compared to competition based on regulated access to BT's network and wholesale services.³ In particular, network competition provides much greater scope for product differentiation and is a more effective spur for innovation (from both BT and its competitors). For example, investing in their own networks gives providers full control over the quality of service provided. Absent competition, BT's SMP creates several adverse effects for consumers, namely a lack of choice of services, weaker incentives to invest and innovate (i.e. including to invest in new technologies), risk of high retail prices and lower levels of quality. Network competition is therefore a powerful driver of continued investment in high quality networks, delivering long-term benefits to consumers. By exposing more of the value chain to competition, network competition also provides strong incentives for firms to innovate, to become more efficient and reduce costs.⁴
- 2.3 Historically, we have seen benefits from network competition. BT announced its rollout of superfast broadband shortly after Virgin Media's upgrade to DOCSIS 3.0.⁵ Similarly BT's recent announcement on G.fast investment plans was made in the context of Virgin Media offering a maximum service speed of 200 Mbit/s compared to a maximum of 80 Mbit/s available from Openreach using its FTTC network.
- 2.4 In our Strategic Review of Digital Communications,⁶ we set out our long-term vision to encourage investment in large-scale competing broadband networks. As such, in developing remedies to address the competition concerns for this market review period, we have, where appropriate, adopted an approach that we consider will promote greater network competition.
- 2.5 In this consultation, we consider further measures to address the risk that BT might respond to entry in ways that could undermine investment in nascent competitive networks.

² March 2017 WLA Consultation, paragraphs 4.6-4.15.

³ We generally prefer competition to regulation as competition can spur a market on in ways that regulation can do only in an imperfect way. In addition to encouraging innovation and bringing forward investment in FTTP with its inherent benefits, increased network competition will reduce reliance on regulation to deliver good outcomes for consumers.

⁴ Without network competition, even vigorous competition between service providers will not prevent customers being disadvantaged by inefficient, poor quality or otherwise sub-optimal choices concerning the underlying network.

⁵ 2016 Strategic Review, paragraph 4.11.

⁶ Ofcom, February 2016. Initial Conclusions of our Strategic Review of Digital Communications,

https://www.ofcom.org.uk/_data/assets/pdf_file/0016/50416/dcr-statement.pdf.

Regulatory Framework

- 2.6 The regulatory framework for market reviews is set out in UK legislation and is transposed from five EU Directives. These Directives impose a number of obligations on relevant regulatory authorities, such as Ofcom, one of which is to carry out periodic reviews of certain electronic communications markets.
- 2.7 We have set out the relevant regulatory framework in our March 2017 WLA Consultation and reference should be made to that document for further detail.⁷

Impact Assessment and Equality Impact Assessment

Impact Assessment

- 2.8 The analysis presented both in the March 2017 WLA Consultation and in this consultation constitutes an impact assessment as defined in section 7 of the Act.
- 2.9 Impact assessments provide a valuable way of assessing the options for regulation and showing why the chosen option was preferred. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that, generally, we have to carry out impact assessments in cases where our conclusions would be likely to have a significant effect on businesses or the general public, or where there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out impact assessments in relation to the great majority of our policy decisions.⁸

Equality Impact Assessment (EIA)

- 2.10 Annex 7 of the March 2017 WLA Consultation sets out our EIA for the WLA Market Review. Ofcom is required by statute to assess the potential impact of all our functions, policies, projects and practices on race, disability and gender equality. EIAs also assist us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity.
- 2.11 It is not apparent to us that the outcome of our review (including the revised proposals set out in this consultation) is likely to have any particular impact on race, disability and gender equality. More generally, we do not envisage the impact of any outcome to be to the detriment of any group of society. Nor do we consider it necessary to carry out separate EIAs in relation to race or gender equality or equality schemes under the Northern Ireland and Disability Equality Schemes.

⁷ We set out the applicable regulatory framework and the approach to market definition and SMP assessment in more detail in Annexes 5 and 6 of the March 2017 WLA Consultation.

⁸ For further information, see Ofcom, 2005. *Better Policy Making: Ofcom's approach to Impact Assessment*, https://www.ofcom.org.uk/data/assets/pdf_file/0029/45596/condoc.pdf.

Consultation period

- 2.12 The deadline for responses to this consultation is 12 January 2018. Annexes 1 to 4 set out the process for responding to the consultation. Our proposed legal instrument is set out in Annex 5.

3. Risk that BT's pricing behaviour may undermine competitive investment

Recent developments

- 3.1 In addressing the competition concerns identified as arising from BT's SMP, our WLA proposals have sought to promote greater network competition. Our Duct and Pole Access proposals⁹ seek to reduce the costs of and barriers to new network rollout. Our proposals for superfast broadband pricing, in this review period and over time, seek to give BT and its competitors incentives to invest (whether using DPA or building new end-to-end networks) while balancing the need to protect competition and ultimately consumers.
- 3.2 We note several developments since the publication of our March 2017 WLA Consultation that suggest increased appetite for ultrafast network deployment. CityFibre has announced its plan to roll out FTTP to 1 million premises in 12 cities over the next four years in partnership with Vodafone – with a possible extension to up to 5 million premises¹⁰, and BT has consulted on co-investment plans to reach 10 million premises.¹¹ Other developments include an announcement by Hyperoptic of its ambition to pass 2 million homes by 2022¹², and Gigaclear's continued expansion in mainly in rural areas.¹³ We also note the ongoing plans by BT, who have an ambition to pass 2 million homes with FTTP by 2020¹⁴, and Virgin Media who plan to make ultrafast speeds available to an additional 4 million premises by 2020.¹⁵
- 3.3 Further, BT has announced the launch of G.fast, a new technology that will enable it to more directly compete with services delivered over rival FTTP networks. In pilots of the service, BT has used G.fast to deliver speeds of up to 330 Mbit/s over existing copper lines in combination with fibre-to-the-cabinet. BT intends to make this service available to 10 million homes by the end of 2020.¹⁶

⁹ Wholesale local access market review: duct and pole access remedies <https://www.ofcom.org.uk/consultations-and-statements/category-2/duct-pole-access-remedies>.

¹⁰ CityFibre, November 2017. *Vodafone and CityFibre bring gigabit-speed fibre to the UK*.

<https://www.cityfibre.com/news/vodafone-cityfibre-bring-gigabit-speed-fibre-uk/> [accessed 29 November 2017].

¹¹ BT, July 2017. *Openreach seeks support to future-proof digital Britain*.

<http://www.btplc.com/news/#/pressreleases/openreach-seeks-support-to-future-proof-digital-britain-2070816> [accessed 29 November 2017].

¹² Hyperoptic, 2017. *Hyperoptic hits '100 developer' milestone*. <https://www.hyperoptic.com/press/posts/hyperoptic-hits-100-developer-milestone/> [accessed 28 November 2017].

¹³ Gigaclear, 2017. *Announcements*. <https://www.gigaclear.com/news/announcements/> [accessed 29 November 2017].

¹⁴ BT, 2016. *BT to invest billions more on fibre, 4G and customer service*. <http://www.btplc.com/News/#/pressreleases/bt-to-invest-billions-more-on-fibre-4g-and-customer-service-1394948> [accessed 28 November 2017].

¹⁵ Virgin Media, 2017. *Network expansion*. <http://www.virginmedia.com/lightning/network-expansion> [accessed 29 November 2017].

¹⁶ Openreach, *Ultrafast fibre G.fast*. <https://www.homeandbusiness.openreach.co.uk/fibre-broadband/ultrafast-broadband/ultrafast-fibre-g.fast> [Accessed 30 October 2017].

Stakeholder concerns

- 3.4 We received several responses to our March 2017 WLA Consultation that focussed on the impact of our proposed remedies on telecoms providers' investment incentives. Vodafone and CityFibre in particular said that there is a risk that BT would respond to competitive FTTP investment, or the threat of investment, by defensive overbuild and/or introducing geographic price discounts targeted at areas of early rollout by rivals. They argued that such conduct would undermine competitors' willingness to invest in FTTP.
- 3.5 Vodafone expressed concerns that BT's ability as a vertically integrated telecoms provider could enable BT (and other telecoms providers using the Openreach network) to compete more fiercely at the retail level.¹⁷ Vodafone argues retail price competition, while expected, should not be facilitated by strategic behaviour at the wholesale level by an SMP operator.
- 3.6 Vodafone notes that while over the short-term consumers would benefit from lower prices induced by retail price competition, over the longer term the interest of consumers is better served by competition. Vodafone argues if BT is ultimately successful in harming and/or deterring new entry then price competition will be of limited duration and consumer choice will be limited.
- 3.7 CityFibre also expressed concern that Openreach is likely to use the pricing flexibility proposed by Ofcom for superfast broadband access services in excess of 100 Mbit/s to undermine competitor rollout of FTTP services.¹⁸
- 3.8 Specifically, CityFibre set out its concern that BT could price services in excess of 100 Mbit/s below the level that can be replicated by a reasonably efficient entrant in the areas subject to competitive investment in full-fibre ultrafast services. CityFibre argues that in those circumstances a substantial number of potential customers on the new network would move to Openreach's G.fast services and as a consequence would be unlikely to move to FTTP in the short and medium-term.¹⁹

Competition concerns

- 3.9 We have considered further the risk that BT might respond to entry in ways that could undermine investment in nascent competitive networks. In the following section we explain the risks that competition may be distorted, and new competitive investment undermined by a geographically targeted price response from BT. We therefore propose measures to address these risks.

¹⁷ Letter from Vodafone to Ofcom dated 6 October 2017.

https://www.ofcom.org.uk/data/assets/pdf_file/0020/108371/vodafone-letter.pdf, page 2.

¹⁸ CityFibre, September 2017. "Pricing of >100Mbps local access services by Openreach during competitive CP FTTP network roll-out", https://www.ofcom.org.uk/data/assets/pdf_file/0019/108370/cityfibre-letter.pdf, paragraph 1.1.2.

¹⁹ CityFibre, September 2017. "Pricing of >100Mbps local access services by Openreach during competitive CP FTTP network roll-out", https://www.ofcom.org.uk/data/assets/pdf_file/0019/108370/cityfibre-letter.pdf, paragraph 2.1.2.

4. Proposed restriction on BT's ability to target price discounts

BT has the incentive and ability to undermine emerging network competition using targeted wholesale price cuts

- 4.1 Geographically targeted wholesale price cuts could adversely affect the returns that a new build entrant makes on its investment by facilitating retail price reductions and by making it less likely that broadband retailers would switch their business to a new network operator.
- 4.2 Such targeted price reductions by BT could deter rivals from investing in competing networks. This could happen either where BT cuts prices ahead of build occurring (e.g. in response to an announcement of rollout), or because rivals anticipate a strong targeted response after they have rolled out their new network. The impact of such targeted conduct on the potential for the development of network competition may be considerable if responses to new network competition in one geographic area dissuade rivals from investing in competing networks in other areas. This potential to discourage wider network competition may give BT a greater incentive to engage in targeted price reductions in the areas where rollout is expected soonest. Further, as wholesale price reductions can facilitate retail price reductions by other telecoms providers using the Openreach network, as well as BT itself, the effect on a new build entrant could be amplified.
- 4.3 By deterring investments in competing networks, BT benefits from avoiding the pressure of network competition. The payoffs to BT from this could be large. We note that there are some parallels to when BT's rivals began investing in copper-based local loop unbundling (LLU) around 2005. Then, as now, a new technology enabled rivals to compete more effectively with BT in the provision of retail telephony and broadband services. Following competitors' initial investments in LLU-based services, BT reduced prices for its wholesale broadband access product in dense exchanges where competition was most likely to emerge.²⁰ BT's retail broadband competitors faced the choice of either buying a wholesale broadband service from BT to resell to subscribers, or investing in LLU to have more control over the line and potentially sell wholesale services. At the time, LLU operators were concerned about the threat of unpredictable margin erosion by BT which would foreclose competition based on LLU.²¹ BT subsequently committed voluntarily not to

²⁰ Ofcom, November 2006, *Review of the wholesale broadband access markets 2006/07*, paragraph 4.157. https://www.ofcom.org.uk/data/assets/pdf_file/0028/28666/wbamr.pdf.

²¹ Ofcom, Telecommunications Statement, page 5. https://www.ofcom.org.uk/data/assets/pdf_file/0017/38006/main.pdf.

introduce geographically targeted price reductions.²² As we have explained above, potential investors in FTTP today are concerned BT could target price cuts for superfast and ultrafast services to foreclose competition for similar reasons.

- 4.4 We consider that competition law and the remedies proposed in our March 2017 WLA Consultation would not be sufficient to address these concerns. First, our charge controls on GEA 40/10 and MPF set a cap, but not a floor, for charges, and investors might be unclear how the fair and reasonable condition would apply to excessively low prices and targeted discounting. Second, competition law, which would focus on preventing BT from abusing a dominant position, would not be effective in addressing our concerns. Our regulatory objectives in this review are broader, and extend to promoting competition, including network based competition through the rollout of new high-speed networks, to address concerns arising from BT's SMP. In pursuit of these objectives we are not concerned only with preventing anticompetitive foreclosure against a competition law abuse of dominance position. Moreover, *ex ante* regulation can more effectively address the specific risk of conduct occurring in the market review period. Under our proposals it would be clearer up-front to BT and potential competitors what conduct is and is not permitted. This ensures transparency and promotes regulatory certainty. In contrast, *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.
- 4.5 We therefore consider that there is a risk that BT has the ability and incentives to target price cuts in areas where new build occurs or is anticipated, and that this creates a risk of dampening incentives for competitive investment to occur.²³ We have therefore considered measures that may be taken to address this concern.

Prohibition on targeted discounting

- 4.6 If we do not address the concern identified above, there is a risk that BT would diverge from its practice of national pricing through targeted wholesale price reductions in areas subject to competitive investment. We believe that if BT were to introduce geographically targeted wholesale price cuts, that would constitute undue discrimination in current circumstances. The risk is that BT would be setting different prices in different areas according to whether entry had occurred or not, not in response to other factors such as

²² Around the time of the 2006/07 review of the wholesale broadband access markets BT made pricing commitments to the industry and to Ofcom. One of these commitments relates to floors for future broadband pricing, and BT commits to providing a period of stability to LLU by not introducing geographically targeted reductions, below a certain level, to its wholesale broadband prices. These commitments were set out in two letters, dated 10 November 2006, which were sent to Ofcom. These letters, along with Ofcom's response, are available on Ofcom's website. <https://web.archive.org/web/20100329095228/www.ofcom.org.uk/telecoms/ioi/bbpricing>.

²³ In our view, the remedies proposed are appropriate having regard to BT's section 89C Notification which, like the Undertakings in previous reviews, will complement the SMP regulation that we are proposing on BT.

cost variations.²⁴ That discrimination may therefore undermine or otherwise distort potential competition.

- 4.7 In order to address the competition concern identified above, therefore, we propose to introduce a new clause in the draft SMP conditions to specify that such conduct would amount to undue discrimination. This will make clear that BT is prohibited from targeting areas of competitive entry by varying its wholesale rental prices by geography for this review period. In effect, this would require BT to maintain its uniform national pricing approach for Openreach's GEA-FTTC rental services and G.fast. While we are trying to promote competition in superfast and ultrafast broadband services, we recognise that the benefits of this provision could be undermined if BT were able to target price cuts to services currently used alongside GEA-FTTC to deliver SFBB and UFBB (i.e. MPF and WLR). We are therefore also proposing that the restriction would apply to the copper bearer necessary for any GEA-FTTC service.
- 4.8 We do not propose that this measure should extend to BT's GEA-FOTP services. We consider that extending the policy to GEA-FOTP services would do little to help nascent network investment by rivals. This is because BT could not quickly change prices for FOTP services because it would itself need to deploy an FOTP network, and in any case given BT's current limited plans for FOTP it is likely that any overlap with competitor FOTP would be small. In contrast, it could rapidly change prices for existing services and for new services such as G.fast, which are quicker to deploy than FOTP.
- 4.9 Unlike setting a charge control such as a price floor (see below), an additional specification of the no undue discrimination measure is simple to implement and monitor in the broader context of pricing flexibility for superfast (above 40/10) and ultrafast services. It promotes transparency and regulatory certainty in that it will give a clear signal to potential entrants and investors that they will be able to rely on. We consider that it will directly address the potential harm we have identified and reduce the risks faced by potential entrants and therefore improve the prospects for competing network investments.
- 4.10 We recognise that there could be some costs associated with our proposals. In particular, there may be circumstances where BT might wish to cut wholesale charges locally simply because that is BT's best commercial option given that entry has occurred. So long as this competition does not itself dissuade entry from occurring in the first place, it is likely to have benefits for consumers and therefore we would not normally want to prevent it.
- 4.11 However, having regard to our strategic objectives in this review and the nascent emergence of competing networks, 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

²⁴ We recognise that there are variations in costs by geographic area. It is possible that areas where entry occurs are relatively low cost. However, targeted price reductions may nevertheless be regarded as discriminatory, for example if prices were reduced not for all areas that have lower costs, but only for those areas where rivals may want to build networks.

potential entrants' incentives to invest in the first place. 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 entry. Moreover, even if we were to take a benign view of commercial reactions of the types described, it would not be practicable for us to distinguish between such reactions and those that are motivated by exclusionary considerations, seeking to pre-empt or punish entry in one area to dissuade a larger scale entry programme gaining traction. Where there are appropriate circumstances, however, our proposed SMP condition 4.1 enables Ofcom to consent to conduct that would otherwise fall within the scope of the restriction.

- 4.12 These limits on BT's ability to respond to competition on a targeted basis are unlikely to entail significant costs to consumers. Initially at least, and certainly over the upcoming market review period, the footprint of a new network will be limited, and BT will retain the ability to alter its prices on a national basis. The short-term cost to consumers of limiting a targeted response is therefore likely to be limited in this market review period to only the relatively small proportion of premises that could also access the new network. Accordingly, preventing BT from responding to entry in these areas on a targeted basis with wholesale price cuts is unlikely to forgo gains from price competition on a large scale.
- 4.13 Weighed against this short-term cost, the potential benefits could be considerable. In particular, it is possible that targeted discounting in the areas where there is early rollout may discourage more extensive network rollout. The potential benefits could therefore apply to a larger proportion of consumers, and has the potential to lead to enduring competition for the life of the new networks. We therefore consider the benefits to consumers from more network competition are likely to outweigh the costs of limiting BT's ability to respond to competition.

Retail prices

- 4.14 Since BT is vertically integrated, it could potentially target price reductions at the retail level. Our proposals to prevent geographically targeted wholesale price discounts would not prevent this. However, we do not think it would be proportionate to introduce additional measures at this stage to restrict BT's retail pricing. Introducing restrictions on BT's retail pricing would entail a major intervention in retail markets that are currently broadly competitive and which we do not regulate. We also note that the extent to which BT can cut retail prices is constrained by proposals in our March 2017 WLA Consultation. We proposed a fair and reasonable charges obligation on services that were not charge controlled (so including VULA services with speeds over 40/10²⁵), which we proposed to interpret as maintaining excessively high charges, or prices that may result in margin squeeze.²⁶ We said that we would be concerned if the margin on BT's fibre services was such that retail telecoms providers would be unable to offer these services profitably. As a

²⁵ 40 Mbit/s download, 10 Mbit/s upload speed.

²⁶ March 2017 WLA Consultation, paragraphs 5.11 and 9.22.

result, our proposals do provide some protection in respect of BT's ability to reduce retail prices whenever retail price reductions are not paired with wholesale price reductions.

Price floor

- 4.15 In its submission, CityFibre argued for a price floor for services in excess of 100 Mbit/s at the level of a reasonable efficient operator's (REO) Long Run Incremental Cost.²⁷ We have therefore also considered if we should introduce a price floor for BT's higher bandwidth products.
- 4.16 A price floor for BT's services in excess of 100 Mbit/s would affect BT's announced G.fast services. Because G.fast uses Openreach's existing network, it could enable millions of households to access ultrafast speeds earlier than if they had to wait for an FTTP connection. As G.fast is a new technology with uncertain cost and demand, it would be challenging to determine the correct price floor, increasing the scope for regulatory error.
- 4.17 We do not wish to unduly restrict BT's pricing flexibility for a new product, for example by preventing BT from experimenting with pricing. Moreover, 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. Our requirement that wholesale G.fast prices should be set without geographic variations will reinforce this.
- 4.18 We recognise that the potential concerns would be stronger if BT's rollout of G.fast itself appeared to be targeted at areas where rival investment was being developed. At this stage we do not have evidence or expectation that this will be the case.²⁸
- 4.19 Accordingly, we are not minded to pursue this option further.

Implementation

- 4.20 We propose to implement this proposed measure by amending the existing no undue discrimination obligation in draft SMP condition 4 to specify that the following conduct will be deemed to be undue discrimination: charging different prices in different geographic areas for rental services used to provide network access to Virtual Unbundled Local Access ("VULA"), other than VULA that is provided over GEA-FTTP, or for other rental services where those services are being provided in conjunction with such a VULA service for the purposes of providing electronic communications services to end users.²⁹

²⁷ CityFibre, September 2017. "Pricing of >100Mbps local access services by Openreach during competitive CP FTTP network roll-out", https://www.ofcom.org.uk/data/assets/pdf_file/0019/108370/cityfibre-letter.pdf, paragraph 1.1.2.

²⁸ As we discussed above, BT has announced it is making G.fast available to 10m customers over this review period, while in the longer term we hope for competitive investment to reach a similar number of premises, we envisage a much smaller rollout over this review period.

²⁹ We also propose that this provision would apply to BT's SOGEA service once that is launched.

Legal tests

- 4.21 We are satisfied that the proposed condition for BT in the WLA market in the UK excluding the Hull Area meets the various tests in the Act. As we explained at paragraph 5.59 of our March 2017 WLA Consultation, section 87(6)(a) of the Act gives Ofcom a power to impose “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”.
- 4.22 As we have previously explained, this provision implements in domestic law and has the same meaning as Article 10 of the Access Directive, which provides that Ofcom may “impose obligations of non-discrimination, in relation to interconnection and/or access”.
- 4.23 Targeted discounting is a form of price discrimination. Non-discrimination can have different forms of implementation. We typically impose a non-discrimination obligation as a complementary remedy to the network access obligation, 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. Without such an obligation, the dominant provider has the ability and incentive to provide wholesale network access on terms and conditions that discriminate in favour of its own downstream divisions.
- 4.24 Our proposed measure in this consultation addresses a different but complementary objective: preventing BT from potentially undermining or otherwise distorting competition by discriminating in its provision of network access between different geographic areas by way of its prices for rental services in the WLA market. This is consistent with recital 17 of the Access Directive which confirms that “The principle of non-discrimination *ensures that undertakings with market power do not distort competition*, in particular where they are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets” (emphasis added).
- 4.25 We consider that our proposal will further the fulfilment of our duties under sections 3 and 4 of the Act. 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. We are required to secure, in carrying out our functions, among other things, the availability throughout the UK of a wide range of electronic communications services (section 3(2)(b) of the Act). Section 3(4) of the Act also sets out list of matters to which we must have regard where they are relevant to the circumstances. In this context, we consider the following matters to be relevant: the desirability of promoting competition in relevant markets (section 3(4)(a)), the desirability of encouraging investment and innovation in relevant markets (section 3(4)(d)), and the desirability of encouraging the availability and use of high speed data transfer services throughout the UK (section 3(4)(e)).
- 4.26 The Community requirements in section 4 of the Act reflect the regulatory objectives set out in Article 8 of the Framework Directive. The first and fifth Community requirements in

section 4 are also particularly relevant in this context. Section 4(3) of the Act provides that the first Community requirement is a requirement to promote competition. Section 4(7) of the Act provides that the fifth Community requirement is the requirement to encourage the provision of network access for the purpose of securing efficiency and sustainable competition, efficient investment and innovation, and maximum benefits for the ultimate consumers of these services.

4.27 We also consider that the proposed conditions meet the criteria in Section 47(2) of the Act which require conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. The proposed conditions are:

- objectively justifiable, in that we have identified as a competition concern BT's ability and incentive in the provision of network access to target wholesale price discounts in areas that are subject to competitive investment in high speed fibre networks. Our proposal prevents such behaviour and thereby seeks to ensure that potential competition develops to the ultimate benefit of consumers;
- not unduly discriminatory, in that the proposal is to apply to BT which is the only telecoms provider which we propose to find has SMP in the WLA market in the UK excluding the Hull Area;
- proportionate, in that it seeks to prevent undue discrimination that has the potential to adversely affect competition and ultimately cause detriment to consumers. Moreover, the proposal specifically targets conduct we have identified as a concern and goes no further than is necessary to fulfil this objective; and
- transparent in relation to what it is intended to achieve, in that it is clear that the objective of the proposed measure is to address the specific competition concern of targeted discounting that we have identified in this consultation.

4.28 For the reasons set out above, we consider that the proposed condition is appropriate to address the competition concerns identified, in line with section 87(1) of the Act.

The BEREC Common Position

4.29 We have also taken utmost account of the BEREC Common Position. In relation to achieving the objective of a level playing field, the BEREC Common Position identifies the following competition issues which arise frequently³⁰:

“Alternative operators may not be able to compete on a level playing field which may result in SMP players: having an unfair advantage; having unmatched advantage, by virtue of their economies of scale and scope, especially if derived from a position of incumbency; discriminating in favour of their own group business (or between its own wholesale customers), either on price or non-price issues; and/or exhibiting obstructive and foot-dragging behaviour.”

³⁰ BEREC Common position on best practice in remedies on the market for wholesale (physical) network infrastructure access at a fixed location imposed as a consequence of a position of significant market power in the relevant market, pages 9-10.

4.30 In this respect, the BEREC Common Position identifies, amongst other things, as best practice that:

“BP17 NRAs should impose a general obligation of non-discrimination.

BP18 NRAs should further clarify how the non-discrimination obligation is to be interpreted on a case-by-case basis.”

4.31 In relation to achieving the objective of enabling a viable business case, the BEREC Common Position identifies the following competition issues which arise frequently³¹:

“SMP operators offer pricing schemes / prices not allowing alternative operators to compete on a level playing field and/or enabling a viable business case. SMP operators offer pricing schemes on a discriminatory basis, or prices which do not allow a sufficient margin. In case of long-run upfront commitments SMP operators offer prices not only reflecting the reduction of the risk for the investor.”

4.32 In this respect, the BEREC Common Position identifies, among other things, as best practice that:

“BP57 NRAs should ensure that discounts are not discriminatory. NRAs should ensure that volume discounts comply with their margin squeeze test (see BP49).”

Consultation question: Do you agree with our proposal to amend the no undue discrimination remedy to specify that BT cannot target discounts for its wholesale local access services providing, or integral to providing, VULA (excluding FTTP) in particular areas? Please provide your reasons and any evidence in support of your views.

³¹ BEREC Common position on best practice in remedies on the market for wholesale (physical) network infrastructure access at a fixed location imposed as a consequence of a position of significant market power in the relevant market, page 19.

A1. Responding to this consultation

How to respond

- A1.1 Ofcom would like to receive views and comments on the issues raised in this document, by 5pm on 12 January 2018.
- A1.2 You can download a response form from <https://www.ofcom.org.uk/consultations-and-statements/category-2/wla-competition-superfast-ultrafast-broadband>. You can return this by email or post to the address provided in the response form.
- A1.3 If your response is a large file, or has supporting charts, tables or other data, please email it to wla2017@ofcom.org.uk, as an attachment in Microsoft Word format, together with the cover sheet (<https://www.ofcom.org.uk/consultations-and-statements/consultation-response-coversheet>). This email address is for this consultation only, and will not be valid after 31 March 2018.
- A1.4 Responses may alternatively be posted to the address below, marked with the title of the consultation:
- WLA 2017 team
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- A1.5 We welcome responses in formats other than print, for example an audio recording or a British Sign Language video. To respond in BSL:
- Send us a recording of you signing your response. This should be no longer than 5 minutes. Suitable file formats are DVDs, wmv or QuickTime files. Or
 - Upload a video of you signing your response directly to YouTube (or another hosting site) and send us the link.
- A1.6 We will publish a transcript of any audio or video responses we receive (unless your response is confidential)
- A1.7 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt if your response is submitted via the online web form, but not otherwise.
- A1.8 You do not have to answer all the questions in the consultation if you do not have a view; a short response on just one point is fine. We also welcome joint responses.
- A1.9 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The question is listed at Annex 4. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.

- A1.10 If you want to discuss the issues and questions raised in this consultation, please contact Heli Frosterus on 020 7981 3404, or by email to heli.frosterus@ofcom.org.uk.

Confidentiality

- A1.11 Consultations are more effective if we publish the responses before the consultation period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents' views, we usually publish all responses on our website, www.ofcom.org.uk, as soon as we receive them.
- A1.12 If you think your response should be kept confidential, please specify which part(s) this applies to, and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.
- A1.13 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.14 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further at <https://www.ofcom.org.uk/about-ofcom/website/terms-of-use>.

Next steps

- A1.15 Following this consultation period, Ofcom plans to publish a statement in early 2018.
- A1.16 If you wish, you can register to receive mail updates alerting you to new Ofcom publications; for more details please see <https://www.ofcom.org.uk/about-ofcom/latest/email-updates>

Ofcom's consultation processes

- A1.17 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 2.
- A1.18 If you have any comments or suggestions on how we manage our consultations, please email us at consult@ofcom.org.uk. We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.19 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact Steve Gettings, Ofcom's consultation champion:

Steve Gettings
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA
Email: corporationsecretary@ofcom.org.uk

A2. Ofcom's consultation principles

Ofcom has seven principles that it follows for every public written consultation:

Before the consultation

- A2.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

During the consultation

- A2.2 We will be clear about whom we are consulting, why, on what questions and for how long.
- A2.3 We will make the consultation document as short and simple as possible, with a summary of no more than two pages. We will try to make it as easy as possible for people to give us a written response. If the consultation is complicated, we may provide a short Plain English / Cymraeg Clir guide, to help smaller organisations or individuals who would not otherwise be able to spare the time to share their views.
- A2.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.
- A2.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.
- A2.6 If we are not able to follow any of these seven principles, we will explain why.

After the consultation

- A2.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish all the responses on our website as soon as we receive them. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.

A3. Consultation coversheet

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts? _____

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

A4. Consultation question

Question 1: Do you agree with our proposal to amend the no undue discrimination remedy to specify that BT cannot target discounts for its wholesale local access services providing, or integral to providing, VULA (excluding FTTP) in particular areas? Please provide your reasons and any evidence in support of your views.

A5. Annex 5

Draft legal instruments

Proposals for SMP services conditions

NOTIFICATION OF PROPOSALS UNDER SECTION 48A OF THE COMMUNICATIONS ACT 2003

Proposals for setting SMP services conditions in relation to BT under section 45 of the Communications Act 2003

Background

1. On 31 March 2017, Ofcom published a consultation entitled “Wholesale Local Access Market Review 2017”³² (the “**2017 WLA Consultation**”). The 2017 WLA Consultation set out Ofcom’s proposals to identify the market for the supply of copper loop-based, cable-based and fibre-based wholesale local access at a fixed location in the United Kingdom excluding the Hull Area for the purpose of making a determination that BT has significant market power in relation to that identified market. As a result of this proposed significant market power determination, Ofcom proposed to set SMP conditions on BT under section 45 of the Act.
2. The proposed market power determination and the proposed SMP conditions are set out in the notification under sections 48A and 80A of the Act, at Annex 23 of the 2017 WLA Consultation (the “**March 2017 Notification**”).
3. On 20 April 2017, Ofcom published a consultation entitled “*Wholesale Local Access Market Review: Consultation on Duct and Pole Access remedies*”³³ (the “**April 2017 DPA Consultation**”). The April 2017 DPA Consultation set out Ofcom’s proposals in relation to duct and pole access, including proposals to set further SMP conditions on BT under section 45 of the Act which are set out in a notification under section 48A of the Act at Annex 8 (the “**April 2017 Notification**”).
4. On 1 August 2017, Ofcom published a consultation entitled “*Wholesale Local Access Market Review: Consultation on pricing proposals for Duct and Pole Access remedies*”³⁴ (the “**August 2017 DPA Pricing Consultation**”). The August 2017 DPA Pricing Consultation set out Ofcom’s proposals in relation to duct and pole access pricing and regulatory financial reporting, including proposals to set further SMP conditions on BT under section 45 of the Act which

³² <https://www.ofcom.org.uk/consultations-and-statements/category-1/wholesale-local-access-market-review>

³³ https://www.ofcom.org.uk/data/assets/pdf_file/0008/101051/duct-pole-access-remedies-consultation.pdf

³⁴ https://www.ofcom.org.uk/data/assets/pdf_file/0019/105427/consultation-dpa-pricing.pdf

are set out in a notification under section 48A of the Act at Annex 8 (the “**August 2017 Notification**”).

5. On 9 August 2017, Ofcom published a consultation entitled “Wholesale Local Access Market review – Recovering the costs of investment in network expansion”³⁵ (the “**WLA Network Expansion Consultation**”). Annex 5 to the WLA Network Expansion Consultation set out the notification under section 48A of the Act (the “**WLA Network Expansion Notification**”) in which Ofcom proposed to amend SMP condition 7B (VULA charge control) set out in Schedule 1 to the March 2017 WLA Notification by replacing it with the condition 7B set out in the Schedule to the WLA Network Expansion Notification.
6. On 14 September 2017 Ofcom published a consultation entitled “Wholesale Local Access Market Review, Further Consultation on proposed charge control for wholesale standard and superfast broadband”³⁶ (the “**September 2017 WLA Consultation**”) setting out further proposals on specific issues that have the effect of changing the levels of the charge controls proposed in the March 2017 WLA Consultation including proposals to set further SMP conditions on BT under section 45 of the Act which are set out in a notification under section 48A of the Act at Annex 8 (the “**September 2017 Notification**”).

Proposals in this notification

7. With reference to the proposed significant market power determination and the proposals in the March 2017 Notification (as amended by the April 2017 Notification, the August 2017 Notification, the WLA Network Expansion Notification and the September 2017 Notification) Ofcom is proposing to set a further SMP condition in relation to the market identified in paragraph 1 above.
8. The SMP condition referred to in paragraph 7 above comprises of Ofcom’s proposals relating to non-discrimination in the market identified in paragraph 1 above and is shown as an amendment to proposed condition 4 in the Schedule to this notification (changes to the previous version of SMP condition 4 as proposed in the March 2017 Notification and amended pursuant to the April 2017 Notification are shown in underlined italics).
9. The SMP condition as set out in the Schedule to this notification is to be applied to BT to the extent specified in that Schedule and shall, unless otherwise is stated in that Schedule, take effect from 1 April 2018 or such other date specified in any notification under sections 48(1) and 79(4) of the Act adopting the proposals set out in this Notification.

³⁵ https://www.ofcom.org.uk/data/assets/pdf_file/0022/105682/Recovering-the-costs-of-investment-in-network-expansion.pdf

³⁶ https://www.ofcom.org.uk/data/assets/pdf_file/0023/106448/Proposed-charge-control-for-wholesale-standard-and-superfast-broadband.pdf

Ofcom's duties and legal tests

10. The effect of, and Ofcom's reasons for making, the proposals in relation to SMP conditions referred to in this notification are set out in the consultation document accompanying this notification.
11. Ofcom considers that the proposed SMP conditions comply with the requirements of sections 45 to 47 and 87 of the Act, as appropriate and relevant to each such SMP condition.
12. In making the proposals referred to in this notification, Ofcom has considered and acted in accordance with its general duties set out in section 3 of the Act and the six Community requirements in section 4 of the Act. In accordance with section 4A of the Act, Ofcom has also taken due account of all applicable recommendations issued by the European Commission under Article 19(1) of the Framework Directive and the utmost account of any relevant opinion, recommendation, guidelines, advice or regulatory practice adopted by the Body of European Regulators for Electronic Communications (BEREC pursuant to Article 3(3) of Regulation (EC) No 1211/2009).

Making representations

13. Representations may be made to Ofcom about any of the proposals set out in this Notification and the accompanying consultation document by no later than 12 January 2018.
14. Copies of this notification and the accompanying consultation document will be sent to the Secretary of State in accordance with section 48C(1) of the Act.

Interpretation

15. For the purpose of interpreting this notification (which for the avoidance of doubt includes the Schedule):
 - a. except in so far as the context otherwise requires, words or expressions have the meaning assigned to them in paragraph 13 below, and otherwise any word or expression has the same meaning as it has in the Act;
 - b. headings and titles shall be disregarded;
 - c. expressions cognate with those referred to in this Notification shall be construed accordingly; and
 - d. the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.
16. In this Notification:

- a. **“2017 WLA Consultation”** means the notification described in paragraph 1 above;
- b. **“Act”** means the Communications Act 2003 (2003 c. 21);
- c. **“April 2017 DPA Consultation”** means the consultation document described in paragraph 3 above;
- d. **“April 2017 Notification”** means the notification described in paragraph 3 above;
- e. **“August 2017 DPA Pricing Consultation”** means the consultation document described in paragraph 4 above;
- f. **“August 2017 Notification”** means the notification described in paragraph 4 above;
- g. **“BT”** means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006;
- h. **“Framework Directive”** means Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended;
- i. **“Hull Area”** means the area defined as the 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communication (Hull) plc, (now known as KCOM);
- j. **“March 2017 Notification”** means the notification described in paragraph 2 above;
- k. **“September 2017 WLA Consultation”** means the consultation document described in paragraph 6v above;
- l. **“September 2017 Notification”** means the notification described in paragraph 6 above;
- m. **“Ofcom”** means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002 (2002 c. 11);
- n. **“United Kingdom”** has the meaning given to it in the Interpretation Act 1978 (1978 c. 30);
- o. **“WLA Network Expansion Consultation”** means the consultation document described in paragraph 5 above;

p. **WLA Network Expansion Notification**” means the notification described in paragraph 5 above.

21. The Schedule to this notification shall form part of this notification.

Signed

A handwritten signature in black ink, appearing to read 'B. Potterill', with a stylized flourish at the end.

Brian Potterill

Competition Policy Director, Ofcom

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

1 December 2017

Condition 4 – No undue discrimination

- 4.1** Except insofar as OFCOM may from time to time otherwise consent in writing, the Dominant Provider must not unduly discriminate against particular persons or against a particular description of persons, in relation to the provision of network access in accordance with conditions 1 and 2, as applicable.
- 4.2** In this condition, the Dominant Provider may be deemed to have shown undue discrimination if it unfairly favours to a material extent an activity carried on by it so as to place one or more Third Parties at a competitive disadvantage in relation to activities carried on by the Dominant Provider.
- 4.3** The Dominant Provider must publish all such information in relation to the provision of network access provided by the Dominant Provider pursuant to Condition 2.1(d) in such manner and form, and including such content, as OFCOM may from time to time direct for the purposes of providing transparency on the Dominant Provider's compliance with its obligations under this Condition 4.
- 4.4** *In this condition, the Dominant Provider 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, or for other rental services where those services are being provided in conjunction with such a VULA service for the purposes of providing electronic communications services to end users.*