



CityFibre’s response to Ofcom’s
“Consultation on designation regulations”.

CityFibre

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Executive Summary

We at CityFibre once more welcome the opportunity to respond and participate in the discussions on the future of the Universal Service Obligation (USO)¹. We acknowledge the importance of the USO and the role the Universal Service Provider (USP) has in shaping the future of the UK's digital infrastructure and its place in a digital world.

We acknowledge many of the issues we have previously raised, including the responsibilities any potential USP should have when fulfilling their relevant role, will be addressed in further detail at a later consultation this year.² We however feel there are some issues, including ones discussed in our previous correspondence, which continue to be relevant to this discussion on the proposed designation process.

Structure of this submission

We begin by re-iterating Government and Ofcom's ambitions for national full-fibre coverage. We continue with re-iterating our position and recommendations on the proposed mandatory responsibilities a potential USP should have when delivering the USO, taken in light of Government and Ofcom's aim for national full-fibre (FF) rollout. We then elaborate the importance of observing these issues now as opposed to after the fact – i.e. avoiding mandating responsibilities post hoc and provide our analysis and recommendations on Ofcom's designation approach and proposed draft regulation.

¹ Ofcom. (2018) "Implementing the Broadband Universal Service Obligation – Consultation on designation regulations." 13th September 2018. https://www.ofcom.org.uk/data/assets/pdf_file/0011/120404/Implementing-the-Broadband-Universal-Service-Obligation.pdf

² *Supra note 1*. Paragraph 1.11. Page 2.

Introduction

National ambitions for full-fibre rollout

Whilst the current state of the UK's digital infrastructure is still not where we would all like and need it to be, we have seen significant changes in the past few years, driven by a combination of: market competition, regulatory interventionism and political impetus. Full-fibre rollout (FFR) has now become top priority for DCMS, affirming this in their Future Telecoms Infrastructure Review (FTIR)³ and Ofcom supporting in its own corresponding statement on "Regulatory Certainty to Support Investment in Full-Fibre Broadband" (IFFB)⁴. Both documents go to great lengths to highlight the importance of full-fibre broadband (FFB) for the future of the UK's digital infrastructure and both have set themselves goals and targets to realise this intent.

The FTIR, states Government's intent for FF coverage is to have 15 million premises covered by 2025 and for nationwide coverage to be achieved by 2033. The FTIR highlights the best way to do this is to incentivise infrastructure competition via an easing of access to passive telecoms infrastructure (unrestricted duct and pole access), long-term regulatory certainty, and the gradual removal of the existing legacy copper networks.⁵ In relation to rural coverage the FTIR outlines an "outside-in" approach to deployment. Although the details are to follow, we assume this will mean

³ Department for Digital, Culture, Media and Sport. (2018) "Future Telecoms Infrastructure Review". 23rd July 2018. Find:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727889/Future_Telecoms_Infrastructure_Review.pdf

⁴ Ofcom. (2018) "Regulatory certainty to support investment in full-fibre broadband". 24th July 2018. Find:

https://www.ofcom.org.uk/data/assets/pdf_file/0025/116539/investment-full-fibre-broadband.pdf

⁵ *Supra note 3.*

Duct and Pole access: *Page 6; Section 2.5.1, Paragraphs 67-68, Page 32; Section 4.2.3, Paragraph 242, Page 71.*

Regulatory Certainty: *Section 2.6.1, Paragraphs 93-94, Pages 37-38.*

Outside-in Approach: *Page 8; Section 2.3.3, Paragraphs 44(4), Page 28; Section 2.7.2, Paragraphs 129-135, Pages 44-45.*

Legacy Network Removal: *Page 8; Section 2.8, Page's 46-47.*

a focus on public subsidy of FF deployments in rural areas. No timescales are outlined for this in the FTIR but self-evidently to complete nationwide coverage of FF by 2033 would require that such an intervention programme is commenced as soon as possible. Hence, there is an awkward interplay between Ofcom's focus on short-term measures to promote broadband USO and the prospect of a FF intervention in rural areas which also commences imminently.

In Ofcom's IFFB statement the tone was similar to the FTIR. It echoes the need for FFB across the UK and realises the ambition of the Government to have nationwide coverage by 2033. It reiterates the general mechanisms for incentivising investment, further elaborating on the need for unrestricted duct and pole access (DPA), long-term regulatory certainty and the transition from older copper networks to fibre.⁶

Both statements make a brief note of the existence of the USO framework, stating it may have a "complementary" role, but both however fail to specify exactly how this complementarity will be achieved and the mechanistical aspects of its role in the context of FFR.⁷ It continues to be CityFibre's opinion that in order to achieve national FF coverage, the USO must not conflict in any way with this intent and where it does so it should be subject to reasonable change, amendments and/or clarification that recognises the primacy of the FF goals in both Government and Ofcom's strategy.

⁶ *Supra note 4.*

Duct and Pole access: *Paragraph 1.16, Page 7; Paragraph 3.16, Page 19; Paragraph 4.20, Page 24.*

Regulatory Certainty: *Paragraph 1.34, Page 10; Paragraphs 2.19-2.20 Page 17; Paragraph 2.24 Page 17.*

Legacy Network Removal: *Paragraph 5.3, Page 29; Page 30.*

⁷ *Supra note 34.* Paragraph 133, Page 45; Page 75.

CityFibre has previously highlighted its concerns that the current framework provides an excessive focus on the “safety net ambitions”⁸ of the USO, which has meant the current framework detracts from Government and Ofcom’s primary ambitions for FFR. This stopgap means of dealing with the UK’s issues with broadband coverage and quality are a concern, as whilst acknowledging in and of itself the USO is not a broadband rollout programme, it encourages rollout of the most minimum of standards. It is our view that the USO in its current form and present ambiguity hampers the realisation of this general intent and at some points run counter to the specific mechanisms (mentioned above) for incentivising investment.

August Submission

In our August submission, we shared our concerns with Ofcom over the USO’s technical specification, explaining our issues with its real-world utility⁹ and the framework’s silence on the technology required to deliver these connections¹⁰. We further explained how both sub-set of issues were in direct and indirect conflict with the Government’s and Ofcom’s FFR plans.¹¹

We continue to believe the current technical specification falls short of real-world utility. The minimum download/upload speeds required will largely become obsolete by the time the USO’s implemented (if not so already) ultimately defeating the purpose of the USO, which as Ofcom states is “to prevent social and digital exclusion”¹². We also continue to believe the technical requirements

⁸ Ofcom. (2018) ‘Implementing the Broadband Universal Service Obligation – Request for expression of interest in serving as Universal Service Provider for broadband’. 19th June 2018. <https://www.ofcom.org.uk/consultations-and-statements/category-2/implementing-broadband-uso>

Paragraph 1.3 Page 3; Paragraph 2.4, Page 6

⁹ CityFibre. (2018) ‘CityFibre Response to Ofcom’s request for “interest in serving Universal Service Provider for broadband”’. 20th August 2018. https://www.ofcom.org.uk/data/assets/pdf_file/0037/119989/CityFibre.pdf. Page 4

¹⁰ *Supra* note 9. Page 4.

¹¹ *Supra* note 9. Page’s 4-5

¹² *Supra* note 8. Paragraph 1.3. Page 3.

and the omission of prescribed technology allows and incentivises the prolongation of the country's legacy copper network, and as such runs counter to Government and Ofcom's FF ambitions.

We also submitted our concerns with the efficiency requirements the framework insists on and that in the pursuit of time and economically-driven interests the efficiency guidelines, in their current form, would become a bottleneck for FFR and encourage the use of copper-based and -inclusive technology (FTTC).¹³ It was also highlighted that more work needed to be done in ensuring FFR obtained primacy over any USO endeavour, noting once more the constraint of the USO's time requirements and efficiency deadlines.¹⁴

We at CityFibre continue to hold the position that these rigid efficiency guidelines Ofcom is prescribing, would significantly hamper the incentive to rollout and/or use FF connections as part of the USO and as such will equally encourage the use of an outdated copper network instead.

CityFibre provided two over-arching recommendations to the problems identified, which it believed (and continues to believe) aligns the USO framework to Government and Ofcom's FF ambitions.

Pre-existing full-fibre infrastructure

The first solution proposed was a mechanism which would require the USP show Ofcom they have reasonably considered the use of an altnets pre-existing full-fibre infrastructure (PEFFI) and if

¹³ *Supra note 9. Page 5*

¹⁴ *Supra note 9. Page 5*

in line with the USO's financial viability requirement¹⁵, would have requested its use.¹⁶ We stated altnets, like CityFibre, may already have pre-existing core and spine networks, or may be deploying them in areas which the USP may have within its remit. CityFibre stated that the USP should be encouraged to seek commercial agreements with these altnets, in order to use and/or itself extend these networks, for local access use, to help deliver their USO to these areas. We suggested the use of this pre-existing infrastructure would provide synergies in being the most economically and logistically efficient solution to serving these said areas whilst ensuring these areas do not lose out on a FF service where it was reasonably possible to serve them with such, in turn fulfilling Government and Ofcom's ambition for FFR.

This solution is becoming more pertinent and increasingly more viable, as Ofcom's latest Connected Nations update show FF coverage in the UK has increased from 840,000 premises (4% of UK) to 1,400,000 premises (5% of UK)¹⁷; as well as this there is the fact we are currently seeing a new wave of fibre deployments announced from a host of network providers (including ours).¹⁸

¹⁵ accounting for the £3,400 cost per premises. The Electronic Communications (Universal Service) (Broadband) Order 2018 No. 445. Schedule 1. Paragraph 2 (d)(i). See:

<http://www.legislation.gov.uk/ukxi/2018/445/schedule/1/paragraph/2/made>

¹⁶ *Supra* note 9. Page 6.

¹⁷ Ofcom. (2018) "Connected Nations Update". 2nd October 2018. Find at:

https://www.ofcom.org.uk/_data/assets/pdf_file/0019/122194/connected-nations-october-2018.pdf

¹⁸ To name a few, See: CityFibre. (2018) "Three New Towns Cities Join CityFibre Join Vodafone Full Fibre Programme". Press Release Find at: <https://www.cityfibre.com/news/three-new-towns-cities-join-cityfibre-vodafone-full-fibre-programme/>

See also: Jackson, Mark. (2018) "Appointment helps vxfibre target FTTP for midlands and the north". ISPreview - Online News Article. Find at: <https://www.ispreview.co.uk/index.php/2018/10/appointment-helps-vxfibre-target-ftp-for-midlands-and-the-north.html>

See also: Telecompaper. (2018) "PCCW Global Networks seeks UK code powers to expand fibre network" Telecompaper – Online News Article. Find at: <https://www.telecompaper.com/news/pccw-global-networks-seeks-uk-code-powers-to-expand-fibre-network--1263837>

See also: Jackson, Mark. (2018) "Zayo expands UK metro fibre optic network around greater London". ISPreview – Online News Article. Find at: <https://www.ispreview.co.uk/index.php/2018/10/zayo-expands-uk-metro-fibre-optic-network-around-greater-london.html>

Primacy of FF in USO areas

In addition to this, CityFibre argued for regulatory forbearance where crossovers arose.¹⁹ CityFibre's concern was (and is) in an eagerness to implement the USO, the USO areas would lose out on the more long-term and higher quality provision of FF services. Where these conflicts arose, we recommended the USO framework include a mechanism so as to allow the primacy of these projects to take place and/or the use of the infrastructure which has won the state aid contract. CityFibre raised concerns that the USO could be weaponised as means of overbuilding areas which are undergoing FF rollout, with a lower quality copper-based connection.

CityFibre also encouraged Ofcom to consider the outside-in approach highlighted in the FTIR, which would account for rural areas in pursuit of FFR and the convergence of these geographical areas with the USO. CityFibre encouraged Ofcom to consider the implications of the cross-over, so as to ensure no end-user would lose out on FF, in place of a quick USO fix. Drawing on our own success with the LFFN contract, we highlighted the benefit of allowing these schemes to flourish in such areas.

¹⁹ *Supra note 9*. Page 7.

Ofcom has said that these recommended responsibilities will be considered in detail in a further consultation later this year.²⁰ Whilst we are pleased to hear our views have been (and are still actively being) considered, we are concerned the current designation process and Ofcom's current assessment approach makes the implementation of our recommended FF obligations more difficult post-hoc. Specifically, our concern is the assessment criteria Ofcom has provided, which they'll use to designate a USP²¹, fails to adequately consider and stress the significance of a USP providing pre-emptory assessments that they have sought to use PEFFI.

Whilst we realise the PEFFI and primacy requirements have not yet been fully discussed and developed so as to ensure other market factors are protected and preserved - and as such Ofcom have not decided on whether to include PEFFI analysis within its assessment criteria - we urge they do so once the consultation has taken place and concluded, i.e. we urge Ofcom not to consider and/or state the assessment criteria listed as exhaustive and finalised.

²⁰ *Supra note 1*. Paragraph 1.11. Page 2.

²¹ *Supra note 1*. Paragraph 2.22. Page 7.

Designation process

CityFibre have reviewed and considered Ofcom's analysis of the three designation approaches it has identified. We are in agreement with both the choice of potential options Ofcom has considered and the reasons for why it has selected a direct designation approach.

Competitive designation process

We agree with Ofcom on the fact a competitive process would not be appropriate for this initiative.

In particular we agree,

*“there is a possibility that the winning bid (lowest subsidy bid) could be one which involved services being offered to consumers at a very high price”.*²²

We are in further agreement,

*“a winning bid which minimised the subsidy through being low cost might be one which compromised on network rollout...or subsequent service provision”.*²³

We feel the latter point highlights a competitive tender process, in seeking to drive costs as low as possible, would hinder the effectiveness of mandating the use of PEFFI and would arguably be more likely to incentivise the use of copper-based connections.

²² *Supra note 1*. Paragraph 2.18. Page 6.

²³ *Supra note 1*. Paragraph 2.18. Page 6

The Regulations

Whilst we are largely in agreement with the regulations Ofcom has provided for the designation of a USP, we are slightly concerned with the omission of a bilateral requirement (or words to that effect) for CPs to volunteer themselves, as opposed to Ofcom nominating CP's unilaterally, to be a USP. Whilst we admit and acknowledge Ofcom have not suggested this would be the case now and/or in previous statements, the proposed regulations read as if they would have the prerogative, if they were to choose to do so.

Re-iterating once more that Ofcom have not appeared to suggest this would be the case, we take this opportunity to analyse and discuss why Ofcom may consider it would be necessary to nominate and mandate unilaterally and provide alternative solutions to such. Arguably the most likely case which would warrant Ofcom unilaterally nominating and mandating a CP to be a USP, is where the CP in question is not one but has network in or near the area where the (and/or no) USP is delivering; and if and where there is a pre-existing USP, it does not have sufficient network coverage in the area or to the same standard and/or in the least to the standard required by the USO specification.

This mechanism arguably runs the risk of disincentivising investment in certain areas, arisen from the risk of it being repossessed by proxy and/or in the least repurposed by a regulatory body. Network providers may be more reluctant, when delivering non-residential networks, to these USO area, leading to significant losses for local: economies, authorities, public organisations and businesses. The effects of this strategy would not be isolated to the USO area itself and will arguably leak into the proximal surrounding areas (which are not considered USO areas), as these providers

will become wary of deploying network in areas near a USO area, withstanding whether the deployment is FTTP/H or not (e.g. leased line deployment, or dark fibre deployment).

Our PEFPI alternative provides a much more holistically functional solution to this issue, in that it: ensures the primacy of FF rollout in pursuing the USO; it allows the altnet autonomous control over the utility of its network; it allows the altnet to secure a commercial agreement with the USP which arguably incentivises further investment; it ensures the USO is rolled out economically and efficiently. We believe the onus of delivering FF via a USO mechanism should adhere to positivist obligations, in that it should apply solely to the USP who is volunteering themselves to deliver said services.

To revisit the point we made earlier, we encourage Ofcom - until its concluded on its consultation later in the year – to leave the option to update the assessment open. In particular the option to include a requirement to provide greater weight of assigning USP status to network providers who show they seek to provide the USO area with FF services, and if not possible, they will seek to engage in commercial negotiations with the altnet who has PEFPI in or near to the requested USO area.

Amendment of the Regulation:

In light of the above, our recommendation is to amend Section 4 (1) to include (changes in bold font):

(1) In order to secure the universal service, OFCOM may propose the designation of such persons as they consider appropriate as universal service providers,

(a) provided the person Ofcom may propose has volunteered [or committed] themselves with the intent to become a Universal Service Provider, in a separate formal submission to Ofcom”

Our recommendation is to amend Section 4(2) to include (changes in bold font):

“(2) Proposals for designating any person as a universal service provider shall be by means of a notification published by OFCOM—

(a) stating that they are proposing to designate that person as a universal service provider;

*(b) giving the reasons for making that proposal **including the proposed commitment from the Universal service provider as required under 1(a)**;*

(c) inviting alternative proposals from any other person to be designated as a universal service provider instead of the person stated in the notification; and

(d) specifying the period within which representations about OFCOM’s proposal, including any alternative proposals, may be made;

References

Legislation

- The Electronic Communications (Universal Service) (Broadband) Order 2018 No. 445. See: <http://www.legislation.gov.uk/ukxi/2018/445/schedule/1/paragraph/2/made>

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