

CityFibre



CityFibre's response to Ofcom's consultation on existing geographic offers

Non-confidential version

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1 Introduction

- 1.1 CityFibre is committed to a commercial rollout of full fibre to over 8 million premises by 2025 and has ambitions to go further, with an aspiration to build to 10 million premises and beyond by the end of the decade. Protection against anti-competitive pricing is critical to our investment case. CityFibre therefore welcomes Ofcom's approach to regulating geographic discounts and other Openreach commercial terms, as set out in the 2021 WFTMR Statement.
- 1.2 Ofcom is right to recognise the significant adverse impact which geographic discounts may have on the investment case for alternative full fibre networks. Ofcom's prohibition of such discounts is an important protection against conduct by Openreach which could delay or prevent rival network rollout, to the detriment of end-users.
- 1.3 The current consultation concerns three existing Openreach offers which would be prohibited by the geographic discrimination prohibition unless Ofcom provides consent. CityFibre's position, as explained below, is as follows:
- i. The relevant offers have been operating for some time now and, to the extent that they are harmful to competition, they have already produced most of their adverse effects on the market. On that basis, CityFibre does not propose that these schemes should now be prohibited.
 - ii. In permitting these historic offers to remain in place for the remainder of their term, however, Ofcom should be careful to avoid setting any precedent for authorising future offers with similar characteristics. As is recognised in the 2021 WFTMR Statement, geographic discounts are inherently liable to undermine new alternative network build and are therefore subject to a prohibition without Ofcom's consent.
 - iii. The onus must therefore be on Openreach to show that any proposed new offer will not adversely affect rival network and/or is objectively justified, based on a fully reasoned submission to which CityFibre and other altnets can respond. Ofcom should only grant consent where Openreach has met this requirement.
 - iv. Ofcom's reasoning in the consultation document in relation to the existing schemes is cursory and does not attempt any real effects analysis. It also places heavy reliance on Openreach's stated intentions, which are an unreliable gauge.
 - v. Such a 'quick look' approach may be sufficient in relation to what are essentially legacy arrangements, but for future offers – including any extensions of or amendments to these existing offers – a much fuller effects-based assessment will be needed to be sure that Openreach is not able to impede or prevent alternative network build. If applied to future offers, we consider Ofcom's current approach would be inadequate.
 - vi. It is also imperative that Openreach respects the process laid down by Ofcom and brings forward any proposed new offers promptly for Ofcom's consideration without first discussing them with ISPs or otherwise publicising them to the market. Such 'signalling' conduct by Openreach is likely to have severe adverse effects on the market, encouraging ISPs to 'wait and see' whether particular offers may be proposed and permitted by Ofcom and deterring them in the interim from concluding deals with CityFibre or other altnets. Ofcom should make clear to Openreach that it will not be

permitted to 'play' the new consent process in this way by using signalling to chill competition.¹

2 The importance of regulating geographic discounts

- 2.1 The prohibition on the use by Openreach of geographic discounts introduced in the 2021 WFTMR Statement is an essential element of Ofcom's policy framework for promoting competition and investment in alternative full fibre networks.
- 2.2 The significant investment required to undertake scale build in competing infrastructure of the kind that CityFibre is contemplating is inherently risky. CityFibre and other altnets need to know that they will be protected against commercial conduct by the incumbent, Openreach, which has the effect of undermining roll-out and preventing the emergence of network competition.
- 2.3 Openreach can prevent new network build in a number of ways. In particular, it can introduce geographic discounts in areas where operators are planning or proceeding to roll out, thereby reducing the returns that are achievable by operators and curtailing their investment plans. More generally, Openreach can use other commercial terms, such as loyalty discounts, to tie ISPs to its network and deter them from switching to new rival networks. The anti-competitive effects of such arrangements are likely to be particularly acute where the targeted competitor, as in the case of CityFibre, is a wholesale-only, open access provider that by necessity must attract ISPs onto its network.
- 2.4 Ex post competition law is not an adequate basis for fostering network competition in the UK. Its focus is upon preventing anti-competitive conduct and not upon promoting competition in accordance with Ofcom's statutory duties. It is in any event too slow: investigations are lengthy and complex, and by the time they reach a conclusion, competition has already been harmed. There is a relatively small window of opportunity to encourage new network build and investors need the certainty of ex ante protections before they commit.
- 2.5 The prohibition on the use of geographic discounts by Openreach introduced by Ofcom in relation to a number of key products in Areas 2 and 3 helps to provide the certainty required for network roll-out. Ofcom's consent to an exemption from the prohibition should only be granted where Openreach provides detailed evidence as to why a proposed geographic discount scheme would not affect alternative network rollout.
- 2.6 The extent to which the new controls are effective in promoting network competition will therefore depend on whether the consent procedure followed by Ofcom is rigorously controlled to ensure that geographic discounts are not permitted save in very clear cases where they will not adversely affect rival network roll-out. We discuss this point further in the attached Annex.

3 The analysis required under the 'consent' process

- 3.1 The regulation imposed in the 2021 WFTMR Statement contains a clear prohibition on the use of geographic discounts by Openreach in respect of particular products. Exemptions from that prohibition may only be granted in writing by Ofcom and there is therefore an expectation that exemptions will only be granted in limited circumstances. Indeed, Ofcom has made clear in the

¹ The recent Royal Mail case is a good example of an incumbent network operator engaging in anti-competitive signalling conduct as to its pricing plans so as to generate uncertainty and delay a rival network's roll-out, notwithstanding the suspension of those plans by reason of Ofcom's intervention: see the Competition Appeal Tribunal's judgment in *Royal Mail v. Ofcom* [2019] CAT 27, §§356-361, 395-397.

2021 WFTMR Statement that it will rigorously scrutinise any geographic discounts that Openreach proposes before granting its consent.

3.2 The Statement contains the following helpful guidance, which should be carefully adhered to when considering any future Openreach offers:

- i. Ofcom expects Openreach to explain both the purpose of the scheme and why it would not deter new alternative network build.² The burden is therefore on Openreach to justify its geographic discounting. Ofcom states that a general exemption for existing offers would not be appropriate.³
- ii. The assessment of individual requests for consent will need to be conducted on a case-by-case basis reflecting the context and circumstances. Ofcom will not necessarily consent to a new scheme because Openreach has done something similar before.⁴
- iii. As part of the assessment, Ofcom will consider:
 - o any objective justification provided by Openreach for the differential pricing; and
 - o whether such pricing is consistent with Ofcom's overarching policy objectives (including the strategy to promote network competition).⁵
- vii. The reference to objective justification reflects an approach consistent with the analysis of abuse of dominance under ex post competition law, where the dominant undertaking must bring forward a properly supported objective justification for any conduct which is capable of adversely affecting competition.⁶
- viii. In that connection, the dominant undertaking must specifically identify the objectives which a particular pricing measure is designed to achieve; and must also provide a properly quantified analysis of the benefits (in particular, any alleged efficiencies⁷) that are said to flow from its pricing.

4 Ofcom's proposal to consent to Openreach's existing offers

4.1 In its present consultation, Ofcom proposes to consent to three existing offers:

- The GEA Volume Offer, introduced in 2018 and due to run until September 2023;
- The FTTP only offer V2, which applies rental discounts until 30 September 2022; and
- The Local Marketing Offer (or 'LMO'), which was available from November 2019 to 30 June 2020 and from 1 February 2021 to 31 March 2021, and which applies rental discounts until 30 September 2022.

4.2 Ofcom's analysis of these three existing offers is at a very high level. It is confined to 15 paragraphs and relies on a qualitative 'quick look' assessment. Openreach does not appear to have provided any quantified analysis of its own as to the likely effects of the schemes or to

² 2021 WFTMR Statement, Volume 3, para 7.130

³ 2021 WFTMR Statement, Volume 3, para 7.143

⁴ 2021 WFTMR Statement, Volume 3, para 7.133

⁵ 2021 WFTMR Statement, Volume 3, para 7.129.

⁶ *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ 2009/C 45/12, paragraph 31.

⁷ Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, paragraphs 55 and 26.

have advanced any objective justification in the competition law sense. Ofcom places reliance on statements from Openreach as to the purpose and objective of the schemes.

- 4.3 In CityFibre's experience the schemes at issue have had an adverse effect on its ability to roll-out. By way of example, [X].
- 4.4 CityFibre does accept that the adverse effects of these schemes have already played out, in whole or in large part, and there is little to be gained by prohibiting them now.
- 4.5 However, in the case of the GEA Offer, which is not just a geographic discount but also a form of fidelity rebate, [X]. As Ofcom has recognised in the WFTMR statement, terms which allow ISPs to qualify for discounts provided the size of alternative networks remains below certain limits should not be permitted where they undermine alternative network rollout.
- 4.6 As things stand, CityFibre's protection from the anti-competitive effects of this offer for the remainder of its lifetime are dependent on Openreach, having changed the qualifying alternative operator limitation twice already, not making a further change that would disqualify CityFibre.
- 4.7 Looking to the future, CityFibre's overriding concerns are:
- first, to ensure that Ofcom's consent to these schemes should not be viewed as giving Openreach a green light for further schemes of this nature, which could profoundly limit the scope for effective infrastructure competition in the UK;
 - secondly, to underline the need for any future offer to be subjected to a more detailed and rigorous ex ante assessment of likely effects than Ofcom has considered appropriate for these existing arrangements. Without such proper scrutiny, the new controls introduced in the WFTMR Statement will fail to provide the protection and certainty that are needed for network competition to develop effectively in the UK;
 - thirdly, to ensure that Openreach cannot introduce loyalty inducing schemes, such as volume discounts, which may have an equivalent effect to the geographic discounts subject to the prohibition. Whilst there is no express prohibition on such practices, CityFibre would welcome confirmation from Ofcom that loyalty inducing conduct by Openreach which undermines alternative network rollout will be considered as a breach of its obligation not to unduly discriminate.

5 Conclusion

- 5.1 In order to address the concerns set out above, CityFibre invites Ofcom to reiterate the following matters – all of which are consistent with the guidance contained in the WFTMR Statement – in its decision granting consent to the existing offers:
- i. Any consent to Openreach's existing offers should not be understood as setting a precedent for the approval of any arrangements having similar characteristics which Openreach may seek to introduce in the future, including by way of extension or amendment to the existing schemes;
 - ii. any future offer will need to be carefully assessed on a case-by-case basis to determine its specific effects on network-based competition in particular areas;
 - iii. to assist with such an assessment, Openreach will be expected, when seeking consent, to provide a detailed explanation as to why its offer is compatible with network competition and (if alleged) why it is objectively justified; and

- iv. Openreach should not, prior to obtaining Ofcom's consent to proceed, engage in discussions of possible offers with customers and/or otherwise publicise possible offers to the market. Such signalling behaviour is itself liable to distort competition thereby defeating the purpose of the consent process.
- 5.2 Further, specifically in the case of the GEA Offer, Ofcom should continue to monitor this offer to ensure that no material changes are made to it during the remainder of its period of operation that have anti-competitive effects, such as a further change to the qualifying alternative operator threshold.
- 5.3 In addition, CityFibre notes the following points which should, in its view, be observed when assessing whether to grant consent in future cases:
- i. The assessment should focus first and foremost upon the likely effects of the offer on rival network roll-out. The analysis should be supported by reasoning sufficient to understand the basis of Ofcom's conclusions.
 - ii. Ofcom should not assign any significant weight to Openreach's stated justifications for its conduct, which – even if contained in internal documents – will inevitably have been crafted with a view to subsequent regulatory proceedings.
 - iii. Other operators will be given a full opportunity to comment on Openreach's supporting explanation and on any supplemental analyses undertaken by Ofcom.
 - iv. The assessment of effects should take into account the overall effect of Openreach's current and future offers in the market, which may have a cumulative impact on rival network operators.

Annex CityFibre's assessment of Openreach FTTP offers with geographic pricing

[Attached as a separate document]