

Response to consultation on proposed regulatory waivers for Bulk Grouping provision

Submission from CityFibre: Non-confidential version

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CityFibre

1 Context and Executive Summary

1.1 This document comprises CityFibre’s formal response to the Ofcom consultation document entitled ‘Upgrading broadband customers to superfast products: Changes to quality of service regulation on Openreach’, published on 25 November 2019.¹

1.1 Context: Openreach’s request

1.2 On 18 October 2019, Openreach submitted a formal request to Ofcom, asking for “*regulatory waivers in relation to its launch of a Bulk Grouping provision capability (‘the capability’) for GEA-FTTC (‘FTTC’) and Single Order GEA (‘SOGEA’)*”.²

1.3 As defined by Ofcom, this Bulk Grouping process comprises circumstances where an Openreach access seeker (e.g. Sky or TalkTalk) accepts that its request for a GEA–FTTC service at the street cabinet may not be provisioned by Openreach until an engineering visit by Openreach to that cabinet can be arranged to deal with an additional request by that same access seeker for a GEA–FTTC service at the same street cabinet.³

1.4 In other words, the process would enable access seekers to undertake batch provisioning, and as a result will be able to save on certain costs. Openreach state that “*in the trial that has been launched, a discount of £11 per installation is being offered via the capability.*”

1.5 Specifically, Openreach has requested that provision orders that are placed using the capability are exempted from the First Available Date (‘FAD’) Quality of Service (‘QoS’) Standard and from three Key Performance Indicators (‘KPIs’) as imposed by Ofcom in the 2018 Quality of Service for WLR, MPF and GEA Statement on the basis of Condition 11 in of the Wholesale Local Access (‘WLA’) SMP conditions (referred to below as the WLA QoS Statement).

1.6 Openreach’s request is that the waivers are put in place as soon as possible, and that they remain in place until the end of March 2021 or the end of the regulatory period covered by the WLA QoS Statement, whichever is later.

1.2 Executive Summary

1.7 CityFibre notes that the remedies concerned were (and are) primarily invoked to address concerns that Openreach would have the ability and incentive to provide favourable terms of service to its own downstream (BT) arm.

1.8 These remedies therefore seek to protect against discrimination that would directly harm Openreach access seekers. Openreach claims that it will be able to offer the service with savings on certain costs. Openreach state that “*in the trial that has been launched, a discount of £11 per installation is being offered via the capability*” and that there was consensus amongst the CPs to have this service with the relevant waivers.

1.9 As such CityFibre recognises that these independent access seekers, as the parties primarily affected by the change, are primarily best placed to determine whether this remedy variation will be net-beneficial for them, balancing the potential cost savings versus the risk of discrimination by Openreach. At the same time, Ofcom, in applying the statutory principles applicable to variations must consider any general interest concerns that arise that may not be likely to be reflected in the submissions of independent access seekers having regard to their particular incentives and objectives.

¹ Ofcom (2019). ‘Upgrading broadband customers to superfast products: Changes to quality of service regulation on Openreach’ 25 November [\[Link\]](#)

² Openreach (2019) ‘Openreach request for regulatory waivers in connection with its proposed Bulk Grouping provision capability for GEA-FTTC and SOGEA’ 18 October [\[Link\]](#)

³ Ibid, page 14.

- 1.10 However, we wish to use this consultation to address concerns around the principle of Ofcom intervening within a market review and the potential unintended consequences of deregulation under current proposals.
- 1.11 **In principle we are supportive of Ofcom using its powers to vary remedies within a market review period when and where appropriate.** CityFibre **strongly agrees with the principle** that Ofcom should be open to exercising its powers to vary remedies in appropriate cases during market review periods. Any such intervention must, as Ofcom is aware, be guided by the principles of necessity (objective justification) proportionality and transparency, while also avoiding undue discrimination. In addition, CityFibre would emphasise that any review of remedies must pay particular attention to any interval during which under or over enforcement that is not be properly or adequately addressable by measures to be adopted for the subsequent regulatory period.
- 1.12 **Ofcom must consider the impact of this request on FTTP take-up.** Both the Government and Ofcom have said the preferred mechanism to achieve full fibre coverage and take-up is through a competitive market that has at its heart a model of head-to-head infrastructure competition between the incumbent Openreach and other full fibre infrastructure operators. Our concern with the current proposed variation is that it is not in keeping or in pursuit of the aforementioned targets and runs the risk of promoting FTTC take-up at the expense of FTTP investment and rollout. In addition, it is not sufficiently clear on facilitating market wide transition to fibre (and PSTN switch-off) versus facilitating Openreach's own capability and ambitions in partly undertaking that task.
- 1.13 **Finally, Ofcom is urged to approach the issue of PSTN switch-off based on the precautionary principle.** CityFibre very much supports and intends to be in the vanguard of FTTP roll-out. That said, it is cognisant of the fact that existing Universal Service Obligations are discharged, to a very significant extent over copper networks and PSTN technology. The transition to IP is largely distinct from the issue of the connectivity medium. In respect of copper switch-off, CityFibre suggests that Ofcom observes the precautionary principle of seeking to absolutely minimise the possibility of premature or pre-emptive copper switch-off. In this regard, CityFibre is eager to avoid a situation where the benefits of fibre are in any way attenuated in the public mind by disruption to or premature termination of legacy services thereby possibly bringing fibre into unfair disrepute. In addition, CityFibre suggests that if the proposed trials are to be supported through a variation of remedies, learning should be share on an open, industry wide basis.

2 CityFibre's views on the proposed regulatory waivers

2.1 Varying remedies within market review periods can be appropriate in certain circumstances

The principle of intervention

- 2.1 CityFibre **agrees with the principle** that Ofcom should be open to exercising its powers to vary remedies during market review periods. We agree with Ofcom's view that regulatory intervention may be needed to vary existing remedies provided the decision is made on the strict basis there has been a material change in the relevant market and/or there has been a material change in the market assumptions Ofcom used in its original analysis.
- 2.2 CityFibre considers this principle of intervention should be equally applied to situations of positive regulation (i.e. introducing and/or expanding existing SMP obligations) as well as deregulation/revocation. CityFibre also understands that in assessing any variation, due account must be had to issues such a regulatory predictability. That, however, should not be an excuse for inertia in all cases, not least because the underlying competitive problem may well have greater distortive effects than any short-term and likely negligible impact on certainty. Furthermore, separate equilibrating levers may be available to Ofcom if necessary bearing in mind however that the context for variation will (very often) be anti-competitive conduct that was perhaps thought unlikely but which subsequently plays out in the market without an adequate *ex ante* restraint.

The need for considered, proactive intervention during the 5-year Market Review period

- 2.3 In its Digital Communications Review (DCR), Ofcom acknowledged the importance of competitive full fibre deployment to *"drive both innovation and affordable prices"* for consumers and ensure *"the UK will be a world leader in the available and capability of its digital networks."*⁴
- 2.4 Since then, Ofcom has supported this position in its recent publications, making significant note of the fact that the industry is moving at a rapid pace with the expectation that the coming years will see (significantly more)⁵ major investment in fibre-rich networks that can serve **both** residential and business markets.⁶ Ofcom makes note of the widely varying use of these full fibre networks stating:
- "investors in full-fibre networks are increasingly looking to offer a range of services over a common underlying fibre infrastructure: ultrafast broadband to households and small businesses; leased lines to larger businesses; and backhaul for mobile operators [...]" [emphasis added].*⁷
- 2.5 As such to accommodate for: this enhanced technical capability; the need for regulatory certainty to ensure the significant investment envisaged is indeed made; and the time it takes to deploy new

⁴ Ofcom (2016). "Digital Communications Review – Initial Conclusions". 25th February 2016. Paragraph 1.2. Page 2. [\[link\]](#)

⁵ Ofcom's latest figures show full fibre coverage is at 10% of total UK residential and business premises (or approx. 3 million premises) up 4 percentage points from this time last year.

See: Ofcom (2019). "Connected Nations Report 2019: UK report". 20th December 2019. Page 10. [\[link\]](#).

⁶ Ofcom (2018). "Regulatory certainty to support investment in full-fibre broadband: Ofcom's approach to future regulation". 24th July 2018. Paragraph 1.6. Page 6. Paragraphs 2.13 – 2.15. Pages 15-16. [\[link\]](#).

Ofcom (2018). "Consultation Promoting Investment and Competition in Fibre Networks." 11th December 2018. Paragraph 1.7. Page 3. [\[link\]](#).

Ofcom (2019). "Promoting competition and investment in fibre networks: Initial proposals – Approach to remedies". 29th March 2019. Paragraph 1.10. Page 4. [\[link\]](#).

⁷ Ibid. 24th July 2018. Paragraph 1.9. Page 6.

networks⁸, Ofcom intends to remove its traditional demarcation of residential⁹ and business¹⁰ services¹¹ and consider these markets holistically in a single market review running every 5 years¹² – otherwise known as the Wholesale Fixed Telecoms Market Review (WFTMR).

- 2.6 CityFibre welcomes Ofcom’s proposal to conduct the market reviews for the three fixed access markets together (the physical infrastructure market, the wholesale access market, and the business connectivity market - PI, WLA and BCMR respectively). [3<]. It is these smaller customers who (CityFibre hopes and anticipates) will wish to buy FTTP, driving demand for a deep consumer network.
- 2.7 The consequence of the above is that, for CityFibre, it is artificial to view the business and residential wholesale markets in this particular situation. Both use the same infrastructure; both are relevant to investment decisions. To put it the other way around: any development that improves the investment climate in respect of the ‘business connectivity’ markets or the economics of expanding the network to business premises will result in a network expansion that also encompasses FTTP consumers and small businesses.
- 2.8 It is a long-held view of CityFibre that inconsistency in approach and objectives to how these markets are regulated has caused market distortions and has deterred investment in new fibre infrastructure.
- 2.9 Notwithstanding CityFibre’s support for this move towards holistic approach to market reviews, it is also CityFibre’s view the need for these interim interventions may become even more critical as Ofcom introduces 5-year market review periods. That, is so, not least because both of the length of that period of time (in the context of a constantly evolving sector) and by reasons of the fact that within at least 3 years, deficiencies or unwarranted constraints in the existing regime may have crystallised. As such, it would be remiss not to consider remedial action where that exists as a possibility. It also allows for the know-how and market insight that is developed by Ofcom in respect of the next 5 year period to be capable of being actioned without needing to wait to the end of the current 5 year period in all cases. In some instances, the requirement for intervention may also be driven by timing imperatives including the phasing of significant contracting, [3<], the key purchasing decisions of retailing CPs (3<) particularly in relation to their own FTTP consumption strategies are being made in the next year to eighteen months.
- 2.10 Whilst CityFibre acknowledge Ofcom will be conducting a thorough analysis of the market prior to its final statement the nature of *ex ante* regulation means not every eventuality can be accounted for. As stated above, Ofcom notes the market has evolved – and is evolving - rapidly with significant investment in full fibre, evolution of 5G and monumental changes in consumer digital habits and consumption rates¹³ and as such the market could look entirely different within the 5-year market review to the snapshot it considers beforehand.
- 2.11 Therefore, it stands to reason that Ofcom should explicitly permit itself the ability to adapt to a likely change in market circumstances and ensure it can adjust obligations/remedies to preserve the incentives for fibre investment and infrastructure competition accordingly.

⁸ Supra note 8. Ofcom (2018). “Consultation Promoting Investment and Competition in Fibre Networks.” 11th December 2018. Paragraph 1.8. Page 3. [\[link\]](#).

⁹ As traditionally covered in its Wholesale Local Access Market Reviews.

¹⁰ As traditionally covered in its Business Connectivity Market Reviews.

¹¹ As well as considering the newly introduced Physical Infrastructure Market Review (i.e. ‘upstream regulation’). Link for consultation [\[Link\]](#). Link for final statement [\[Link\]](#).

¹² Supra note 8. Ofcom (2018). “Regulatory certainty to support investment in full-fibre broadband: Ofcom’s approach to future regulation”. 24th July 2018. Paragraph 1.34. Page 10. [\[link\]](#).

¹³ Supra note 7.

- 2.12 We acknowledge Ofcom's concerns around the market (and investor) need for regulatory certainty.¹⁴ We also acknowledge the fact that significant investment decisions cannot be confidently made where there is a risk of regulatory intervention¹⁵ unbeknownst to the Communications Provider (CP) and/or intervention occurring at irregular intervals. We therefore wish to stress what we are encouraging Ofcom to do is to analyse each request to vary remedies be done on a full assessment of its merits and on a case-by-case basis.
- 2.13 Furthermore, in its pursuit for commercial and regulatory certainty, Ofcom should also be mindful of the aggregate effects of multiple requests, i.e. the aggregate impact on competition as well as the market perception and resultant impacts on investment. In other words, it is important that Ofcom considers not only the direct impact of progressively removing a growing number of Significant Market Power (SMP) remedies from BT/OR, but also considers the reputational implications, and the direction of travel it indicates which can materially impact new-entrant investor confidence.

The legal test

- 2.14 As noted above, whilst Ofcom are moving towards a standard 5-year cycle for market reviews the relevant legislation permits them to intervene provided they are able to support their intervention using the same 4-factor criterion they use during the designated market review period.
- 2.15 Ofcom is able to set **and modify** conditions within market review periods provided it meets the test as defined under Section 47 (2) Communications Act 2003:

“That test is that the condition or modification –

- a. Objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;*
- b. Not such as to discriminate unduly against particular persons or against a particular description of persons;*
- c. Proportionate to what the condition or modification is intended to achieve; and*
- d. In relation to what it is intended to achieve, transparent.*

- 2.16 The question of under what circumstances Ofcom should vary remedies within market review periods is one on which CityFibre has conducted a separate correspondence with Ofcom. From that, we have understood Ofcom's position to be that, as an administrative matter and having regard to the need for regulatory stability and certainty, it will only vary remedies in exceptional circumstances mid-review. We note that this sets a higher test for variation of remedies than that strictly required by section 47(2) above. It is puzzling, in the light of this claimed administrative practice, to see Ofcom minded to vary remedies in this case where the case advanced for doing so is that it would be convenient for Openreach (and Openreach claims, its CP customers) to do so, and without regard to the broader impact on infrastructure competition of doing so, an argument we develop in more detail below.
- 2.17 For the avoidance of doubt, CityFibre considers that variation of remedies is legally permissible and in some instances may be positively required within market review periods but also agrees that such variation of remedies should not be undertaken lightly. But we consider that a different standard appears to have been applied to this remedy request compared with that which Ofcom has applied to our parallel request for remedies variations that would safeguard infrastructure competition.

¹⁴ Supra note 14.

¹⁵ Or negative externalities coming from that regulatory intervention, for example premature deregulation which could sterilise competitive infrastructure investment into an area.

- 2.18 Ofcom in considering revoking remedies, must consider the reason for the remedy in the first place – the competition concern it sought to address when introducing it, in order to determine whether a) that competition concern remains and b) if so, whether removing or varying the remedy is the right thing to do. Where there is evidence, in particular based on evolving or anticipated market circumstances, of a material gap between those and the existing remedies suite, then there is objective justification for variation. In terms of proportionality, this entails a consideration of the less distortive means of closing that gap effectively, taking a realistic view of the likely effects of any remedies suggested for the subsequent 5 years. In addition, regulatory predictability must be considered, not as an invariable brake on change, but rather as a matter to be considered in the round.

3 Unintended consequences of this request: FTTP take-up

Full fibre policy considerations

- 2.2 Ofcom must be minded to the implications of any remedy change (revocation or introduction) has on its key policy objectives, namely the promotion of competing full fibre networks.
- 2.3 As noted above, since 2016 Ofcom's long-term regulatory policy objective has been to support infrastructure-based competition in the fixed telecommunications market and to create the necessary conditions for positive returns on investment in full fibre networks.
- 2.4 Since then the rollout of full fibre networks has now become top priority for DCMS, reaffirmed in its Future Telecoms Infrastructure Review (FTIR)¹⁶ with Ofcom supporting in its own corresponding statement on "Regulatory Certainty to Support Investment in Full-Fibre Broadband".¹⁷ Both documents go to great lengths to highlight the importance of full fibre broadband for the future of the UK's digital infrastructure and both have set themselves goals and targets to realise this intent.
- 2.5 For further clarity, the FTIR states Government's intent for full fibre coverage is to have 15 million premises covered by 2025 and for nationwide coverage to be achieved by 2033.¹⁸ 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.¹⁹
- 2.6 Both the Government and Ofcom have said the preferred mechanism to achieve this is through a competitive market that has at its heart a model of head-to-head infrastructure competition between the incumbent Openreach and other full fibre infrastructure operators.
- 2.7 CityFibre has responded to this strategic shift by embarking on a £2.5bn investment plan which aims to construct full fibre networks connecting 5 million premises across the UK by 2025. Capital deployment has already commenced in 26 towns and cities, [3<].
- 2.8 [3<].
- 2.9 As mentioned earlier within this document, critical purchasing decisions by these CPs will be made over the course of the next 12 to 18 months which will determine the market structure for the foreseeable future as they align themselves with network builders in different parts of the UK.²⁰

¹⁶ Department for Digital, Culture, Media and Sport. (2018) "Future Telecoms Infrastructure Review". 23rd July 2018. [\[Link\]](#).

¹⁷ *Supra note 8.*

¹⁸ Noting of course the fact this date may yet be forward based on political statements made by Government in the recent months.

¹⁹ *Supra note 24.*

- 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.*

In Ofcom's follow-up statement (*supra note 8*) the tone was similar to the FTIR. It echoes the need for full fibre broadband across the UK and realises the ambition of the Government to have nationwide coverage by 2033. It re-iterates 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.

²⁰ Gigaclear and Hyperoptic have both announced plans for competitive fibre investment.

- 2.10 [3<]. It is not overstating the case to say that it is in this period that the success or failure of the Government's, and Ofcom's, stated objective of creating a competitive full fibre market will be determined.
- 2.11 It is therefore crucial Ofcom, in deciding to intervene, do so with priority of safeguarding the emerging infrastructure competition in that market and prohibiting (either in continuation of existing obligations or the introduction of new ones) any anti-competitive practices by Openreach that could have the effect of foreclosing that market.

Issues with the current proposal

- 2.12 As defined by Ofcom, this Bulk Grouping process comprises circumstances where an Openreach access seeker (e.g. Sky or TalkTalk) accepts that its request for a GEA-FTTC service at the street cabinet may not be provisioned by Openreach until an engineering visit by Openreach to that cabinet can be arranged to deal with an additional request by that same access seeker for a GEA-FTTC service at the same street cabinet.²¹
- 2.13 In other words, the process would enable access seekers to undertake batch provisioning, and as a result will be able to save on certain costs. Openreach state that "in the trial that has been launched, a discount of £11 per installation is being offered via the capability." Specifically, Openreach have requested that provision orders that are placed using the capability are exempted from the First Available Date ('FAD') Quality of Service ('QoS') Standard and from three Key Performance Indicators ('KPIs') as imposed by Ofcom in the 2018 Quality of Service for WLR, MPF and GEA Statement on the basis of Condition 11 in of the Wholesale Local Access ('WLA') SMP conditions (referred to below as the WLA QoS Statement).
- 2.14 Our concern with the current proposed variation is that it is not in keeping or in pursuit of the aforementioned targets and runs the risk of promoting FTTC take-up at the expense of FTTP investment and rollout.
- 2.15 We acknowledge the remit of this upgrade path is concerned with moving MPF and WLR+SMPF consumers onto FTTC services however, there is a material risk that the result of such proposals will be a delay in the migration of customers to FTTP which will ultimately dampened investment in FTTP and leave consumers worse off overall. It is therefore critical that Ofcom consider the full implications of such proposals to ensure that they do not undermine their overall regulatory strategy; to promote investment in competing full fibre networks.
- 2.16 This issue is exacerbated by the fact that FTTC service contracts offered by CPs can be up to 24 months in duration . This can be significantly problematic, as Ofcom itself notes a large proportion of consumers rarely switch provider and that in reality the consumer may stay on the same network for large periods of time.²² Furthermore, the current rules and processes around cross-platform switching – whilst in the process of being developed²³ - are cumbersome and complicated which in turn helps to further entrench these consumers onto their current service (and by extension the FTTC network).
- 2.17 Taking into consideration the aforementioned issues around cross-platform switching, the limited capacity available on Openreach infrastructure (which is likely taken up by these copper drop connections and would otherwise be utilised for FTTP drops via the PIA product), current issues around Early Termination Charges (ETC's) and fibre advertising, lead to a further entrenchment of end-users on FTTC networks and thus damage to FTTP take-up rates and thus the larger investment case.²⁴

²¹Openreach (2019). 'Openreach request for regulatory waivers in connection with its proposed Bulk Grouping provision capability for GEA-FTTC and SOGEA' 18 October'. Page 14. [\[Link\]](#).

²² Ofcom (2018). 'Helping consumer get better deals: A review of pricing practices in fixed broadband'. 25th September 2019. [\[link\]](#).

²³ Ofcom (2019). 'Fair treatment and easier switching for broadband and mobile customers'. 17th December 2019.

²⁴ [3<].