

Annex A



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Significant concerns with Ofcom's Wholesale Fixed Telecoms Market Review proposals and conduct

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1 Introduction and background

1. Competitive fibre operators currently plan to invest in excess of £8bn in new fibre infrastructure for the UK. Investors seek stable, long-term policy environments which support a level playing field, but are concerned that, through the Wholesale Fixed Telecoms Market Review (WFTMR), Ofcom is pursuing policies which favour investment by BT, reduce competitive investment incentives, and increase regulatory risk. There is also concern that Ofcom's proposals are not aligned with Government telecoms policy and put at risk Government achieving its target of 85% fibre coverage by 2025.
2. Builders and operators of, and investors in, competitive fibre networks in the UK are deeply concerned at some of Ofcom's proposals within the WFTMR which they believe to be contrary to Ofcom's own stated strategy and in conflict with Government policy.
3. Competitive investment in new fibre infrastructure is a core and essential element of the Government's telecommunications policy, as set out very clearly in the Statement of Strategic Priorities (SSP).¹ Ofcom itself committed to a pro-competitive strategy in its Strategic Statement of July 2018².
4. In the WFTMR, however, Ofcom seems to be assuming that BT will be the primary infrastructure builder³, and that it will have ubiquitous coverage. This is despite repeated statements from BT/Openreach that it will not be able to deploy fibre everywhere and expects other providers to contribute to the total coverage, and the increasingly optimistic picture in terms of alternative providers' willingness and ability to make substantial investments in all parts of the market including rural areas.

¹ [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842918/SSP - as designated by S of S .pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842918/SSP_-_as_designated_by_S_of_S_.pdf)

² https://www.ofcom.org.uk/data/assets/pdf_file/0025/116539/investment-full-fibre-broadband.pdf. See paragraph 1.6

³ This can be deduced from Ofcom's approach to BT's copper retirement, in which BT can only retire its copper-based services once BT itself has achieved specific % fibre coverage. Ofcom does not acknowledge that some areas may have competitive fibre coverage only, with no BT/Openreach coverage. Additionally, Ofcom's fibre costing model assumes that BT will get 100% market share in Area 3.

5. The fastest way to make full fibre available to as many UK homes as possible is through a combination of build by Openreach, Virgin and full-fibre providers. This is a core and essential element of the Government's telecoms policy, as set out in the SSP⁴.
6. In order for Ofcom to deliver on its own strategic objectives and the Government's Strategic Priorities, it needs to embrace the pivotal role of competitive fibre investors and operators (large and small) and seek solutions to actively encourage and facilitate continued competitive investment and deployment.
7. Given the significant negative impact on alternative investment that could result from the current WFTMR proposals, Ofcom is encouraged to take sufficient time and care to address the issues presented in this document rather than rush to complete the WFTMR process in ways that would stymie competitive investment.
8. The signatories are willing to work with Ofcom and other stakeholders to develop alternatives to Ofcom's current proposals. In many cases, alternatives have already been proposed in individual and joint consultation responses, so this could be achieved relatively quickly with minimal impact on the WFTMR timing.

2 Inconsistencies with Government policies and SSP

9. The Government has set out its pro-competitive policies in the Future Telecoms Infrastructure Review (FTIR)⁵ and the subsequent SSP. Government recognised the need to encourage competitive investment in fibre for two reasons, firstly, it would increase the inflow of investment into UK fibre infrastructure and speed up deployment to the benefit of citizens, consumers and the overall economy, secondly, it would put pressure on BT to accelerate fibre deployment in order to protect its market position against new competitors. Ofcom also published a Strategic Statement to coincide with the FITR, embracing the need to encourage infrastructure investment across the UK.

⁴ SSP paragraphs 1, 9, and 24, noting that the Government's Outside-In programme targets deployment by Openreach **and** competing providers.

⁵ <https://www.gov.uk/government/publications/future-telecoms-infrastructure-review>

Since then, however, some of Ofcom's regulatory proposals have not matched this commitment to infrastructure competition.

10. In the WFTMR Ofcom is proposing a pro-competitive price regulation approach, which will help attract investment into the UK fibre market, but other components of the WFTMR are clearly favouring deployment by BT over competitive deployment and making it necessary for BT to overbuild competitive fibre infrastructure in order for it to cease provision of copper-based services.
11. This document sets out concerns relating to substance of Ofcom's proposals as well as to Ofcom's conduct during the WFTMR, where it appears that such proposals or conduct is contrary to the FTIR and/or the SSP, that is highlighted.

3 Ofcom's conduct and processes

12. During the second half of 2020, Ofcom issued a number of consultations related to the WFTMR, including the Area 3 pricing remedies consultation, the last copper retirement consultation, and the consultation of adjustments to proposed WFTMR remedies.
13. The significant risks associated with Ofcom's proposals in those consultations are set out in section 3 above. This section addresses Ofcom's conduct in relation to those consultations.
14. Ofcom is known and respected for its inclusiveness and thorough consultation processes, but the most recent WFTMR-related consultations have been characterised by the following:
 - Very short time allowed to respond to complex proposals;
 - Significant proposals presented very late in the WFTMR consultation process;
 - Insufficient detail in consultations;
 - Absence of meaningful impact assessments;
 - Incomplete analysis of proposals put forward;

- Bias towards BT/Openreach in follow-up consultations; and
- Limited engagement with stakeholders during consultation periods.

15. Additionally, the subjects of the consultations appear to have focused on addressing concerns expressed by BT/Openreach, with no focus on issues raised to Ofcom by competitors to BT/Openreach. Overall, the WFTMR process has been characterised by an emphasis on arriving at arrangements with BT/Openreach, at the cost of detailed consideration of concerns raised by competitive providers.

3.1 Time allowed to respond to complex consultations

16. The Area 3 price remedy consultation, which first introduced the concept of the BT Commitment, was issued during the main summer holiday period, and allowed only 6 weeks for stakeholders to respond. The Area 3 definition and remedies were amongst the most contentious parts of the WFTMR, and the impact of Ofcom's proposals were significant; allowing only 6 weeks to analyse and respond to the proposals, (especially as this happened during August and September), was inappropriate and inconsistent with Ofcom's own consultation principles⁶ and its general duties.⁷

17. The copper retirement consultation which was issued in October (in response to BT submissions), proposing that BT could withdraw copper-based services earlier than proposed in the January WFTMR, again allowed only 6 weeks for stakeholders to respond. In light of the very significant risks to competitive fibre deployment arising from the copper retirement process, and the fact that Ofcom's third consultation on that subject in 10 months did not address any of those risks, this was a very tight response time.

⁶ <https://www.ofcom.org.uk/consultations-and-statements/how-will-ofcom-consult>. Note paragraph 4 stating that Ofcom will consult for up to 10 weeks, depending on the potential impact of Ofcom's proposals.

⁷ See sections 7 and 48A of the Communications Act 2003. In particular, 48A (4) specifies 1 calendar month as the minimum consultation period. Given this consultation was undertaken during the main holiday period, in reality Ofcom offered nothing more than the absolute minimum consultation period for these very controversial proposals which will have material impacts on competitive fibre network investors and operators.

18. The further consultation on certain proposed remedies was issued on November 6th, with a response deadline of December 8th, allowing barely the minimum 1 calendar month period for stakeholders to respond. This consultation included the proposals discussed above for changes to how charges for costs of accessing Openreach's ducts should be shared between BT and access seekers. The extremely short time allowed for this consultation, combined with Ofcom's unwillingness to offer an extension to that timetable, meant that the responses to this consultation were hurried and curtailed.
19. Requests for extensions to the consultation period were denied, and several stakeholders did not manage to submit by the closing date but did so within a very short time afterwards.
20. The significant impacts of Ofcom's Passive Infrastructure Access (PIA) pricing proposals are set out below. Allowing less than 5 weeks for stakeholders to respond to those proposals could not be considered sufficient.

3.2 Late presentation of material changes and proposals

21. Ofcom's consultation of certain proposed remedies closed on December 8th, very late in the overall WFTMR timetable and close to Ofcom's WFTMR Final Statement deadline in March 2021. Despite this (perhaps caused by these proposals being presented so late) stakeholders undertook extensive analyses to understand the rationale for, and impact of, Ofcom's proposals, but there are significant concerns that Ofcom may not have been able to give full consideration to the responses received, given the timing of the consultation⁸.
22. The responses submitted questioned how the costs to be recovered in duct rental charges were derived, but Ofcom would not have been able to analyse the arguments submitted nor to accommodate any of the proposals presented without causing delays to the WFTMR timetable.

⁸ See section 48A (6), which requires Ofcom to "consider every representation about the proposal made to them."

23. Competitive provider discussions with Ofcom during the consultation period suggested that Ofcom did not consider the proposals to have a material impact and was surprised at the reaction by stakeholders. Competitive provider discussions with Ofcom, after the consultation was closed, suggested a full rejection by Ofcom of all arguments presented in the consultation responses without presentation of underlying rationale.

3.3 Incomplete consultation documents

24. The Area 3 price remedy consultation was surprisingly short, given the significance of its proposals (only 35 pages, including legal instruments). The consultation stated that BT had proposed a Commitment to cover 3.2m premises in Area 3, but it offered no information or analysis of this offer (beyond whether it would be sufficient to compensate for any additional revenues collected due to the proposed change to the charge control). Nor did the consultation address the strong concerns expressed by a large number of respondents to the main WFTMR, regarding the definition and size of Area 3⁹.

25. The consultation also did not attempt to consider whether the BT Commitment could have any adverse impacts on competition or consumers, despite the fact that the WFTMR responses from several respondents had alerted Ofcom to this and Ofcom's duties to protect the interests of consumers and further competition where viable.

26. The consultation on changes to certain proposed remedies included a section of 6 pages in which Ofcom proposed to fundamentally change the way costs of BT ducts should be shared between BT and access seekers. The proposal offered no rationale for why Ofcom's proposal would result in fair and reasonable PIA charges, nor did it consider the impact of the proposed changes on PIA users, only a brief review of the charges resulting from the proposed changes.

⁹ Section 48A (3) of the Communications Act 2003 sets out what Ofcom must include in its proposals for market definitions and SMP remedies. This and the other two follow-on WFTMR consultations covered in this paper did not address severe concerns already submitted to Ofcom in responses to the main WFTMR consultation, nor did they address concerns in general regarding the impact of Ofcom's proposals on infrastructure competition.

3.4 Missing impact assessments

27. The Area 3 price remedy consultation did not contain a regulatory impact assessment section. Nor did the actual consultation document include any attempt at considering any potential competition or consumer impact of the proposals set out in the document. As the consultation presented significant changes to those set out in the January WFTMR consultation, this follow-on consultation could not be considered to be covered by the initial WFTMR impact assessment.¹⁰
28. The copper retirement and proposals to change certain remedies consultations included boiler-plate impact assessment sections (which refer out to the main consultation document to perform the impact assessment); neither attempted to identify or measure any impacts on competition or consumers of the proposals put forward.
29. Missing impact assessments may suggest that Ofcom had not identified any potential impacts. But as stakeholder responses to main WFTMR consultation had already alerted Ofcom to potentially material negative impacts, it is a cause of concern to see that there was no attempt to address or assess their validity and/or seriousness.

3.5 Incomplete analysis

30. As set out above, none of the three WFTMR consultations included meaningful impact assessments. This means that the consultations did not offer any analysis of how the proposals would affect competitive fibre builders (or any other stakeholder groups).
31. Without presentation of potential issues and analysis of those issues, it cannot be expected that respondents will be able to respond fully to the consultations. Many stakeholders have limited resources and competencies in the area of regulation and cannot be expected to anticipate issues not included in the consultations.
32. It is particularly striking that Ofcom did not include impacts that had been identified by respondents to earlier consultations, even if just to explain why it did not consider them

¹⁰ Ofcom's duties to provide impact assessments are set out in Section 7 of the Communications Act 2003.

relevant or material. Their omission from follow-on consultations may be construed as a lack of regard by Ofcom to certain responses.¹¹

3.6 Bias in Ofcom's assumptions and analyses

33. Ofcom's WFTMR and subsequent consultations appear to be based on an overall assumption that BT will deploy a ubiquitous fibre network across the UK. That is clearly erroneous:

- The SSP requires Ofcom to consider 'competition for the market' to achieve full and fast Fibre to the Premises (FTTP) coverage.¹²
- The Outside-In programme will award funding to BT and competitive providers to deploy in locations where public subsidies are required to make a single fibre network viable – it would be incredible for Ofcom to expect BT to overbuild competitive fibre networks deployed under this programme.
- BT and Openreach have repeatedly stated in public that BT/Openreach will not deploy to the entire country.

34. This presumption has led Ofcom to allow BT to claim the 3.2m most commercially attractive premises in Area 3 as a virtual exclusive franchise area, effectively freezing competitive providers from new deployments in those areas and guaranteeing overbuild by BT of existing competitive fibre networks in those areas.

35. Ofcom has not included in its subsequent consultations the very significant concerns voiced by competitive providers in their main WFTMR responses; only issues raised by BT have warranted reconsultation by Ofcom.¹³

¹¹ See footnote 11.

¹² SSP paragraph 22.

¹³ Paragraph 4 (b) of the EECC ([file:///C:/Users/GitaSorensen\(GOSCons/Downloads/EuropeanElectronicCommunicationsCodeUpdatingEUTelecomRules.pdf](file:///C:/Users/GitaSorensen(GOSCons/Downloads/EuropeanElectronicCommunicationsCodeUpdatingEUTelecomRules.pdf)) sets out the duty of regulators to not discriminate between providers of electronic communications networks and services. Also section 4(6) of the Communications Act 2003 provides clearly that Ofcom must not favour one form of electronic communications network, electronic communications service or associated facility.

4 Concerns relating to Ofcom analyses and proposals

36. Ofcom's clearly stated WFTMR objectives are to transform the business case for investment in full-fibre broadband and remove barriers to help the rollout of fibre networks right across the UK – including areas that are hard to reach. These dovetail well with the Government's SSP and, overall, the Ofcom proposals were well received by builders and operators of, and investors in, new competitive fibre infrastructures in the UK.
37. Ofcom has conducted a number of consultations as part of the WFTMR process and the signatories to this submission have expressed strong concerns throughout¹⁴.
38. One very significant area where it was felt that Ofcom's proposals were in conflict with its overall objectives, and the SSP, was the definition of and proposed remedies for Area 3. Here almost all respondents to the WFTMR (including BT/Openreach) disagreed with Ofcom on which areas should be included in Area 3, what the criteria for Area 3 should be, and how Area 3 should be regulated.
39. Ofcom's Area 3 definition is also at odds with the Government's definition of where there is no viable commercial business case for fibre deployment. This is demonstrated by the scope of the Government's Outside-In programme, which covers up to 5m premises, whereas Ofcom had identified approximately 9.2m premises as part of Area 3. This implies that 4.2m premises, while commercially viable, are not regarded by Ofcom as suitable for competitive deployment. Ofcom offers no analysis or explanation of why this should be the case.
40. Ofcom subsequently re-consulted on the price regulation in Area 3 but did not reconsult on the Area 3 definition, despite having received material objections from many respondents.

¹⁴ <https://www.ofcom.org.uk/consultations-and-statements/category-1/2021-26-wholesale-fixed-telecoms-market-review>
<https://www.ofcom.org.uk/consultations-and-statements/category-2/bt-commitment-area-3-fibre-network>
<https://www.ofcom.org.uk/consultations-and-statements/category-2/copper-regulation-withdrawal-conditions>

41. Other issues were identified by competitive fibre builders and operators, including Ofcom's proposals for how BT/Openreach should be able to retire its copper-based services. These proposals did not consider the impact of copper retirement on infrastructure competition, or the role of alternative fibre infrastructure where it is the only infrastructure in a location. Two further consultations on this subject also failed to recognise the impact on, and role of, alternative infrastructure.¹⁵
42. In a very late consultation (November 2020), Ofcom proposed changes to how charges for access to duct space are calculated. The last major review of the duct and pole access was in the 2018 Wholesale Local Access Market Review (WLAMR), and since then Ofcom's approach to PIA pricing had been consistent and transparent. Price levels have consistently been reduced since then (notably in the Physical Infrastructure Market Review (PIMR) in 2018/19), and the January 2020 WFTMR consultation was consistent with that approach.
43. But the November 2020 consultation proposes changes which result in a significant increase to prices for certain types of duct and allow BT to continue to over-recover the costs of providing duct access indefinitely.
44. Separately from the WFTMR consultation process, but directly linked to Ofcom's product market definition in the WFTMR, Openreach announced in late November new terms and pricing for products that are crucial to competitive fibre deployment – the Ethernet Access Direct (EAD) product and Optical Spectrum Access (OSA) products. Openreach stated that, as it had no regulatory obligation to offer these products for the purpose of FTTP backhaul, and alternative providers could use the upstream regulated PIA product for this, it was imposing a significant surcharge on the standard pricing for EAD and OSA products used for FTTP backhaul.
45. Additionally, BT/Openreach stated in its WFTMR response that, for the same reasons, it would not allow use of the forthcoming dark fibre product in Area 3 for FTTP backhaul.

¹⁵ This could be considered discriminatory treatment by Ofcom, by favouring the resolution of issues raised by BT and not addressing those raised by other providers of electronic communications networks and services.

Discussions with Ofcom on the matter initially indicated reluctance by Ofcom to engage with this issue in the absence of a formal complaint. Later indications from Ofcom suggest that its position may have changed, although no formal communications have been received to confirm this.

46. Individually, each of the issues outlined above would increase regulatory risk for competitive fibre investment in the UK, impair returns on existing deployments entered into on a “fair bet” understanding, harm future deployment business cases, and delay and reduce investment and deployment. This is entirely at odds with Ofcom’s own objectives and the Government’s policies. Combined, however, they appear to represent a consistent bias in Ofcom’s WFTMR proposals.
47. The main WFTMR proposal is the change to how Openreach prices are regulated to encourage investment in new fibre infrastructure. This change is welcome but is contradicted by a number of other proposals in the WFTMR. Concerns raised by competitive providers have not resulted in further analysis and consultation by Ofcom, nor has Ofcom explained why it considers the concerns raised to not be valid or material.
48. Below is an impact analysis of the Ofcom proposals outlined above.

4.1 Definition of Area 3 and introduction of BT Commitment for Area 3

49. Ofcom consulted on the Area 3 definition in January 2020 and then on proposed changes to remedies in Area 3 in July 2020. Many respondents expressed deep concerns at the likely impact of Ofcom including locations that are commercially viable for at least one fibre network into Area 3. Ofcom’s proposal for the ‘BT Commitment’ in Area 3 has also met with widespread concern and opposition.
50. The BT Commitment constitutes a voluntary commitment by BT to deploy FTTP to 3.2m households in Area 3, within the 5-year period covered by this review. No other provider

was offered the opportunity to make similar commitments, despite some offering to do so¹⁶.

4.1.1 Impact of Area 3 definition and the BT Commitment

51. Area 3 is too large. Ofcom has included approximately 9m premises in Area 3. That 9m includes locations where competitive operators have already deployed, are in the process of deploying, or have fully funded plans to deploy fibre. Ofcom offers no rationale for why it has not excluded such premises, other than references to difficulties in very granular analysis. Nor does Ofcom present any impact analysis for this.
52. Ofcom's inclusion of those premises in Area 3 means that BT can include them in its Commitment, which then becomes meaningless if it simply commits to overbuild existing fibre or displace competitive providers.
53. Area 3 is inconsistent with Government policy. Government analysis suggests that a maximum of 5m premises are not commercially viable for fibre deployment. Where deployment is commercially viable, Government policy is to encourage competitive supply and deployment. This is set out clearly in the SSP, in particular sections 1.1, 1.2 and 1.3.
54. BT's Commitment sterilises commercial investment opportunities. Once BT announces its plans to cover a location, local authorities often stop working with competitive providers even where BT often plans mean significantly later deployment. This is particularly the case as BT present their deployment as part of an agreement reached with Ofcom. Additionally, as some areas may not support more than one fibre infrastructure, certainty that BT will overbuild existing fibre means that funding is withdrawn from locations covered by the BT Commitment. Ofcom's approach damages investor confidence.

¹⁶ This could be considered discriminatory, as Ofcom offers the opportunity to make a commitment to provide fibre coverage to BT only.

55. The BT Commitment constitutes discrimination by Ofcom. Due to the sterilising effect of the BT Commitment, it effectively constitutes a right by BT to reserve locations in Area 3 for its sole deployment. No other investor in fibre has been given this opportunity¹⁷ and Ofcom has strongly resisted proposals to create exclusive franchise areas where individual operators can deploy fibre. This increases perceived regulatory risk for investors, as Ofcom appears to favour the incumbent.
56. The BT Commitment allows BT to cream-skim Area 3. BT's Commitment covers commercially attractive locations which should not be in Area 3. These are locations that competitive providers have already covered or plan to cover, but they are now being 'reserved for BT'. In reality the Commitment is meaningless, as BT would be very likely to cover those locations in any case, Ofcom is therefore causing harm to competitive investment prospects with no counterbalancing benefit to justify doing so.¹⁸
57. Ofcom's area 3 proposals (definition and BT Commitment) will reduce and delay commercial fibre investment in the UK¹⁹. A significant portion of the £8bn or so planned competitive investment is targeted at Area 3 deployments. As described below, Ofcom's proposals cause direct harm to investment incentives and will reduce total commercial investment in the UK, leaving more to be covered by subsidies paid for by the taxpayers. This is contrary to the SSP.
58. End users will benefit from fibre later than would be the case without the BT Commitment. The BT Commitment removes competition for the market and leaves it to BT to decide when it wants to cover the areas covered by the Commitment. Without competitive pressure to deploy in Area 3, BT will no doubt focus on Area 2 where it does face such pressures – leaving consumers within the BT Commitment areas to wait longer than they would otherwise. This directly contradicts the "Outside-In" approach to deployment set out in the SSP, section 1.4.

¹⁷ As noted above, this could be considered as Ofcom favouring BT over competitive providers, in apparent conflict with the EECC and the Communications Act 2003.

¹⁸ See footnote 19 above.

¹⁹ This would appear inconsistent with the FTIR and the SSP.

4.2 Copper retirement

59. Ofcom consulted on copper retirement in January 2020, in June 2020, and again in October 2020. Significant concerns by competitive fibre builders were raised in response to those consultation, in particular to the January and October consultations.
60. Ofcom's proposals for how BT can retire its copper-based services are almost entirely focused on reducing or avoiding detrimental impact on vulnerable end users and communications providers (CPs) that use Openreach services to serve end users. Despite competitive providers having pointed out repeatedly the risks to infrastructure competition arising from BT copper retirement activities, these are not even included in Ofcom's consultations.²⁰

4.2.1 *Impact of Ofcom's copper retirement proposals*

61. Market foreclosure effects: Allowing Openreach to accelerate the process of introducing 'stop sell' of copper products and trigger copper withdrawal runs a substantial risk that large parts of the market are foreclosed to alternative fibre builders. It will allow Openreach to lock in both BT's own downstream customers and those of independent retail ISPs ahead of full fibre builders being able to establish sufficient market presence in the areas concerned. Openreach has expressed its intention to develop incentive programmes for its wholesale customers to migrate their retail customers from Openreach's copper service to Openreach's fibre services. Such programmes, combined with the ability to introduce 'stop sell' and ultimately withdraw copper services will leave ISPs with little option but to transfer their customers en masse to Openreach fibre. Clearly, if Ofcom is serious about promoting infrastructure competition this would be highly premature.
62. Consumer's preferences will be distorted: To facilitate copper retirement, ISPs will need to undertake extensive preparatory marketing – not least, because forced migration of

²⁰ It is concerning that this may not be consistent with Ofcom's duties to include impact assessments, nor with duties to ensure that consultations are complete and comprehensive.

customers content with their existing service will require considerable marketing effort. The intensity of such campaigns, and their focus on rapid migration to facilitate Openreach's specific commercial decision to retire its copper, would make it extremely hard for competing network operators to compete for attention of consumers.

63. Secondly, it is possible that BT and the other Openreach-based retail providers could offer to migrate existing customers to fibre while they are still in contract for copper-based services. This would mean that they could tie in customers for a new full contract period and, additionally, once customers have moved to fibre the natural 'switching window' would be closed and the ability for competitive network operators to attract retail customers would be significantly reduced.²¹
64. Competitive fibre network operators would struggle to reach critical mass. Due to the consequences set out above, competitive fibre operators would not be able to attract sufficient retail and wholesale customers to achieve minimum efficient scale on their networks. Their investments would therefore become unviable.
65. Investment risk would increase substantially. The compound effect of the consequences set out above would be increased investment risk, higher cost of capital, and reduced investment in commercial fibre deployment in the UK.
66. BT will have to overbuild existing fibre. If BT can only retire its copper services once it has achieved the set % coverage with its own fibre network, it will not be able to make commercial decisions about whether/when to overbuild existing fibre operated by competitors. Whilst Ofcom is clearly committed to a competition model which promotes overbuild, we believe Ofcom recognises that the specific targeting of overbuild in areas of nascent competition, with resultant deterrent effects, is not desirable.
67. Obliging BT to overbuild to facilitate copper retirement effectively constitutes Ofcom interference in commercial deployment decisions and substantially increases the risk that

²¹ There is concern that this in fact favours providers of electronic communications services using BT's network over those that do not.

competitive fibre, in locations that can only support a single network, will be subject to economically inefficient overbuild by BT.²²

4.3 Pricing of PIA

68. Ofcom consulted on PIA prices in January 2020 and November 2020. Several stakeholders submitted weighty responses to the November consultation, expressing deep concerns at Ofcom's proposed changes and how BT's costs were calculated.

69. Ofcom's November 2020 consultation is a reaction to BT's response to Ofcom's January 2020 WFTMR response and proposes to change the principle for how costs of ducts and poles are shared between BT and PIA users, resulting in a 33% increase of rental prices for 2-bore ducts, and considerable uncertainty about how PIA prices will be set in the future.

70. BT had asserted that PIA duct rental pricing would increase in the long term, once BT has removed its copper cables and therefore no longer occupies as much duct space as it does at present. Ofcom's reaction to that is to change how costs are shared, from a reflection of how the space in ducts is shared between BT and one or more PIA users to something Ofcom refers to as 'value-based' pricing. Ofcom offers no justification for how it has arrived at its proposed value-based charges and it is not clear whether this methodology is in compliance with Ofcom's duties.²³

4.3.1 *Impact of Ofcom's proposed PIA duct rental cost allocation approach*

71. Profitability of existing deployments will be impaired. When deciding whether to deploy fibre networks to a particular area, competitive operators typically compare the costs of building networks entirely themselves (which entails high up-front capex) with the cost using PIA rental (which entails lower up-front costs but recurring opex over the lifetime of the network). Current pricing has meant that PIA has been an attractive option.

²² This would appear to be inconsistent with the FTIR and the SSP, which both seek to achieve deployment to as much of the UK as possible at pace.

²³ Ofcom's duties to consult provide that Ofcom should provide its rational and impact assessment of its proposals.

72. Investment decisions rely on stable forecasts of PIA prices over multiple decades. A change in the forecast price trend of the magnitude proposed by Ofcom results in a major increase to the PIA costs over the lifetime of a network, and could dramatically reduce the projected returns, quite possibly making them negative. This undermines the “fair bet” principle, which Ofcom has adopted in the past, and which the SSP states should apply over an extended timescale.²⁴
73. Funding for new competitive deployments will be reduced. As confidence in returns from existing competing fibre investments is diminished, it is inevitable that new funding for competitive networks will be less forthcoming. Rates of return will be lower, making investments less attractive and more risky; this will lead to higher costs of capital.
74. Many areas which were previously considered attractive for investment will no longer find a place on the competitive providers’ lists of targets, especially smaller towns, villages and rural areas. Other areas may remain marginally profitable but be de-prioritised and delayed. Overall, fibre deployment would likely be significantly lower than currently planned by competitive providers.²⁵
75. BT will continue to over-recover its duct costs at the expense of customers. BT’s published regulatory Financial Statements show that, over many years, BT has consistently recovered more than the cost of its duct and pole infrastructure via regulated charges set by Ofcom. Ofcom’s current proposals allows this to continue, paid for by competing providers and end-users (i.e., customers of both BT and competing providers).
76. Fibre customers will subsidise an obsolete and inefficient duct network. BT’s duct network was dimensioned to support a tree-and-branch network of copper cables, which occupy a much larger cross-sectional area than modern fibre cables. A modern duct network, designed to support fibre cables only, would be much simpler and comprise

²⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842918/SSP_-_as_designated_by_S_of_S_.pdf Section 1.3

²⁵ This could mean that the data collected by Ofcom as part of the WFTMR process is no longer sound for the purposes of implementing regulatory remedies for the next five years.

only one or two bores; it would therefore be cheaper to install and operate. Ofcom proposes that BT should continue to recover the costs of this inefficient infrastructure after the copper cables are no longer in use.

77. BT will have no incentive to remove redundant copper cables. Ofcom's value-based charging removes an incentive for BT to utilise duct space efficiently. This could result in copper cables remaining in ducts and taking up capacity needed for new fibre cables. This could result in overbuild that is economically inefficient and increases the carbon footprint of the telecoms sector unnecessarily.

4.4 Pricing and usage restrictions for EAD, OSA and DFA for FTTP backhaul

78. BT (through Openreach or BT Wholesale) has been supplying EAD circuits for all purposes for many years. EAD circuits form temporary or permanent parts of many competitive networks in the UK. Likewise, since BT introduced its OSA product, operators have also started using this for connectivity within their networks.
79. BT's new pricing varies depending on how the circuit is used, not on the nature or the costs of the circuit itself. BT has introduced significant surcharges on any EAD or OSA circuits used for transport of aggregated FTTP traffic. BT/Openreach is also proposing (in its WFTMR response) to prohibit the use of the forthcoming dark fibre products in Area 3 for FTTP aggregation. BT uses Ofcom's leased lines market definitions to justify these positions.
80. Many competing network providers or other CPs have contacted Ofcom directly to express their concerns and ask that Ofcom intervene. If BT is exploiting ambiguity in the definition of SMP markets, or a market boundary has been mistakenly set inappropriately, Ofcom should intervene to prevent BT from frustrating competitive fibre deployment.

4.4.1 Impact of BT's EAD and OSA pricing behaviour and DFA usage restrictions

81. BT's surcharges affect products which are key to competitive fibre deployment. The surcharges to new EAD and OSA circuits represent significant increases over the standard rental prices (e.g., 10G EAD rental increases by 126% and 10G OSA by 141%).
82. Competitive operators make use of these BT products for a variety of purposes related to FTTP deployment, for example:
- Providing backhaul connections to the internet (possibly via other networks) from the operator's own core and access FTTP networks within a town.
 - Connecting points of presence (PoP) in adjacent towns or villages when deploying FTTP networks in small towns or villages.
 - Connecting individual PoPs in larger towns or cities to the internet (possibly via other networks).
 - A cost-effective means of connecting PoPs in rural settlements (serving only a small number of premises) to each other or to the nearest fibre exchange.
83. In some cases, the EADs or OSAs will be short-term solutions, allowing accelerated rollout of FTTP in advance of the competing provider constructing its own backhaul infrastructure (possibly using PIA); in other cases, they are long-term solutions.
84. Competing operator costs will increase significantly. In all of these cases the aggressive price increases imposed by BT will result in material increases in costs for competitive fibre providers. This will lead to reduced profitability and longer paybacks, and consequently risks reduced funding availability for commercial fibre deployment.
85. The planned new dark fibre remedy in Area 3 would constitute a low-cost efficient backhaul option for competitive fibre deployment, viewed as a silver lining amongst Ofcom's several harmful proposals. However, BT's position is clear that dark fibre will not be available for FTTP backhaul, and there is no evidence that Ofcom will intervene in the interest of competitive providers, despite it being evident that BT has SMP in the supply of those connections.

86. Reduction in speed and scale of competitive deployment. As a result, the pace of deployment of competitive fibre will be slower, and it is likely that areas with low customer density and high costs will become unviable for commercial deployment.
87. This impact will be particularly severe in rural areas; greater levels of government subsidy would be needed, and competitive participation in, for example, the Outside In programme may be significantly reduced. This seriously undermines the principle set out in the SSP to ensure that gigabit-capable connectivity becomes available across all of the UK on a similar timescale, with no areas left behind.²⁶
88. The price surcharge sets a precedent for further changes. Following BT's unilateral action in introducing the surcharge for EAD and OSA, there is a longer-term risk that BT could completely withdraw EAD and OSA services for FTTP aggregation. This would further intensify negative impacts on deployment timescales and costs mentioned above. BT could also adopt the same 'value-based' approach on other products, if other operators identify those as alternative means to accelerate fibre deployment.

5 Conclusions

89. Ofcom's WFTMR proposals put at risk the Government's achievement of its 85% fibre coverage by 2025 target.
90. This is because Ofcom actively encourages BT to overbuild existing fibre and proposes remedies that will sterilise large parts of Area 3 from competitive investment and deployment.
91. Ofcom's proposals are in direct conflict with the SSP, will cause a reduction of overall commercial fibre investment in the UK, higher costs to taxpayers through increased subsidies and reinforcement of BT's existing market powers, to the direct detriment of customers, consumers, and the economy.

²⁶ [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842918/SSP - as designated by S of S .pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842918/SSP_-_as_designated_by_S_of_S_.pdf) Section 1.1

Annex B: Signatories

The following parties are signatories to this document:

1. Airband - Founded in 2009, Airband is an independent internet service provider bringing high speed broadband to homes, business, and industry in rural and hard-to-reach areas. Airband works closely with the Department for Digital, Culture, Media & Sport, BDUK, local authorities and communities to build high availability fibre infrastructure that residents, businesses, and other ISPs can access to help overcome the UK's digital divide. <https://www.airband.co.uk/>
2. Community Fibre - Community Fibre is London's largest fibre only communications network provider and one of the largest users of BT's PIA product in the UK. Backed by large institutional investors including Warburg Pincus, DTCP, Amber Infrastructure and RPMI. Community Fibre is on track to expand its 100% full fibre network to one million properties by the end of 2023.
3. County Broadband - Established in 2003, County Broadband has transitioned over the past two years from a wireless operator, to a predominantly fibre operator. The company received £46m investment in late 2018 to support the deployment of circa 36,000 homes passed and is now preparing for its next funding round in 2021 to support deployment to a further 150,000 rural premises in the East Anglian region. The company employs substantial use of Passive Infrastructure Access (PIA), as well as its own installation of ducts and poles.
4. euNetworks - euNetworks is a Western European provider of bandwidth infrastructure services. We focus on delivering scalable, fibre based products and solutions to a customer base that is at the centre of technology transformation. Our customers require fibre based data centre to data centre connectivity, both within the key cities in Europe and between these cities, supporting both their bandwidth growth and the performance requirements that their applications demand. Our customers' needs shape how we develop our network further. We own and operate 17 dense fibre based metropolitan city networks. These are connected with an intercity backbone covering 51 cities in 15

countries. Our metro networks are in London, Manchester, Dublin, Amsterdam, Rotterdam, Utrecht, Paris, Frankfurt, Cologne, Dusseldorf, Stuttgart, Munich, Hamburg, Berlin, Vienna, Milan & Madrid. euNetworks leads the market in data centre connectivity, directly connecting over 440 in Europe today, with further data centres indirectly connected. We are also a leading cloud connectivity provider, direct connection to all key cloud platforms and access to additional platforms. Our product set of Fibre, Wavelengths and Ethernet is bundled to deliver bandwidth solutions for our customers, from euTrade to Cloud Connect, DC Connect, and Media Connect.

5. Full Fibre - Full Fibre are building Fibre Only, Wholesale Only, Gigabit Broadband networks in the UK's under-served market towns. Funded by Basalt Infrastructure, we will build to at least 500,000 homes and business by 2025. This new infrastructure will unlock economic growth, fuel social mobility, and unlock the flexible working economy as well as providing extensive dark fibre networks to support mobile cell sites.
6. Glide - Glide's fully invested and scalable national network reaches 100,000 premises across the UK, holding the position as a UK leader in infrastructure solutions for difficult-to-serve markets. In 2019/20, Glide delivered uncontended, ultrafast, gigabit enabled, FTTP broadband to businesses through 650 fibre cabinets to over 450 business parks across the country. Its network provides 1500km of uncontended fibre, operating in 60 towns and cities, with planned deployment to 11 new fibre cities with unlimited speeds already available to SMEs in Coventry.
7. Grayshot Gigabit – Grayshott Gigabit Limited (“Grayshott Gigabit”) is a telecom service provider aiming to provide Gigabit connectivity over full fibre to the premise and fixed wireless access to underserved rural communities in Hampshire and surrounding areas. Grayshot Gigabit plans to start network deployment during the summer of 2021 and plans to cover approximately 19,000 premises over the coming 5 years.
8. INCA - INCA is a trade association. Its members are supporting, planning, building, and operating sustainable, independent, and interconnected full fibre and wireless networks that advance the economic and social development of the communities they serve and

permit the provision of applications and services through open competition, innovation, and diversity. INCA's aims are to:

- support the development of sustainable independent networks through collaboration on the provision and procurement of products and services and adoption of common standards.
- support collaboration between members to create new, independent digital infrastructure that can be shared by operators and suppliers.
- support mutual trading between members.
- represent the interests of independent networks.
- promote the advantages and successes of independent networks.

INCA has more than 150 members, including: network owners, operators, and managers; access and middle mile networks; public sector organisations actively promoting the development of 21st century digital infrastructure; vendors, equipment suppliers, and providers of services that support the sector.

9. ITS – ITS Technology Group Ltd was formed from the acquisition of several smaller telecommunications organisations, providing fixed and wireless connectivity. Following Aviva taking a majority shareholding and providing significant growth finance in 2019, the company has focused strategically on deploying full-fibre metropolitan and regional networks, delivering B2B wholesale connectivity to resellers, wholesale service providers and other operators. In January 2021, ITS has over 150 channel partners and operator customers taking service on over 35 networks across the UK, including 11 full-fibre metro, 10 full-fibre business park and 5 hybrid fibre and fixed wireless networks for business and residential users. ITS believes passionately in asset re-use and makes extensive use of PIA.
10. Jurassic Fibre - Jurassic is a full-fibre broadband provider focused on bringing the best ultrafast connectivity in the UK to the underserved communities and businesses of the South West, and in particular Devon, Dorset, Somerset, and Cornwall. Backed by £250m of equity funding from Fern Trading Limited (managed by Octopus Investments),

Jurassic has committed plans to connect over 350k premises by 2025, and to significantly increase this coverage beyond. Building a future proof FTTP network to homes and businesses in market towns, villages and some of the hardest to reach communities. This will secure the region's reputation as the best place to live, work and holiday in the world, and provide a platform to attract inward investment to seaside and rural communities that have traditionally been allowed to fall behind the rest of the UK. Jurassic Fibre is working closely with Local Authorities within the region to ensure that their plans remain transparent, and the risk of subsidy being invested in commercially viable areas can be reduced with the ambition that no-one gets left behind.

11. Spectrum - Spectrum Fibre (Spectrum) is a Wales-based internet and managed IT services company that is dedicated to bringing high-quality full fibre broadband to the communities of south Wales – and becoming one of Wales's leading broadband providers. Having recently secured landmark cornerstone investment from Infracapital, one of Europe's leading infrastructure investors, to deliver an initial £200m plan, Spectrum is currently in the process of extending its full fibre network to towns and villages from Haverfordwest to Chepstow. The initial phase of work will reach 150,000 premises, but the company's ambition is to connect as many underserved communities as possible over the coming years, rapidly accelerating the roll-out of full fibre across the region. With offices in Cardiff and across its service area, Spectrum intends to have a strong community presence and provide customers with high-quality internet services from a local, trusted team.
12. Swish - Swish is a full-fibre broadband provider, bringing truly exceptional connectivity services to homes and businesses in the Home Counties. Our goal is clear and simple - to improve lifestyles and enhance the future of our communities by connecting people, businesses, and services instantly through reliable broadband. We are backed by £250m of equity funding from Fern Trading Limited (managed by Octopus Investments), which will allow us to pass 250,000 properties over the next four years. We have ambitions, through further equity raises and debt funding, to pass more than 500,000 properties. We target underserved market towns and villages and, everywhere we go,

place a huge amount of emphasis on building strong local relationships, with local councils, local businesses, and end customers.

13. Truespeed - Founded in 2014, Bath based Truespeed is a full fibre broadband provider delivering ultrafast connectivity to homes and businesses in the South West's hardest to reach cities and rural areas. Powered by a community focused ethos, Truespeed is building a brand-new infrastructure able to deliver 10 gigabit-capable full fibre broadband directly into premises. Bringing the South West out of the digital slow lane, Truespeed delivers the very best high-performance, highly reliable and truly future-proofed connectivity.
14. WightFibre - WightFibre provides phone, TV and broadband services to homes and businesses on the Isle of Wight. The WightFibre Gigabit Island Project, a £90M+ project, will see full-fibre broadband deployed to around 60,000 homes and business across the Island by 2022 and to a total of 72,000 homes by 2025. Already (Nov 2020) 23,000 homes can receive full-fibre broadband. WightFibre is owned by Infracapital Partners and was the first company to receive funding from the government's Digital Infrastructure Investment Fund in 2017.
15. Zayo - Zayo Group is a global provider of communications infrastructure services, including Dark Fibre, Wavelength, data centre connectivity, Ethernet, and IP services. Zayo operates in the United States, Canada, France, Germany, Netherlands, Belgium, Switzerland, Italy, Ireland, and the United Kingdom. Zayo was founded in 2007 and is headquartered in Boulder, Colorado, with European headquarters in London and Paris. Zayo's UK network spans more than 133,000 miles of fibre strands and connects over 130 data centres via unique routes including alongside national gas pipelines and within London's sewer system. Zayo provides many customers with dedicated fibre connections utilising a combination of on-net, new construction, and off-net leased fibre. Zayo extends its network to customer premises with a combination of purchased dark fibre as well as self-installed new-build fibre.
16. Zzoomm - Zzoomm is designing, building, and operating new full fibre networks, where the fibre runs into the property to serve the family or business. Zzoomm is building out

this network in smaller towns and suburban areas across the UK where there is no existing full-fibre network. Zzoomm's ambition is to serve more than a million homes and businesses with full fibre over the next five years in underserved market towns across the UK. From company foundation by Matthew Hare OBE in December 2018 to construction start in September 2019, Zzoomm has moved at pace to realise this ambition. Zzoomm completed the construction of its first network in Henley-On-Thames in 2020, has started construction of its second network in Hereford and is rated Excellent on Trustpilot and Google by customers.