

Non-Confidential

KCOM - Response to Ofcom's Wholesale Fixed Telecoms Market Review 2021-26 (excluding the Hull Area)

1. Introduction

- 1.1 KCOM Group Limited ('KCOM') welcomes the opportunity to provide input in response to Ofcom's Wholesale Fixed Telecoms Market Review (the 'Consultation').¹ The Consultation includes proposals on the definition of relevant markets, market power determinations and remedies package for the respective wholesale markets. The focus of our response relates to Ofcom's provisional SMP findings and the proposed remedies.
- 1.2 Ofcom's Consultation recognises the critical importance of full fibre (FTTP) broadband services to the UK and the role that this review will have in shaping the competitive landscape for the future. It is therefore essential that this review provides a level playing field for the industry so that consumers and business can fully benefit from the growth and innovation drivers obtained from full fibre deployments, and Multi-Service Networks (MSNs) more generally, both now and into the future.
- 1.3 Ofcom is presented with a unique opportunity to ensure that rival networks can compete effectively against BT in the provision of very high-speed wholesale services, and by extension to offer alternative downstream retail solutions.
- 1.4 Our fibre investment, and those made by competing providers, will play a critical role in the economic development of the UK and in Yorkshire and Humberside and the North East region more specifically. Full fibre networks provide the only future-proof Next Generation Access (NGA) solution that is capable of effectively meeting the future broadband demands of customers in the UK both in terms of scalable bandwidth and in terms of their reliability. MSNs also provide critical leased line inputs that are used in both fixed and mobile (5G) broadband networks.
- 1.5 KCOM currently provides fibre broadband services to a range of businesses and consumers **outside the Hull Area and is in a period of network expansion**. Specifically:
 - KCOM's full fibre network expansion that it is currently deploying being funded by up to £100m of new investment.² This is a material deployment that will

¹ Ofcom (2020), Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26, 8 January 2020, available at: https://www.ofcom.org.uk/_data/assets/pdf_file/0037/188956/wftmr-volume-1-overview.pdf

² KCOM announces further £100 million fibre broadband revolution for region, 8 January 2020, available at: <https://www.kcomhome.com/discover/categories/kcom-news/kcom-announces-further-100-million-fibre-broadband-revolution-for-region/>



provide residential and business premises access to full fibre and leased line services [X].

- [X]

1.6 Furthermore, **the current Government has adopted the ambitious target of delivering “gigabit-capable broadband” nationwide by 2025.**³ As a full fibre provider KCOM is committed to providing material support in meeting the 2025 target and we are reviewing our deployment plans accordingly. [X]

1.7 It is not necessarily the case that Openreach has to be the sole full fibre provider in Area 3 locations and therefore the regulatory inducements being proposed for Openreach are unlikely to be needed to ensure deployment(s) in all Area 3 locations identified in the Consultation. [X] It is important for the regulation proposed in the Consultation to facilitate complementary network roll-outs by committed Communications Providers (CPs) in addition to Openreach, rather than chilling these initiatives.

1.8 To this end **we would seek the following modifications to Ofcom’s proposals in its Consultation.**

- First, where there is a commitment from an alternative provider to deploy on commercial terms this should result in the removal of the specific regulatory dividend (e.g. the FTTC cross-subsidy) that is designed to promote Openreach’s investments in Area 3. In addition, Openreach should also not be given the flexibility to apply wholesale geographic discounts in these Area 3 locations.
- Second, Openreach should be held to a strong transparency obligation in relation to its network roll-out plans. If there is any evidence it is altering its planned deployment in an Area 3 location for anti-competitive reasons (for example, targeting an area which was not in its original build plan), Ofcom should make clear that it will take swift action (e.g. through an ex-post Competition Act investigation).

1.9 **In our view, our proposed approach will ensure network roll-out Area 3 takes place in a complementary manner, keeping potential overlaps between Openreach and other CP networks (and therefore deployment costs) to a minimum and mitigating the risk of investment hold-up.** [X]

³ PM speech at Convention of the North in Rotherham, 13 September 2019, available at: <https://www.gov.uk/government/speeches/pm-speech-at-convention-of-the-north-in-rotherham> and subsequent PM Queen’s speech: *The Queen’s Speech and associated background briefing, on the occasion of the opening of parliament on Monday 14 October 2019*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839370/Queen_s_Speech_Lobby_Pack_2_019_.pdf. The previous Government had a target to build a UK-wide full-fibre network by 2033 with the strategy for achieving this out in its 2018 *Future Telecoms Infrastructure Review* (FTIR), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/732496/Future_Telecoms_Infrastructure_Review.pdf.



- 1.10 Set out below is a more detailed summary of the key points of KCOM's response to the Consultation. The representations contained within this response are solely concerned with KCOM's business outside the Hull Area.
- 1.11 If Ofcom would find it helpful to discuss these representations further, we will be happy to meet to do so.

2. Summary

- 2.1 KCOM agrees with the stated objective of the WFTMR⁴ and notes Ofcom's proposed market definition, the SMP findings and the remedies package. We have set out certain specific points in relation to these below.
- 2.2 It follows from Ofcom's analysis that there is a clear case for deregulating certain copper-based markets, which includes narrowband voice (WFAEL), digital voice (ISDN) and the upstream broadband market (WBC). We also recognise the rationale for maintaining regulation in current generation broadband access markets, including the ongoing use of a charge control (MPF).

Market definition – Infrastructure market

- 2.3 We agree that there is a single infrastructure market in the UK (excl. the Hull Area).

Market definition - Wholesale Local Access (WLA) and Leased Lines Access (LL Access) geographic markets

- 2.4 KCOM notes the use of postcode sectors as the basis for identifying relevant WLA and LL Access geographic markets.
- 2.5 Ofcom has undertaken its geographic analysis of rollout by MSNs (i.e. those that do or will provide both broadband and leased lines) across the UK. It has assessed three alternative MSNs to Openreach (Virgin Media, CityFibre and FibreNation) and their respective rollout plans across the UK as it considers that much of the deployment over the review period to be driven by them.
- 2.6 Much has changed since the publication of the Consultation. The composition of MSNs has changed with CityFibre acquiring FibreNation from TalkTalk. Importantly, KCOM has also been acquired by Macquarie and while not currently proposing to deploy at the same scale of the other MSN providers KCOM has already committed £100m of new investment (not contingent on supply-side State aid). Where KCOM is deploying, it is doing so to the majority of premises within a given geographic area. Further investments under consideration [X].

⁴ <https://www.ofcom.org.uk/consultations-and-statements/category-1/2021-26-wholesale-fixed-telecoms-market-review>



- 2.7 The coverage threshold proposed by Ofcom will result in postcode sectors being considered as having a greater number of competing networks (existing or potential). Specifically, on Ofcom's revised thresholds the following three geographic markets result:
- **Area 3**, encompassing 30% of UK premises, where no rival to Openreach exists or plans to deploy to the majority of premises;
 - **Area 2**, encompassing 70% of UK premises, where either there is already a single competitor to Openreach (generally Virgin Media) or where one or more operators have plans to construct an FTTP network; and
 - **Area 1**, encompassing a small% of UK premises, where there are two established rival networks to Openreach. Currently no parts of the UK fall into this category.
- 2.8 On Area 3, the Consultation proposes to find that competitive conditions within this market are likely to be similar throughout the market review period, with Openreach present (committed) and potentially some other MSNs present in a part of some postcode sector (but below the network coverage threshold). However, given the favourable regulatory settlement Ofcom proposes for Openreach, scale rollout by other MSNs will likely be precluded. As a new entrant MSN, it is critical that Ofcom's analysis takes our current and future plans into account and that analysis should use appropriate geographic units and coverage metrics. Failure to do so risks undermining our investments given the remedies proposed in Area 3.

Market definition conclusion

- 2.9 Ensuring markets are correctly defined is clearly key in then establishing Significant Market Power (SMP) and in turn considering the appropriate remedies.

Competitive constraints and SMP

- 2.10 KCOM recognises that in the single UK infrastructure market (excluding the Hull Area), BT holds SMP.
- 2.11 There is material new investment in full fibre networks being undertaken in the UK, including locations provisionally identified by Ofcom as Area 3. In addition, it is credible that that there will be additional investment being undertaken in Area 3 locations over the course of the market review. Specifically, it is important that Ofcom recognises KCOM's current and planned investments as an MSN operating in both WLA and LL Access markets in the UK.
- 2.12 While we do not consider this rival build in Area 3 will affect the finding that BT holds SMP in both WLA and LL Access markets for the period of the current



review, we recognise the direct bearing it has on the form and structure of the remedies applying in Area 3.

SMP remedies regime

- 2.13 In the UK infrastructure market, KCOM does not consider that Duct and Pole Access (DPA) is likely to be widely used to facilitate network deployments in Area 3 locations. Rather, it is more likely that Dark Fibre Access (DFA) and managed 'grey' fibre will provide the relevant access products to support the deployment of competing networks.
- 2.14 If Ofcom does not consider that DPA will be used at all in Area 3 locations, then we do not consider it appropriate to introduce it as a remedy. Importantly, BT is also subject to the ATI Regulation ('symmetric' requirement to provide access to duct and pole and infrastructure), which provides an alternative route to access.
- 2.15 **In Area 2**, where there is some existing material scale commercial deployment by rival networks to BT, or where Ofcom consider it could be economic for deployments based on engagement with potential investors, KCOM considers the form of the proposed remedies package to be important. Specifically:
- **On Openreach's notification (ACCN) of new Wholesale reference Offer (WRO) fibre pricing** – We agree with draft SMP Condition requiring that Openreach gives 90-day notice for new Wholesale Reference Offers (WRO) offers and pricing. This provides both Ofcom and Communications Providers (CPs) with sufficient time to review notified pricing, consider the impacts and respond accordingly.
 - **On the need for Ofcom to limit Openreach's ability to provide geographic wholesale offers to prevent targeted pricing in areas of current or planned competitive build** – These measures are clearly needed to allow rival commercial build to occur without the risk of take-up being harmed through predatory wholesale price discounting in specific parts of the country. For example, in the absence of a prohibition on Openreach's use of geographic discounting in Area 2:
 - Openreach may seek to offer selective discounts (either for existing customers, or for new customer) in locations where an alternative infrastructure provider is offering services.
 - Openreach could favour downstream BT businesses purchasing under the guise of a discount available to all.
 - **On the need to maintain a charge control on the anchor FTTC product (40/10Mbit/s) to ensure an orderly transition to full fibre networks.** We consider that residential and business end customers already value the



different performance attributes offered by full fibre. The use of a charge control therefore ensures that customers on entry level first generation fibre are protected while providing full fibre pricing flexibility affords providers the requisite freedom to explore a range of propositions that motivate the effective and efficient use of the new infrastructure.

2.16 **In Area 3**, where Ofcom considers that there is unlikely to be material scale commercial deployment by more than one operator (which Ofcom assumes is Openreach), we consider that the form of the remedies package is crucial in determining consumer outcomes. Specifically:

- On the need for Ofcom to provide Openreach with a cross-subsidy to motivate full fibre deployment, **we consider it important that this is restricted to only those locations where there is no committed build by a rival CP**. There is no reason for Openreach to receive a ‘regulatory dividend’ in Area 3 locations where another CP has committed to deploy fibre. This would only serve to entrench worse consumer outcomes through higher wholesale prices. In such situations, Openreach should maintain **indexed pricing on its legacy copper products** to enable the customer transition to full-fibre products. KCOM also considers it important that Ofcom provides itself with a mechanism to adapt the regulatory settlement in Area 3 within the period of the market review, without the need to conduct a new market assessment, in order not to chill-out prospective builds by CPs.
- In any case, to prevent inhibiting rival CP rollout in Area 3 locations before it even occurs, Ofcom must prohibit Openreach from offering geographic discounts on its FTTP products. Ofcom recognises the need for a prohibition on geographic discounts for FTTP in Area 2 to prevent Openreach from deterring rival rollout. Ofcom’s view is that since rival rollout is unlikely to occur in Area 3, there is no reason to impose a similar restriction on Openreach. However, this ignores the fact that commercial rollout plans can and will continue to evolve as circumstances change over the market review period.
- Finally, we also request that Ofcom imposes a transparency obligation on Openreach, requiring it to publish its deployment plans covering Area 3 – these plans should include indicative timings. Any deviation would need to be objectively justified to Ofcom (for example, in response to rival CP network roll-out which leads Ofcom to lifting the cross-subsidy in a particular Area 3 location). Ofcom should clearly signal under what conditions it would consider Openreach’s intent to be prima facie evidence of anticompetitive behaviour, and what steps it would take under those circumstances (such as an ex-post Competition Act investigation and financial penalties). Holding Openreach to its plan will ensure effectiveness and efficiency of deployment, minimising overlaps in the first instance (to ensure Area 3 is fully fiberized) and duplication of costs to the benefit of consumers.





2.17 If Ofcom’s consultation proposals stand, they would not provide KCOM with the regulatory certainty necessary to enable it to make a firm decision on expanding its deployment ambitions into further postcodes in Area 3 in Yorkshire and Humberside and the North East. The changes we have suggested are essential to **level the playing field between Openreach and other CPs** [✂].

