Wholesale Fixed Telecoms Access Market Review

UKCTA Response to Ofcom

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Introduction

1. UKCTA is a trade association promoting the interests of fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. We advocate regulatory outcomes designed to serve consumer interests, particularly through competition, to Ofcom and the Government. Details of membership of UKCTA can be found at www.ukcta.org.uk. This response does not necessarily reflect the views of Virgin Media, Sky and CityFibre, who will be submitting their own responses to Ofcom.

2. We welcome this opportunity to comment on Ofcom's proposals for Wholesale Fixed Telecoms Access Market. We have structured our response as follows:

   a. The right Regulatory Framework for our Economy;
   b. Wholesale Local Access: The future of WLR regulation; an appropriate GEA Anchor approach and the need for more prescriptive rules on wholesale discounts;
   c. Geographic Markets: Ensuing a robust market definition
   d. Assuring Quality of Service for fibre and copper services;
   e. Regulating Wholesale Business Connectivity Services;
   f. Review of the RAV approach for Area 3;

A – The right regulatory Framework in the current Economic Climate

3. UKCTA supports initiatives to improve access to connectivity for the UK's consumers and businesses. High-speed connectivity is important for enterprise and commerce, delivering public services, enabling social participation and community engagement as well as becoming a key means to receive content on demand. The current health crisis has reinforced the need to ensure consumers and businesses have access to reliable and bandwidth capable connectivity.

4. The impact of the unfolding economic situation needs to be carefully considered within this market review. It is important that Ofcom take the time to consider this new economic reality in detail, before it sets about fixing a framework that will last until 2026. Setting regulation for such a long period was already a significant challenge within a normal economic cycle. That task is now considerably harder given the very uncertain and turbulent economic outlook for the UK economy as a whole. Our industry is a key part of the solution and it is imperative that the regulatory environment is cast so it can deliver for all UK consumers and businesses.

B - Wholesale Local Access

Wholesale Line Rental (WLR) Regulation – A Copper Bearer Market

5. Today, Wholesale Line Rental and Metallic Path Facilities (MPF) are both primarily used as copper bearers to support broadband access and /or telephony access. Yet, despite the close similarities between the products, they are dealt with separately under regulation. They are near identical services that may have come from different starting points but are now used primarily for the same purpose – providing copper bearer access to support broadband. Separate WLR regulation may have been sensible when these were wholesale exchange lines for dial-tone and telephony, but that is now no longer the case.

6. Even at a component level, they are closely related, with WLR having an additional line card, which often goes unused in the broadband environment as end users provision their broadband services without a fixed line, or decide not to plug in a telephone, even where a fixed line is provided as part of the service. MPF does not have a line card and the bearer is jumpered off to a co-location room to be linked to separate backhaul by the LLU provider. MPF, in common with WLR can and is used to provide exchange line functionality, with the LLU operator adding line card capability to provide dial tone, where this is requested.

7. Given the legacy investment in co-location space and the supporting backhaul needed to consume MPF, the two services are substitutes for CPs with LLU infrastructure available to them. However, given the looming prospect of copper switch off , any new investment in LLU assets would be irrational, limiting the prospects for moving between the products. However, the near identical physical and usage characteristics of these copper bearers makes it very difficult for Ofcom to justify taking a divergent regulatory approach and leaving WLR outside of scope.

8. It would seem both pragmatic and proportionate to include LLU and WLR in the same bearer market, using the same charge control remedy covering both derivatives of copper.

Discounts

9. UKCTA welcomes the proposed 90 day notice period that Openreach will be required to give around new offers and pricing. Much of the focus on discounting has been viewed from the perspective of limiting geographic wholesale offers to prevent targeted pricing in areas of current or planned competitive build. These measures are entirely necessary 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.

10. We do however believe the biggest risk posed from wholesale discounting remains, and discount schemes that allows Openreach to potentially favour BT Group purchasing under the guise of a discount available to all needs to be prohibited. Openreach could do this in a volume or product mix basis, and while on paper other CPs may be eligible, the reality might be somewhat different as practical barriers prevent take up due to unrealistic expectations being set around the qualification criteria. It is imperative that discounts are designed for all and not set at unreasonable levels to prevent participation at a practical level. While there may be a role for discounts in the market, discounts must not be used to divide the market and favour particular retailers, particularly downstream BT divisions.

Setting an Anchor fit for consumers in 2026

11. It is vital that a fit for purpose broadband pricing anchor that actually reflects mainstream broadband usage in the review period is introduced as a safeguard. We believe this should be a basket based approach containing at least 40/10 – 80/20 GEA. With price certainty at these basic wholesale price points, to ensure retail backstop broadband pricing has a solid foundation, while FTTP investment is free to compete for the growing retail appetite for higher speed demand.

12. Ofcom are proposing to continue using the 40/10 service as the anchor product, which is the only service subject to price regulation in Area 2 (the location containing the vast majority of consumers). Given annual average broadband speeds are rising by 20% or more annually[1], this suggests the Area 2 Anchor product has been set at too low a speed level that will not provide the consumer safeguarding necessary to constrain pricing of mainstream residential broadband services in the UK.

13. With a number of mainstream providers choosing not offer 40/10 and focus their entry level mainstream broadband product at higher speeds, the anchor looks in the wrong place in 2020 and by 2026 it risks falling into obsolesces, with almost no constraining impact what so ever. Ofcom judged 40/10 as the suitable point for the anchor in 2018, believing that the continued presence of standard broadband services (using MPF and ADSL) would also help to act as a constraint. The long-term future of standard broadband services looks uncertain, as consumers are increasingly turning their back on these speeds, as it struggles

[1] Ofcom Average Download Speed (% Annual Improvement)
* May 2019 = 54.2Mbps (+17.32%)
* May 2018 = 46.2Mbps (+27.62%)
* April 2017 = 36.2Mbps (+25.26%)
* March 2016 = 28.9Mbps (+26.75%)
* February 2015 = 22.8Mbps (+21.93%)
* October 2014 = 18.7Mbps (+5.06%)
* April 2014 = 17.8Mbps (+21.09%)

to cope with a content market increasingly turning to streaming and video on demand.

14. Businesses require higher speeds in order to function effectively. This will become even more pronounced when voice moves to IP by 2025, when even small businesses will require larger bandwidths to meet their telephony needs. 80/20 broadband is the speed of choice for such sites now and gives further weight to the need for a charge control on this product.

15. There is also compelling evidence to suggest that consumers rarely decide to regress their broadband speed, meaning customers who are already receiving services above 40/10 will not revert back to it should the retail price of the service they are consuming increase, even by a material amount.

16. In these circumstances there is an obvious opportunity for Openreach to incentivise use of the higher speed non-anchor services through special offers and discount schemes and then once customers have committed to them, becoming accustomed to the broadband capacity these services provide, they will not risk dropping to a lower speed to save money, muting any constraining effect of the anchor. Overtime, this effect is only likely to become more pronounced and provides an easy profit maximising route for Openreach, absent any regulatory constraint.

C- Approach to Geographic Markets for Wholesale Local Access

Framework for considering geographic markets

17. Defining geographic markets in fixed line telecoms is unusual compared to geographic market definition exercises in other sectors. In general, geographic market definition proceeds by considering the geographic area within which consumers would be willing to move their demand in the case of a small but significant increase in price. For example, supermarket geographic markets are generally defined in terms of the driving time, which it takes from customers' homes to the various supermarkets in their area, and considers the manner in which these customers switch between different options.

    a. Conversely, in telecoms markets domestic customers can only consume fixed line telecoms services at the home in which they live. The financial and time costs of moving house are such that no rational customer would move home in order to obtain broadband services at a 10% lower price. Therefore, on a purely economic basis, it would be possible and appropriate to define around 30m different geographic markets, representing each premises nationally.

b. Of course, 30m different geographic markets cannot sensibly be individually assessed. It is therefore necessary to aggregate them into groups for which SMP and remedies can be considered. Within each of these groups, conditions of competition need to be sufficiently homogeneous that the same finding on SMP can be reached and the same remedies are appropriate.

c. Ofcom's proposed approach to geographic market includes a number of key assumptions which we discuss below:
    - geographic units;
    - competitor set;
    - network coverage threshold; and,
    - grouping into geographic markets

Geographic units

18. The first step in Ofcom's analysis is to determine the base geographic units at which it will conduct its first order assessment, in order to group them into economic markets in which SMP can be assessed. Ofcom addresses this at V2 7.16-7.18 of its proposals:

In our December 2018 preliminary consultation on geographic analysis (the December 2018 Consultation228), we proposed to reject individual premises (c. 30 million) as our geographic unit because of these practicality considerations. We expressed the view that BT exchange footprints (c. 5,600 contiguous areas) or postcode sectors (c. 10,000 areas) were our preferred candidates.

Most stakeholders expressing a view favoured more granular geographic units such as postcodes (c. 1.6 million) or some alternatives, for example, BT suggested mapping based on a squared-grid. No respondent supported the use of BT exchanges. Having considered these submissions, as set out in Annex 8, we propose to use postcode sectors.

19. UKCTA considers that the geographic units of postcode sectors proposed by Ofcom are insufficiently homogeneous across the postcode sector for competition analysis purposes. Although postcode sectors are not equally sized, on average they contain around 3,000 premises. Especially in rural areas, where postcode sectors can be large, and on the boundaries of towns, they can

encompass a range of competitive conditions.[2] We therefore agree with all of the stakeholders who responded to Ofcom's consultation, including many UKCTA members, who also unanimously considered the unit to be too large.

20. The grounds for Ofcom continuing to use postcode sectors are unclear, in the context of an earlier consultation, which stated that Ofcom's views were preliminary, and the universally negative views of respondents. Ofcom has not cited any evidence or modelling which would demonstrate that conditions of competition are homogeneous across such large units. There essentially appears to be no evidential support for Ofcom's current proposal. Ofcom should therefore reconsider its proposals in light of the considerable opposition to them from across the industry. In UKCTA's view, the most appropriate alternative approach for Ofcom to adopt would be to use full postcodes. This would be a much more granular and therefore precise approach, while at the same time remaining tractable for Ofcom's analysis.

Networks included in assessment

21. Ofcom assesses the degree of competition in each postcode sector on the basis of the number of existing and planned networks. We agree that this is a reasonable method of distinguishing areas with different competitive conditions for the purpose of geographic market analysis. However, it is inadequate to assess SMP, which needs to be determined on the basis of a more rounded assessment, and we therefore disagree with certain aspects of Ofcom's approach.

22. At V2 §§7.19-7.38, Ofcom provides its analysis of proposed rollout by MSNs across the UK. It has assessed three alternative MSNs to Openreach (Virgin Media, CityFibre and FibreNation) and their respective rollout plans across the UK. Ofcom states that it has specifically considered these providers as it expects much of the rollout in the control period to be driven by MSNs.

23. Since Ofcom's proposals were published, CityFibre has acquired FibreNation from TalkTalk. Hence there are essentially only two potential MSN competitors to BT rolling out in the UK at present: Virgin Media, which is planning limited additional rollout to premises amounting to less than 10% of UK premises, and CityFibre, which has headline plans to roll out to 8m premises, and has currently announced specific cities amounting to 5m premises, having thus far passed

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[2] This can be seen by the fact that the proportion of premises in Area 2 is changed significantly by moving from a 70% homes passed threshold to a 50% threshold.

around 250,000 premises, including those passed by FibreNation prior to its acquisition.

24. It is unclear from Ofcom's consultation precisely why it confines its competitor set for its geographic market analysis to MSNs alone and has excluded broadband only networks. In UKCTA's view there are likely to be few competitive interactions in the upcoming regulatory period between leased line and broadband services: they will be sold to different customers, at prices independent from one another, and in many cases will be provided by firms which do not offer the other product. This approach therefore cannot be justified by any competitive advantages for MSNs, or likely differences between MSNs and broadband only networks in their competitive impact on WLA markets for a given scale of network.

25. Ofcom's purported justification for this decision can be found at V2 §§7.55-7.65 of its consultation. In essence this amounts to looking at the current roll out of broadband only networks (V2 Table 7.4), and finding that there are few postcode sectors in which current roll-out of broadband only networks would have a meaningful commercial impact (84 of them, amounting to 0.1m premises). However, it is instructive to compare this scale with the *current* scale of MSNs, as set out in V2 Table 1.2. This table shows that the current scale of MSNs other than Virgin Media and BT is 0.14m premises– a very similar current scale. An argument that broadband only providers are currently small scale would apply with equal force to MSNs outside BT and VM.

Network coverage threshold

26. A key assumption that Ofcom adopts in the geographic market analysis is the coverage threshold that has to be met in order for a network to be counted as being present in a particular postcode sector. Ofcom sets out its views on this as follows (V2 §§7.22-7.24):

    In the December 2018 Consultation, we presented illustrative results applying a coverage threshold of 65% of premises passed in a postcode sector - largely because this threshold had been used in previous market reviews - and invited stakeholder views. In summary, BT Group and Openreach favoured a lower threshold, Virgin Media saw 65% as broadly acceptable, but the majority of stakeholders who made submissions on this point thought that the threshold should be higher.

    We recognise that there are arguments for applying a higher or lower threshold. Our proposal is to apply a 50% threshold when considering MSNs. A 50% threshold means that we only include postcode sectors where an MSN network *passes more than half of premises in that locality. We think that is a reasonable approach to drawing a line for where a network is present. We consider that our proposed approach of applying a slightly lower threshold than we previously consulted on is consistent with our strategy of promoting network investment and competition. Setting a higher threshold would exclude postcode sectors even where more than half of premises would likely see competition. Hence, a higher threshold could result in postcode sectors being considered to have no competing networks despite existing or potential network presence covering the majority of premises.*

27. That is, having previously consulted on a 65% threshold, and finding that most stakeholders thought this threshold was too low, one stakeholder felt it to be appropriate, and BT Group and its subsidiary Openreach thought it to be too high, Ofcom has proposed to significantly reduce the threshold, from 65% to 50%.

28. Notably, in its consultation Ofcom provides no theoretical or evidential justification for this proposal. Rather, part of the justification is entirely circular—that it should be 50% because any number above 50% would mean that an operator covering more than half of properties would not be included. This is, of course, definitionally what any threshold in excess of 50% implies. However, it is not an economically based argument; there is nothing special about 50% as a threshold.

29. Ofcom should ground its approach in the extent of coverage which would be necessary in order rival networks to act as a competitive constraint on Openreach, and make a small but significant increase in price (of 5-10% from the competitive level) unprofitable. This would properly ground its approach in economic theory, by reflecting the economic rationale for defining different geographic markets– that they have meaningfully different conditions of competition.

30. Any such grounding in economic theory is certain to demonstrate that a 50% threshold is meaningfully too low for operators to act as an effective competitive constraint on Openreach. Ofcom should revert to a coverage threshold in the range of 60-75%, choosing a point within this range based on economic modelling of the constraints different thresholds will impose on Openreach.

Grouping of areas based on degree of competition

31. In this section we discuss Ofcom's approach to how postcode sectors are grouped together to form geographic markets, UKCTA's view on these, and an alternative approach.

Ofcom's proposals on area grouping

32. As set out above, it is necessary to group defined geographic units together into agglomerations with broadly similar competitive conditions so that appropriate remedies can be applied to them. Ofcom sets out its position regarding this aggregation at V2 §§7.39-7.52.

33. In that section of its consultation, Ofcom proposes to define three different geographic markets:
    - Area 3, encompassing 30% of UK premises, where no rival to BT 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 0% of UK premises, where there are two established rival networks to BT. Currently no parts of the UK fall into this category.

UKCTA's analysis of Ofcom's proposals

34. **Area 3**—the area where there is no competition and will be no competition throughout the regulatory period– appears to be a well-defined geographic market. Competitive conditions within this market seem likely to be similar throughout the period, with a single major operator, albeit potentially with some other MSNs present in a part of some postcode sector (but below the network coverage threshold).

35. There are, however, some broadband only operators such as Gigaclear and B4RN operating in parts of postcode sectors included in Area 3. Ofcom's proposals, whereby it proposes to exclude broadband only operators, therefore risk expropriating these operators' investments given the proposed remedies in Area 3, as set out above, and Ofcom should use smaller geographic units to avoid such expropriation.

UKCTA

36. Ofcom’s proposal to set a single geographic market containing all postcode sectors in **Area 2** is inappropriate and should be revised (discussed below). This area does not contain homogeneous conditions of competition in any meaningful sense, as it ranges from York—where the CityFibre, Virgin Media and Openreach networks are already competing with one another across large parts of the city– to areas where there is currently an Openreach monopoly but there is the possibility of investment in the last few months of the regulatory period in 2026. That is, there are some elements of Area 2 which will be competitive throughout the period, and others where there will be an effective monopoly throughout the period. It is misleading and confusing to call this area ‘prospectively competitive’ since in most cases it is unlikely that there will be effective competition at any point in the foreseeable future.

37. Ofcom’s justification for why conditions in Area 2 are sufficiently homogeneous is weak at best:

> *We acknowledge that, within Area 2, rival build is more certain in some areas than others. Given the uncertainty around investment plans, the only basis for any further segmentation would, as stakeholders indicate, be in relation to splitting between existing rival network presence and plans of different status (e.g. committed versus uncommitted plans).*
>
> *However, market definition is a forward-looking exercise and, for this review, we are looking ahead to the period April 2021 to March 2026. Our assessment is that there are genuine prospects of future rival network rollout in areas where there are plans for rival build. Whilst some of these plans may not be deployed, we have a reasonable expectation that much of this build could be realised, leading to conditions of competition in these areas developing over the period of the review. Absent regulation, there is uncertainty in relation to where and how much rival build we might see and the competitive impact of any build that does occur. This uncertainty could also apply to more immediate and well developed plans for rival network build. We do not, therefore, think that is appropriate to segment Area 2.*

38. It is notable that Ofcom does not make a claim that there will actually be homogeneous conditions of competition; it could not do so, because this would clearly be untrue. There are at least three clearly distinguishable groups of postcodes within what Ofcom currently defines as Area 2.

39. Table 1: Suggested geographic markets

Existing level of competition	**No altnet build planned**	**Altnet build planned**
BT only	Area 3	Area 2c
BT + 1 network	Area 2b	Area 2a

BT + 2 networks	Area 1	Area 1

Each area within Area 2 is materially distinguishable from others:

- 2a: Two existing operators plus the possibility of a third by 2026;
- 2b: Two existing operators throughout period;
- 2c: One existing operator plus the possibility of a second by 2026.

40. The areas are defined as follows:

- Area 2a, comprising parts of the UK where Openreach and Virgin Media are both currently present, and where Ofcom expects entry by at least one more FTTP builder over the course of the regulatory period (or, indeed, where there has already been such entry). In such areas, there is an established duopoly, and the uncertainty is whether it will remain a duopoly or develop into a triopoly over the regulatory period. This is the most competitive subsection of Area 2, and in some cases, may actually comprise localities which could at the end of the period be categorised as being in Area 1 if Openreach also build FTTP in the locality (in which case there would be three-way competition between ultrafast networks). If Openreach does not build FTTP in the locality then in the medium term there will be a duopoly since the Openreach copper/FTTC network would not be competitive, and will gradually lose market share and competitive impact.
- Area 2b, comprising parts of the UK where Openreach and Virgin Media are both currently present, but where Ofcom does not expect altnet FTTP entry during the course of the regulatory period. In these areas, there is an established duopoly, with Openreach holding SMP as the larger operator, but Ofcom does not expect further entry during the regulatory period. Some of these areas may be natural duopolies, with no scope for entry at all given the prevailing cost and revenue conditions. These areas will begin the control period as duopolies, and end the period as duopolies, without any entry. There is consequently little uncertainty over competitive conditions in these areas over the course of the regulatory period. The majority of Area 2 premises will fall in Area 2b; in this area there is no benefit from or need for remedies to encourage investment from competing networks. [3]
- Area 2c, comprising parts of the UK where at present the Openreach network is not subject to competition, but where Ofcom expects that there may be

[3] CityFibre has announced cities comprising 5m premises for build– approximately a quarter of the premises in Area 2– and has a long term ambition of 8m premises– approximately two-fifths of premises in Area 2. Following FibreNation's sale to CityFibre, there is no other MSN planning scale developments in the UK at present.

altnet FTTP investment during the course of the regulatory period. This is the least competitive part of Area 2, where the uncertainty in Ofcom's forecasts is regarding whether there will be a monopoly or a duopoly at the end of the control period, and at what point (if at all) the locality will transition from a monopoly to a duopoly.

41. Consequently, there is only uncertainty in less than half of Area 2, in contrast to Ofcom's claims in its consultation (for example, V2 §6.8(a), §6.13, §7.43). In Area 2b, there will be a duopoly at both the start and end of the period, and there is little need to take measures which are intended to stimulate investment or to make it more profitable, as no MSNs are planning to build in those areas in any case.

42. Ofcom's own approach is also responsible for increasing uncertainty over build levels. Rather than adopting a cautious approach, where it would only consider a town or city likely to see build when a timetable has been announced for that city, Ofcom's current approach is to assume that build will happen before 2026 even where there is little more than a named city in a press or financial statement, without a timeline or detailed scope for the rollout. Ofcom may be able to alleviate some of the uncertainty by following up and seeking further information on the timing and scale of a roll-out, and amend the market definition applied to any towns or cities which are excessively speculative, or unlikely to see build in the next regulatory period.

43. It is also important to note that while there is uncertainty regarding competitive conditions at the end of the control period in both Areas 2a and 2c, this is not the *same* uncertainty. Rather, in Area 2c, the uncertainty is whether there will be a monopoly or duopoly at the end of the regulatory period, while in Area 2a, the uncertainty is whether there will be a duopoly or triopoly at the end of the period. That is, there is no meaningful uncertainty whether localities in Area 2a or Area 2c will be more competitive at the end of the period– Ofcom can predict with a high degree of certainty that the vast majority of localities in Area 2a will be more competitive than the vast majority of Area 2c throughout the period.

44. It is also important to note that Area 2a is the only part of Area 2 which is prospectively competitive: neither Area 2b nor Area 2c is amenable to effective competition in the control period, as there is no prospect that these areas will have three competing networks in the foreseeable future (which is the minimum needed for effective competition).

45. The lack of homogeneous conditions of competition—or anything close to it—across postcode sectors included in Area 2 is clear from the analysis above.

Setting a single geographic market, as Ofcom proposes, would represent a clear error in both law and economics, with Ofcom ignoring both European guidelines and basic economics in favour of the approach which it proposed—and which was heavily criticised—in its earlier consultation on geographic market definition.

46. Ofcom has also failed to take into account that where an altnet builds FTTP it is likely to be unprofitable for Openreach to overbuild the entrant other than at the margins. Consequently, if Openreach adopts a profit maximising strategy, in the longer term it will cease to be a material competitive threat since its copper/FTTC network will be uncompetitive against FTTP and DOCSIS. Therefore, over time market 2a areas may revert to a monopoly– with the monopolist being a firm other than Openreach– and 2c it may revert to a duopoly between Virgin Media and the altnet FTTP network.

47. Ofcom should therefore segment its currently proposed Area 2 into the three categories of Area 2a, Area 2b, and Area 2c. These three geographic markets meet the criterion of having broadly homogeneous expected levels of competition. Although Ofcom is correct that there will be uncertainty regarding the levels of competition which are actually seen within each of areas 2a, 2b and 2c by the end of the control period, this is not important– Ofcom is undertaking an ex ante assessment where there will be foreseeable differences, between each of these three geographic markets.

48. At present, although Ofcom is proposing to define an **Area 1**, it proposes not to identify any geographic areas as falling within Area 1. Its rationale for this proposal is as follows:

> *Area 1 comprises postcode sectors where there are at least two established rival MSNs to BT.*
>
> *There are 15 postcode sectors that have already seen investment by two rival MSNs to BT. However, based on a wider assessment of competitive conditions, we do not find any postcode sectors where competition from both networks is well established. We note these responses were based on proposals in our December 2018 Consultation where we proposed to include areas where build could be economic in Area 2.*
>
> *Our view is that, absent wholesale access regulation, competitive conditions in the postcode sectors would not be sufficiently distinct from those in other postcode sectors in Area 2. In particular, there is clearly potential for material competition, but it remains uncertain how effective this will prove to be, due to: a) the nascent and currently small scale of build, and that this build remains on-going; and b) the overall levels of penetration operators have been able to achieve given their overall coverage.*

49. It is notable that the approach by Ofcom to defining Area 1 appears inconsistent with those in other areas. In other areas, Ofcom has conducted a prospective analysis, assessing conditions throughout the period and determining whether investment will lead to increased competition. However, Ofcom does not appear to have adopted the same prospective analysis when determining which postcode sectors might be included in Area 1, but has rather assessed whether now—a year before the start of the charge control—there is effective competition in postcode sectors. It is unclear why Ofcom has not conducted a prospective analysis when determining the categorisation of Area 1. It does not consider competitive conditions at the end of the regulatory period, but at the start of the period.

Conclusions on geographic market definition

50. Ofcom's proposals on geographic market definition contain a number of key errors:

- Ofcom should use a more granular geographic unit – we suggest postcodes rather than postcode sectors – in order to ensure more homogeneous competitive conditions and so avoid distortions of competition through inappropriate remedies;
- Ofcom should potentially consider the impact of larger broadband only networks in its assessment;
- The network coverage threshold should be set on the basis of economic modelling, rather than on an arbitrary basis. This is likely to lead to a significantly higher threshold, likely between 60% and 75%.

51. In addition, Ofcom's grouping of postcode sectors into geographic markets contains clear errors, and is out of line with the guidance and legislative framework within which Ofcom operates:

- Area 3 is appropriately defined, although its boundaries and the boundaries of other areas will change if Ofcom changes its proposals on the appropriate geographic unit, the inclusion of broadband only networks and the appropriate network coverage threshold;
- Area 2 is inappropriately wide, spanning three identifiably different groupings of localities, which should be defined as separate geographic markets. Ofcom should therefore split this proposed geographic market into three areas (which we call Area 2a, Area

2b, and Area 2c), depending upon the current level of competition and whether or not altnet FTTP entry is expected.

- On the other hand, no postcode sector is assigned to Area 1 despite there being some postcode sectors in which there are already two operators imposing competitive constraints on Openreach, and Openreach having the technically inferior network. Further, Ofcom does not appear to have undertaken a prospective analysis in each Area assessed.

52. As such, Ofcom should fundamentally review its geographic market definitions and the assignment of different postcode sectors into geographic markets, as there should be five relevant markets rather than the two which Ofcom proposes (given that no location is placed into Area 1); and the boundaries of even those two markets are incorrect, given the inappropriate 50% threshold for an operator being included and the inappropriate lack of consideration given to broadband only networks.

D- QoS and the Fibre surcharge

53. The transition to gigabit-capable networks over the next decade will create a period of considerable disruption and costs to consumers. Therefore, it is critical that throughout this process, consumers retain confidence in the broadband market.

54. In the absence of regulation on FTTP, Openreach will have a strong incentive to dedicate significant resources to rolling out FTTP as quickly as possible in order to hit roll out targets. There is a clear risk that this could mean that Openreach prioritises the pace and scale of its build over the quality of that build.

55. Ofcom should, therefore, introduce new MSLs on FTTP (at the very minimum by applying the existing MSLs it has set for FTTC to the new services). It is disappointing – and counterintuitive – that Ofcom has failed to propose regulation given that it considers that FTTP offers significantly improved performance (e.g. lower fault rates) and that it has even attempted to quantify that 'service uplift' (by proposing that Openreach can charge a £1.50 to £1.85 pricing uplift to reflect FTTP's higher quality).

56. More generally, UCKTA does not support Ofcom's proposal to introduce a price premium for anchor products on FTTP. Ofcom has not produced sufficient evidence to demonstrate that there is either increased value to end consumers (and, in fact, concedes that willingness to pay for very high bandwidths is currently very limited) or that supply side savings are sufficient to justify the

pricing uplift proposed. In fact, for the switchover to full fibre to be successful, many ‘legacy’ subscribers will require equivalent products at equivalent prices and, while there may be some supply side savings in the longer-term, it is likely that FTTP service quality will be relatively poor in the early years as the new products ‘bed in’.

E- Business Connectivity Regulation

57. Ofcom has requested a substantial amount of market data after publication of the consultation. This includes new market data for 2018 and 2019 on circuit trends and later data on network deployment. The consultation process is to allow stakeholders to comment on the data and comment upon the conclusions that are derived from the data. Stakeholders will need an opportunity to review and comment on these datasets.

58. We observe that Ofcom has used the 2017 dataset used for BCM 2019. That data set concluded that the following geographic markets existed – CLA, HNR, BT+1 and BT only. It is not possible to comprehend how Ofcom has been able to use the same 2017 dataset and arrive at very different geographic market segments that drastically increase Area 2 in comparison to its predecessor market BT+1 and similarly reduce Area 3 compared to its predecessor market BT only. It is not apparent that the geographic market analysis has been undertaken as a direct geographic market condition assessment against the leased lines access product market which Ofcom defines.

59. Ofcom has shown in the BCM appeal that a far richer data set enabling more informed stakeholder consultation is available, this should be presented.
    a. The BCM appeal market has identified issues with the geographic market definition approach used in BCM 2019 achieved homogeneous market areas. It is now clear that the CLA is not at all homogeneous. Ofcom must present stakeholders with the broader range of market data which it holds and enable sufficient independent stakeholder scrutiny over this data properly enabling stakeholders to assess geographic boundary proposals.
    b. The CLA landscape has differing characteristics:
        i. There are large buildings such as train stations that take up many postcodes and will have a number of rivals connected to provide services
        ii. There are large high-rise buildings that are multi-tenanted, again covering an entire postcode. These building will have a number of rivals into the basement with varying pre-connected coverage to particular enterprise floors.
        iii. The above make up a minor subset of the geography yet cover a substantial proportion of volume demand.

iv. Separately there are postcodes with a mixture of residential and enterprise occupation across numerous separate buildings. These have substantially higher coverage by Openreach:
v. In 38% of CLA postcodes Openreach is the sole network. In 12% of CLA postcodes Openreach is the sole supplier
vi. Inconsistently there are 72% of postcodes that do not require leased lines;

60. DFA should be a UK wide remedy to SMP for the leased lines access market. Ofcom agrees that DFA is a suitable product to address BT SMP. Instead of limiting its application, Ofcom should consider altered pricing if pricing is the concern. We agree with Ofcom that active services add layers of unnecessary equipment raise costs prevent innovation, prevent total control of a customer's service. Active services perpetuate market control by Openreach / BT. There are substantial inefficiencies with the procurement of an active service from Openreach, which requires multiple party involvement when changing service parameters such as bandwidth.

61. The current Covid situation has highlighted the lack of control that retailers have and how they are confined by Openreach rules. A simple DFA solution would empower retailers with the immediate cost free capability to turn up and turndown service bandwidth.

F- Regulatory Asset Values Approach in Area 3

Would a RAB approach support fibre investment in Area 3

62. Ofcom state that they believe:[4]

    "A RAB approach can help us ensure consumers are protected from excessively high prices whilst providing Openreach with incentives to invest in fibre."

63. We understand from the quote above and from Ofcom's consultation that their aim and indeed the purpose of implementing a regulatory asset base (RAB model) is:
    i. to ensure consumers are protected from excessively high prices and
    ii. to provide Openreach with incentives to invest in fibre.

[4] Paragraph 2.18, https://www.ofcom.org.uk/__data/assets/pdf_file/0030/188814/wftmr-volume-4-pricing-remedies.pdf

64. RAB models are used in various regulated industries; common examples are the water and energy industries. In these industries the [more description of how RAB models are used]

65. We believe, in assessing the impact, benefits and costs of implementing a RAB model in the telecoms industry Ofcom must, in line with the detail included in their consultation answer the following three questions:

a. Does a RAB model protect consumers from excessively high fibre prices?
b. Does a RAB model provide incentives for Openreach to invest in fibre?
c. Does a RAB model ultimately support fibre investment in area 3?

Is Ofcom actually proposing to implement a RAB model in their consultation?

66. In the context of the water industry, the Ofwat use a RAB approach to ensure water suppliers charge prices that are closely matched to the underlying costs they incur (plus an allowable regulated cost of capital). The process of using a RAB model to regulate in the water industry involves a lengthy process between the regulator and the water operating companies. This includes a highly detailed process whereby the operators plans are submitted to and scrutinised by the regulator in a two way process that generally takes years. For Ofwat's 2020 pricing review their first consultation was published in July 2017[5] and an iterative process of business plan submission, review, amendment and resizing occurred over the following 2 years between the regulator and the operating water companies.

67. It appears from Ofcom's consultation that their intension is not to engage in a process such as this, in fact it appears that the calculation of Openreach's actual spend in rolling out fibre networks between 2021 and 2025 has already been estimated by Ofcom. Ofcom do not consider it necessary to further analysis Openreach's costs in this regard and are, it would appear content to use an average cost of fibre rollout per premise to underpin their RAB model calculations.

68. It also appears from Ofcom's consultation that the price of the resulting Fibre service's provided using the assets included in the RAB model are not, at least for the next five years going to be price regulated (apart from the slowest anchor services delivered after copper switch-off).

69. In conclusion, we summarise that Ofcom has proposed a RAB modelling process that does not involve a detailed examination of Openreach's costs or include a process by which the resulting services delivered by the assets are necessarily price regulated.

[5] https://www.ofwat.gov.uk/consultation/delivering-water2020-consulting-on-our-methodology-for-the-2019-price-review/

70. For the above reasons we believe Ofcom's proposed RAB model should more accurately be termed an "enhanced Fibre roll-out and take-up incentives model". Effectively the RAB model Ofcom is proposing is an 'add-on' or 'bolt-on' to their usual modelling approach that has the effect of encouraging the take-up of fibre services and fibre roll-out by spreading the fibre investment costs onto copper services and thus making copper service more expensive than they otherwise would be.

71. For consumers the direct implications over this review period are, in the case that Openreach rolls out fibre services in area 3 that copper services will become more expensive (than they otherwise would be) and fibre services are provided at a price to be determined by Openreach. If as a consumer, you have a strong desire for fibre broadband and the price you pay is relatively, in-elastic then Ofcom's proposal could work for you. However, if you are a consumer that is either content with your current copper based broadband service or unwilling or unable to pay an increased amount for broadband services then Ofcom's proposal would be detrimental to you. This is particularly relevant in the context of a struggling economy where many consumers, some of which will be vulnerable may struggle to fund this.

Will the RAB model achieve Ofcom's aims?

72. As discussed above Ofcom's stated aim of using a RAB approach is to ensure consumers are protected from excessively high prices whilst also providing an incentive for Openreach to invest in fibre services.

73. It is very difficult to understand how Ofcom's RAB proposal can ensure consumers are protected from excessively high prices. The mechanism Ofcom generally uses and has in part in this consultation proposed to use for this is a cost based CPI-X charge control. In area 3, this is what Ofcom has suggested for copper-based FTTC services and this should serve to protect consumers should they desire copper-based broadband services; however, what the RAB model will serve to do is to increase FTTC broadband services to enable Openreach to price above cost. Therefore, in fact, the RAB model serves to do precisely the opposite of protecting consumers from excessively high prices, it does in fact dilute Ofcom's traditional CPI-X cost based approach and enable, in certain circumstances Openreach to price above cost.

74. In terms of the ability of Ofcom's RAB approach to provide incentives for Openreach to invest in fibre we do consider that the model does increase the incentives for Openreach to invest in fibre, however we believe these are very limited and in Ofcom's analysis, they have considered the wrong question.

75. The RAB model Ofcom is proposing enables Openreach to spread the risk of fibre investment in area three (increase copper prices) and serve to encourage

consumer take-up (by making copper broadband more expensive). However, the question Ofcom should be answering is not; does our RAB modelling approach increase the incentives for Openreach to invest in area 3, but rather does our RAB modelling approach increase the incentives for Openreach to invest in area 3 as opposed to area 2. To this the RAB model falls far short of providing any real incentives for Openreach to invest in area 3 rather than area 2. In the event that Openreach invest in area 3, rather than area 2, they will be able to charge slightly more for copper-based services in area 3. However they will also risk (by not building fibre in area 2) losing customers in area 2 permanently and losing all the associated revenue that they may have enjoyed not to mention reducing the scales of economy in area 2 and the future increased competition risk.

76. If Openreach had unlimited capital funding this above point may not be an issue, however Openreach like every other network operator are cash constrained and over the next review period it is highly unlikely that Openreach have the capital available to roll-out fibre networks in both area 2 and area 3, particularly as a result of recent changes in economic circumstances following the pandemic.[6]

Does a forecast build or post-build RAB model make any difference?

77. Ofcom have discussed in their consultation whether taking a pre-investment or post investment approach would more accurately achieve their stated objectives. To enable Ofcom to consider a pre-build RAB modelling approach Openreach have to have plans and share plans that include rolling out network in area 3. Openreach then need to be prepared to commit to those plans and deliver network build accordingly. Ofcom then need to analyse, critique and potentially adjust those plans accordingly. We understand to date Openreach do not have any firm plans to roll-out fibre network in area 3, we also understand that Ofcom have not seen any such plans from Openreach, we therefore conclude that a pre-build RAB modelling approach is not possible at this stage. Given the status of this, we also consider it doubtful that a process including the level of scrutiny required could now be performed before March 2021.

78. Therefore, Ofcom's only option is a post-build approach. Notwithstanding all of the issues mentioned above about the RAB model proposed by Ofcom the added issue with a post-build approach is that it creates uncertainty and instability in the market. Retail businesses cannot forecast what wholesale prices may be over the next five years, other network investors cannot forecast what prices their build –out will be competing with and generally in business markets uncertainty drives inaction.

[6] Openreach quote

Ofcom should be able to answer the appropriate questions and justify a RAB modelling approach

79. As discussed above we believe Ofcom should answer the following questions, and only if it can positively answer yes with the appropriate justification to all the questions should it proceed to implement a RAB modelling approach.

a. Does a RAB model protect consumers from excessively high fibre prices?
b. Does a RAB model provide incentives for Openreach to invest in fibre?
c. Does a RAB model ultimately support fibre investment in area 3?

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