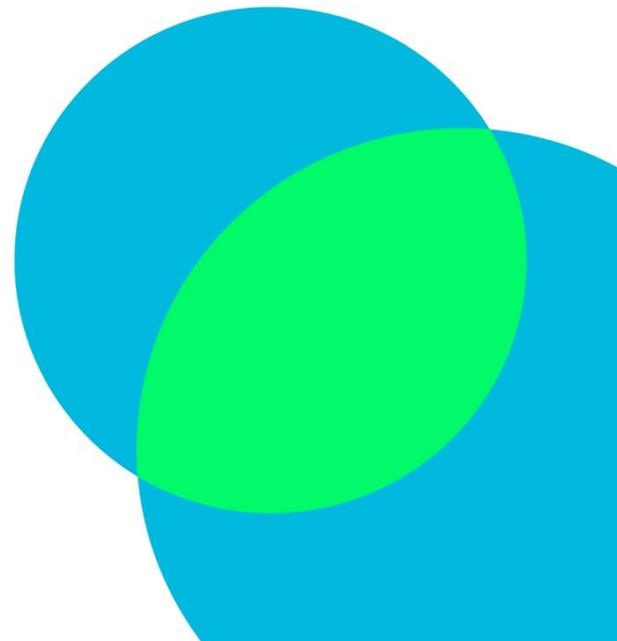


IMPROVING BROADBAND INFORMATION FOR CUSTOMERS

CITYFIBRE RESPONSE TO OFCOM CONSULTATION

5 MAY 2023



I. Executive Summary

1. Full fibre networks offer a number of benefits to consumers not least in higher speeds and significantly improved reliability. Yet, for many years, the term “fibre” has been used by ISPs to describe both full fibre and legacy products leading to consumer confusion, with large numbers of consumers purchasing products which may not be best suited to their needs. Full fibre penetration continues to grow and it is vital that consumers are made aware of the benefits offered by full fibre networks if they are to make informed purchasing decisions to realise the significant economic, social and environmental benefits associated with full fibre networks.
2. The consumer confusion resulting from existing practices also has a significant effect on competition, particularly at the wholesale level, with the latest, high-speed, ultra-reliable full fibre networks deprived of customers that might otherwise have chosen their services. Legacy networks benefit from that confusion with consumers unable to identify those products delivered over the latest technology.
3. As long ago as August 2020, Government expressed concerns about consumer confusion, establishing the GigaTAG to put forward recommendations to address the issue. The GigaTAG reported in June 2021 yet no action has been taken to date. Ofcom’s proposals to bring to an end practices which are the root cause of consumer confusion are therefore to be welcomed and will go some way to addressing the consumer harm which Ofcom has identified.
4. CityFibre is concerned, however, that there is scope to undermine the desired effect of the proposals. ISPs have taken no action to date to address the concerns identified by Ofcom and a number of ISPs continue to describe non-full fibre services as “fibre” despite clear evidence of consumer harm which results from this practice. CityFibre therefore considers that Ofcom should go further by implementing limited changes to its guidance to ensure its effectiveness across the customer journey.
5. CityFibre considers that there are additional, proportionate, measures which Ofcom could easily implement to address consumer harm. Ofcom already requires providers to send end-of-contract notifications and annual best tariff information to their customers which set out the options available to those customers when they are, or are soon to be, out of contract. There is no reason why those notifications could not alert consumers to the availability of full fibre services, thereby reducing confusion and driving even greater competition. Healthy retail and wholesale competition will drive significant benefits for consumers in the longer term, consistent with Government and Ofcom objectives.
6. Consumer confusion has persisted in the marketplace for too long. It is essential that action is taken now to ensure that consumer harm is brought to an end and that competition is allowed to flourish. CityFibre therefore welcomes Ofcom’s proposals which should be implemented without delay.

II. Importance of distinguishing full fibre products

7. With the advent of new, full fibre networks offering higher speeds and greater reliability, the broadband market in the United Kingdom is changing rapidly. New services delivered over fibre-to-the-premises (“FTTP”) offer consumers and businesses faster, more reliable, future-proofed broadband allowing them

to access new and improved services supporting improved productivity, increased innovation and the success of e-commerce.¹

8. Rollout of new networks is progressing rapidly with FTTP services now available to 50% of UK premises.² That rollout is being driven by competition at the network level for the first time, consistent with the objectives of Government and Ofcom.³

(a) Superiority of full fibre products

9. There are currently a range of broadband products available to consumers and businesses in the UK, including:
 - ADSL services delivered over copper connections in the access network;
 - Fibre-to-the cabinet (“FTTC”) services delivered using fibre optic cable to a street cabinet within the access network and copper connections between the cabinet and the premises;
 - Cable services delivered using hybrid fibre-coaxial cable (“HFC”) involving a fibre optic cable to a street cabinet within the access network and copper coaxial cable connections between the street cabinet and the premises; and
 - FTTP services delivered over fibre optic cables end-to-end.
10. In contrast to copper-based ADSL, FTTC and HFC, FTTP delivers broadband over a fibre connection all the way to the premises and so enables customers to access greater upload and download speeds (current retail FTTP offerings can provide symmetric services of 1Gb/s). Future upgrades of FTTP, which are already in the pipeline, will enable FTTP networks to provide even faster speeds to consumers (up to 10Gbit/s and further).
11. As well as the ability to provide faster speeds; “*full-fibre networks may be better in terms of latency, jitter and packet loss*”,⁴ delivering a higher quality experience for users of FTTP services when compared with other broadband services.
12. FTTP also has lower fault rates than other technologies, including HFC. This is partly due to the additional electronics in a copper network, and partly due to the fact that fibre is more resilient than other technologies (including HFC). As a result, FTTP offers a significantly more reliable service with lower variation in data rates and less risk of networks being unavailable.

(b) Social, economic and environmental benefits of full fibre products

13. The advent of FTTP offers significant social, economic and environmental benefits.
14. Frontier Economics was commissioned by the National Infrastructure Commission to consider the gross economic benefits that could be enabled by investment in different forms of broadband infrastructure

¹ GigaTAG Report, page 7.

² <https://www.ofcom.org.uk/news-centre/2023/full-fibre-to-reach-half-of-homes,-as-competition-drives-better-broadband>.

³ WFTMR, Volume 1, paras 2.20 and 2.29 and FTIR, section 2.3.3.

⁴ WFTMR, Volume 1, footnote 12.

("the Frontier Report").⁵ The Frontier Report assessed the economic benefits of FTTP at between £30bn and £70bn⁶ over a 30 year period, with direct consumer benefits of between £3.7bn and £8.7bn.

15. Similarly, a report by WIK Consulting for the FTTH Council Europe estimated that FTTP gives rise to a 1.1% increase in GDP and a 2.9% expected increase in employment.⁷ That same report indicates that societal benefits are significant, although not easily quantifiable, as new services are developed to take advantage of FTTP technology, notably in the fields of healthcare and home automation. Other studies by CEBR for Openreach⁸ indicate that FTTP networks will generate £59bn in productivity gains by 2025, a further 500,000 in employment by 2038 and a boost to the UK economy of £70bn by 2038.
16. FTTP networks also offer significant environmental benefits, producing 88% less greenhouse gases per gigabit compared to other access technologies due to their significantly reduced power consumption.⁹
17. The benefits of FTTP networks are clear. To ensure that those benefits are fully realised, consumers and businesses require information to help their understanding and to ensure take up of FTTP services.¹⁰ However, the broadband market has been characterised by marketing techniques which have created consumer confusion as to the merits of different technologies, leading to consumers purchasing products which may not be suited to their needs, and to a risk to the establishment of competition over the longer term.

(c) Ubiquitous use of the term "fibre" to describe broadband products

18. For a number of years, ISPs have marketed broadband products as "fibre" regardless of the underlying technologies used to deliver such products. The use of the term "fibre" is deliberately calculated to create the impression that the products which are being purchased are of the highest quality with consumers having some understanding of the fact that a product delivered over fibre optic cables is superior to a product delivered over copper or cable.
19. As long ago as November 2017, the ASA found that consumers understand the term "fibre" to mean modern, fast broadband.¹¹ At the time of that research, full fibre services were available to just 1.7% of premises with the dominant technologies available being ADSL, FTTC and cable. At that time, therefore, the most modern, fast broadband available to the vast majority of consumers was either FTTC or cable.
20. However, FTTP services are now available to over half of UK premises. The most modern, fast broadband available to consumers is therefore FTTP. Even where FTTP is not yet available, it is likely to become available to most consumers in the next one to two years, with the rollout of FTTP networks proceeding at pace.

⁵ <https://nic.org.uk/app/uploads/Benefits-analysis.pdf>.

⁶ Figures 55 and 57 of the Frontier Report on the basis of 100% FTTP roll out with infrastructure sharing, the closest scenario to the current position.

⁷ https://www.ftthcouncil.eu/Portals/1/WIK_FTTH_Council_report_FINAL_and_proofread.pdf?ver=wVvCn9JioGfiCRPoFCmRaA%3d%3d, pages 28 and 29.

⁸ https://www.openreach.com/content/dam/openreach/openreach-dam-files/images/hidden-pages/full-fibre-impact/CebrReport_online.pdf.

⁹ WIK report for FTTH Council Europe, page 25.

¹⁰ Gigabit Take-up Advisory Group: Final Report, section 3.2.

¹¹ <https://www.asa.org.uk/news/major-change-to-broadband-speed-claims-in-ads.html>.

21. Yet ISPs continue to market services which are not FTTP as “fibre”, leading consumers to purchase products on the understanding that they are buying the most modern, fast broadband even where this is not the case.
22. For example, all of Virgin Media O2’s broadband products are described as “fibre” despite Virgin Media O2 offering FTTP to only around 1.5 million premises:

Figure 1 Examples of Virgin Media O2 broadband products

What broadband speed do I need?

Different households will need different broadband speeds. Here are our available broadband speeds and what kind of households they suit.

<h2>M125</h2> <p>M125 Fibre Broadband</p> <p>An average speed of 132Mbps provides reliable internet for casual browsing, streaming and video calls.</p> <p>View all M125 broadband deals</p>	<h2>M250</h2> <p>M250 Fibre Broadband</p> <p>Our M250 is a step up from our M125, with an average download speed of 264Mbps.</p> <p>View all M250 broadband deals</p>	<h2>M350</h2> <p>M350 Fibre Broadband</p> <p>The M350 offer has an average download speed of 362Mbps which allows you to do all the above and is strong enough to stream in 4K for multiple users.</p> <p>View all M350 broadband deals</p>
<h2>M500</h2> <p>M500 Fibre Broadband</p> <p>M500 offers a very fast and strong internet connection, with an average speed of 516Mbps, meaning it is good for large households that are online at the same time.</p> <p>View all M500 broadband deals</p>	<h2>Gig1 Fibre</h2> <p>Gigabit broadband</p> <p>Gigabit broadband is ultrafast broadband – this means an average download speed 1130Mbps, it is made for downloading large files, serious online gaming and streaming content in 4K.</p> <p>View all Gigabit broadband deals</p>	

23. When clicking through on individual products, the use of the word “fibre” continues despite the broadband product being delivered over cable technology:

Figure 2 Example of description of Virgin Media O2 products delivered over cable

What is M250 Fibre Broadband?

M250 is our way of saying 250Mbps (megabits per second). Our M250 fibre connection boasts average download speeds of 264Mbps and average upload speeds of 25Mbps.



Leave no browser behind

If you have screens and devices scattered around the house, an M250 Fibre Broadband connection could be just your speed. Ultrafast broadband lets everyone download large files, video chat and keep up with online gaming, all at the same time. No fuss, just a whopping average download speed of 264Mbps.



No buffering, more episodes

You don't have to worry about your TV streams failing you, even in 4K. Just decide what to watch next and let Virgin Media's superfast fibre broadband take you where you want to go.

24. At no point during the order process is the consumer informed that the product they will be purchasing is delivered over cable technology.
25. BT also markets non-FTTP services as “fibre”, as shown in Figure 3. Whilst it advertises FTTP services as “full fibre”, as shown in Figure 4, the differences in presentation are minimal and it is therefore difficult for consumers to readily identify differences between FTTC and FTTP products.

Figure 3 Presentation of BT FTTC products

Fibre Essential

29-36Mb **£30.99^Δ**

Download 24 month
speed range contract

£29.99 upfront [What's this for?](#)
No landline phone service

Customise your package

Checkout now

Everyday browsing and
streaming for all of life's
essentials

23Mb Stay Fast Guarantee
5Mb - 8Mb Upload Speed
[What these speeds mean for you](#)

Fibre 1

29-36Mb **£31.99^Δ**

Download 24 month
speed range contract

£29.99 upfront [What's this for?](#)
No landline phone service

Customise your package

Checkout now

Browse, stream and download on
a few devices at once

23Mb Stay Fast Guarantee
5Mb - 8Mb Upload Speed
[What these speeds mean for you](#)

Figure 4 Presentation of BT FTTP Products

The image shows three product cards for BT FTTP services. The first card, 'Full Fibre Essential', offers 36Mb download speed for £30.99^A per 24-month contract. The second card, 'Full Fibre 1', offers 50Mb download speed for £31.99^A per 24-month contract. The third card, 'Full Fibre 2', is highlighted as a 'Superfast deal' and offers 74Mb download speed for £29.99^A per 24-month contract, with a 'Save £173.99' banner. All cards include a 'Customise your package' button and a 'Checkout now' button. The 'Full Fibre 2' card also features a countdown timer: 'Offer ends 01d 13h 35m 50s'. Each card lists additional features like 'No landline phone service' and 'Stay Fast Guarantee' with specific upload speeds (18Mb, 10Mb, and 20Mb respectively).

26. The continued use of the term “fibre” to describe products which are not FTTP risks serious consumer harm with consumers either (a) purchasing FTTC products which are not best suited to their needs on the understanding that this is the most modern, fast broadband available to them even where FTTP is available or (b) purchasing FTTC products where they may have waited for FTTP to become available on the understanding that FTTP is a superior product.

III. Consumer harm resulting from ISP practices

27. Ofcom rightly identifies the importance for broadband consumers to have “sufficient, useful and timely information to choose the right broadband service for them, and to take advantage of full-fibre networks as these become available.”¹² CityFibre agrees that consumer harm may result from existing practices, since the absence of accurate information on technology leads to the following outcomes:¹³
- consumers being unable to find the right product for their needs;
 - consumers spending unnecessary effort finding out about the characteristics of the products available to them; and
 - some consumers disengaging from the broadband market.
28. CityFibre also agrees with Ofcom’s position in the Consultation that such outcomes may be harmful to customers who are interested in the underlying technology used to provide their broadband service and

¹² Consultation, page 3.

¹³ Consultation, paragraph 3.13.

for whom the differences in performance between technologies are important.¹⁴ Indeed, as the Consultation clearly sets out, the vast majority of consumers fall into this category given the importance which consumers place on reliability, with 98% saying that information on the reliability of a connection would be useful.¹⁵ Consumers that value reliability will necessarily be interested in the underlying technology given the significantly improved reliability which FTTP offers.

29. Ofcom's research shows that at least 27% of fixed broadband customers are not confident in understanding the language and terminology used by providers,¹⁶ a figure which is likely to underestimate the true level of confusion. Even where consumers feel confident, Ofcom's research shows that claimed understanding of the term 'fibre' may be driven by familiarity or association rather than an understanding of the technology.¹⁷ Consistent with the 2017 ASA research, this suggests that consumers understand that "fibre" refers to the fastest, most modern broadband services. Where non-FTTP products are referred to as "fibre", consumers may therefore have a misapprehension as to the products which they are in fact purchasing. This is clearly demonstrated by Ofcom's research which finds that only 46% of those customers that reported being on FTTP live in areas where FTTP is actually available.¹⁸
30. The evidence of consumer harm set out in the Consultation is consistent with CityFibre's own research which has found that 54% of consumers do not understand that 'fibre broadband' includes a mix of technologies.¹⁹ That lack of understanding leads consumers to believe that the term "fibre" refers to the best products available. The use of the term "fibre" for products which are not FTTP, and therefore not the best products available, therefore risks misleading consumers as to the products which they are purchasing.
31. Consistent with the findings in the Consultation, CityFibre's research also shows that cost, reliability and speed are the most important factors for consumers when choosing a broadband product.²⁰ In this respect, CityFibre's research found that 71% of consumers consider reliability an important factor when choosing a broadband package.²¹
32. Information on price and download speed is readily available to consumers shopping around for new deals. However, information on reliability is more obscure if available at all. FTTP services are the most reliable broadband products available in the market yet the presentation of both FTTP and non-FTTP products as "fibre" is likely to lead consumers to believe that there is no difference in reliability between those products.
33. Whether they are aware of it or not, many broadband consumers are confused and therefore making purchasing decisions based on incomplete or incorrect information. The ubiquitous use of the term "fibre" for FTTC, HFC and FTTP products has led consumers to believe that they are purchasing the fastest, most modern, most reliable product even where this is not the case. This risks poor consumer outcomes as consumers cannot make the best decision for their needs.

¹⁴ Consultation, paragraph 3.14.

¹⁵ Consultation, paragraph 3.18.

¹⁶ Ofcom 2022 Switching Tracker, table 261.

¹⁷ Consultation, fn 27.

¹⁸ BDRC, slide 15.

¹⁹ Context Consulting research for CityFibre (Attachment 1), slide 12.

²⁰ BDRC research, slide 18. CI2, slide 26.

²¹ Ci 1 research for CityFibre (Attachment2), slide 26.

34. Consumers are making purchasing decisions based on imperfect information and those consumers risk being locked into contracts for up to 24 months for products which may not be appropriate for their needs. Further, the effect of the current ubiquitous use of the term “fibre” is likely to depress FTTP take up and so deprive consumers and citizens of the significant economic, social and environmental benefits associated with FTTP services in the short to medium term.
35. In order to address this harm, it is important for Ofcom to take action as a matter of urgency as FTTP products become increasingly available.

IV. Harm to competition resulting from ISP practices

36. Ofcom rightly also identifies the harm to competition which results from the consumer confusion it has identified. As set out in the Consultation:²²

“More generally, if consumers purchase the wrong service to meet their needs or are put off from engaging in the broadband market, this could in turn reduce demand for FTTP services, which may distort retail competition and reduce incentives to invest in FTTP networks. This would ultimately lead to worse customer outcomes in terms of price, choice and innovation.”

37. There is a short window of opportunity for competition to become established and the next few years will be crucial in ensuring that competition is delivered over the longer term.²³ If Government²⁴ and Ofcom²⁵ objectives of competition at the network level are to be realised, it is important that any barriers to competition are addressed now rather than waiting to see how matters play out. Indeed, Ofcom’s principal duty is to “*further the interests of consumers in relevant markets, where appropriate by the promotion of competition*”.²⁶ It is entirely consistent with that duty for Ofcom to take action to prevent any barriers to the emergence of competition.

38. It is widely recognised that the better informed consumers are, the greater the level of competition and therefore the better outcomes which can be expected for consumers in the long term:

“Demand-side remedies are regulatory interventions which are intended to enhance competition by helping the demand-side of markets – that is, customers – to work more effectively. This is typically done, in principle at least, by helping consumers to improve their consumer decision-making, such that they are more likely to purchase more suitable products or services for their needs. This should enhance firms’ incentives to compete to serve these customers, in turn driving up value for money, productivity and innovation.”²⁷

39. This is no less true in the broadband market, where improved consumer decision-making will improve competitive outcomes not only at the retail level but also at the wholesale level.

²² Consultation, para 3.15.

²³ WFTMR, Volume 3, para 7.56.

²⁴ FTIR, section 2.3.3.

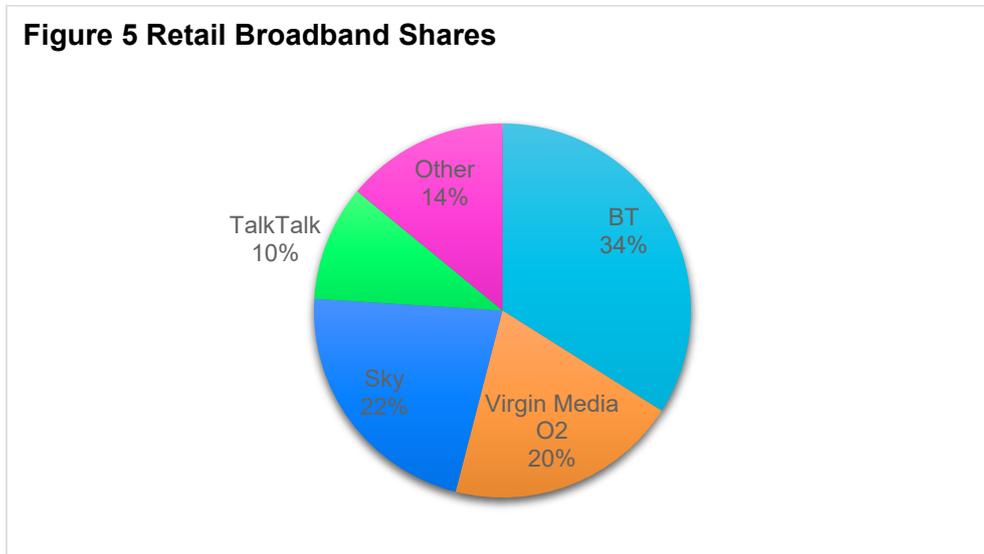
²⁵ WFTMR, Volume 1, para 2.20.

²⁶ Section 3(1)(b) Communications Act 2003.

²⁷ https://www.regulation.org.uk/library/2016-CCP-Demand_Side_Remedies.pdf, page 4.

(a) Retail competition

40. The UK retail market is characterised by a set of large ISPs offering services direct to consumers and businesses and a set of smaller ISPs, typically those that have recently entered the market offering FTTP services on a local basis.
41. The largest of the ISPs are BT, Virgin Media O2, Sky and TalkTalk, as set out in Figure 5 below:



Source: Ofcom 2022 Communications Market Report

42. All of the main ISPs have traditionally offered services over legacy ADSL, FTTC and HFC networks. With the advent of FTTP, they are now beginning to also offer retail FTTP services.²⁸ Typically, and as set out in more detail in paragraphs 18-26, they have marketed FTTC, HFC and FTTP products to consumers as “fibre” regardless of the underlying technology used.

(b) Wholesale competition

43. At the wholesale level, BT Openreach is by far the largest access network, offering ADSL, FTTC and FTTP services to third parties over both its legacy copper network and the FTTP network it is building. Its copper network covers almost the entire country and its FTTP network has to date passed nearly 10 million premises²⁹ with the aim of passing 25 million premises by 2026.
44. Virgin Media O2 is the second largest access network, covering 16.1 million premises, the vast majority of which is over its HFC network (CityFibre estimates that around 1.5 million of these premises are delivered using FTTP).³⁰ Virgin Media O2 has announced its intention to replace its HFC network with

²⁸ Virgin Media O2, using only its own network, offers only limited FTTP products since its network is largely HFC.

²⁹ <https://www.bt.com/bt-plc/assets/documents/investors/financial-reporting-and-news/quarterly-results/fy23/q3/q3-fy23-release.pdf>.

³⁰ <https://news.virginmediao2.co.uk/wp-content/uploads/2023/02/Virgin-Media-O2-Q4-FY-2022-Earnings-Release.pdf>.

FTTP by 2028³¹ and has also established a joint venture, nexfibre, which aims to pass up to 7 million premises with FTTP by 2027.³²

45. CityFibre is the third largest access network, and the second largest FTTP network, having passed over 2 million premises with its FTTP-only network and with ambitions to reach over 8 million premises. CityFibre is a wholesale-only FTTP network supplying services to third parties and does not offer its own retail services to consumers and businesses.
46. A number of smaller FTTP networks are also being rolled out at present. Those networks were, in aggregate, expected to pass over 11 million premises by the end of 2022.³³

(c) Distortion of wholesale competition resulting from ubiquitous use of “fibre”

47. Wholesale providers are dependent on retail providers for take up of their networks. Without that take up, there are reduced incentives to invest and therefore reduced opportunities for network level competition. BT Openreach and Virgin Media O2 benefit from two of the largest downstream retail operations that are able to provide significant take up on their networks. BT Openreach further benefits from established relationships with almost all other ISPs, supplying them with ADSL, FTTC and FTTP services.
48. By contrast, new entrants have a more limited pool of demand from which to drive take-up. In order to drive take up on their own networks, they must win customers from BT Openreach or Virgin Media O2, the incumbent networks. Whilst CityFibre has concluded agreements with TalkTalk and Vodafone along with a number of smaller ISPs, it has yet to reach agreement with the largest independent ISP, Sky. Further, its ISPs will continue to have relationships with BT Openreach and therefore, even where an agreement is entered into with an ISP, that ISP may continue to serve its customers using the BT Openreach network for both FTTP and legacy products.
49. Other new entrant networks are currently reliant on their own downstream retail operations as they have yet to reach wholesale agreements. However, the lack of brand awareness places them at a disadvantage compared to the large retail ISPs and CityFibre understands that the business plans of those networks envisages wholesaling FTTP services over those networks in order to justify the investment made.
50. Take up of FTTP is therefore crucial to the success of network level competition and marketing of broadband products by retail providers is an important factor in driving competition at the wholesale level through increased take up of FTTP services. If retail providers do not allow consumers to distinguish between new FTTP networks offering improved services, and legacy networks which may be less suited to their needs, demand for FTTP networks will be weakened. As a consequence, incentives to invest in FTTP networks are reduced and consumers will lose out on the benefits of competition over the longer term.
51. Vertically integrated, established operators, such as BT Openreach and Virgin Media O2, will be less affected by the reduced demand for FTTP products since they are able to continue to supply consumers through legacy networks. Indeed, in the case of Virgin Media O2, it may be in its commercial interest not

³¹ <https://news.virginmediao2.co.uk/virgin-media-o2-bolsters-future-network-with-fibre-upgrade-plan/>.

³² <https://www.nexfibre.co.uk/>.

³³ <https://www.inca.coop/news/2022-point-topic-altnet-metrics-report>.

to highlight the differences between FTTP and legacy networks, since it has yet to build its own FTTP network and its incentives are therefore to keep customers on the HFC network.

52. The same is not true for new FTTP networks. For take up of their networks to occur, consumers must be provided with the tools to make an informed choice.
53. If consumers are not given the tools to allow them to understand the products available them, competition will be diminished and consumers will lose out on the benefits of that competition in terms of lower prices, greater choice and innovation.

V. Ofcom proposals go some way to addressing harm to consumers and competition

54. In light of the ongoing consumer harm and the risks to competition, action by Ofcom to improve the information relating to broadband products available to consumers is welcome. Ofcom's proposals will go some way to addressing this issue and are therefore a welcome first step in increasing transparency in the consumer presentation of broadband products.
55. For Ofcom's proposals to address the consumer harm which Ofcom has identified, Ofcom must ensure that their implementation is effective. CityFibre is concerned that the proposals put forward by Ofcom risk being circumvented by ISPs and Ofcom should therefore act to close any risk that this will arise.

(a) Clear, consistent information on the underlying technology used to deliver broadband products

56. Ofcom rightly identifies³⁴ that clear, consistent information on the underlying technology used to deliver broadband products will:
 - enable customers to identify the right service for them;
 - reduce ambiguity and effort to understand services, and so could encourage some unengaged customers to seek further information on the right deals for them; and
 - enable customers to be more certain of how their current service is delivered, supporting their ability to make a more informed choice about their future service.
57. Ofcom's research demonstrates this importance with 88% of consumers stating that they would find an easily understood term on the technology used at least somewhat useful.³⁵ This is particularly the case as FTTP services become more widely available. CityFibre's research found that consumers generally associate FTTP with being the fastest and most reliable product (85% strongly agreed full fibre services were the fastest and 76% strongly agreed they were the most reliable).³⁶
58. In order for consumers to make informed choices as to the products they are purchasing, it is therefore important that they are given the tools to be able to distinguish between the products on offer. As shown in Figures 1-4, the widespread use of the term "fibre" to describe products which are both cable, FTTC

³⁴ Consultation, paragraphs 3.22 and 3.23.

³⁵ BDRC research, slide 18.

³⁶ Ci 2 research for CityFibre (Attachment 3), slide 12.

and FTTP prevents consumers from being able to distinguish between the products even where they have some understanding of the differences between the technology.

59. Providing consumers with information on the underlying technology at point of sale will therefore go some way to addressing the consumer harm (and consequently the distortion of competition) caused by current practices.

(b) Ofcom proposed guidance

60. Having identified that there is consumer harm, CityFibre agrees that it is proportionate to take action and that it would not be consistent with Ofcom's duties were it to take no action.
61. Under the guidance proposed in the Consultation, in complying with the requirements of General Conditions C2.3 and C1 to provide "*a description of the services*", ISPs will be required to include a short description of the underlying technology used to deliver the broadband service, using one or two consistent terms.³⁷ Those terms should be "*useful to consumers looking to make an informed decision about their broadband service.*"
62. Ofcom is not prescriptive about the consistent terms and how such terms should be used, save in one respect. ISPs should:
- only use the terms "fibre" or "full-fibre" to describe broadband services which are FTTP; and
 - not use the term "fibre" to describe a broadband product which is not FTTP,³⁸ such as part-fibre or FTTC, Fixed Wireless Access or cable service.
63. This description must be provided by the ISP:
- at point of sale on their website and throughout the online purchase process (Condition C2.3);
 - in the Contract Summary, regardless of the sales channel (Condition C1.5); and
 - in the Contract Information included within the terms and conditions, regardless of the sales channel.
64. Consumers will therefore be informed of the technology offered at the point of sale when they have chosen to switch broadband providers. At that point, if the consumer understands the difference between technologies, they will be able to make an informed choice to purchase a product which best meets their needs in terms of price, quality and reliability.
65. The requirement that non-FTTP products do not use the term "fibre" will also assist those consumers that do not have a proper understanding of the different technologies. As shown by the ASA research conducted in 2017, consumers that have little understanding of the underlying technology over which their broadband is delivered nevertheless understand that the term "fibre" is likely to refer to the most modern, fast technology available. At the current time, that product is FTTP and it is therefore appropriate that the term "fibre" is reserved only to FTTP products if consumer harm is to be reduced.

³⁷ Draft Guidance, paragraph A2.2.

³⁸ CityFibre notes in this respect that the Consultation identifies, at paragraph 2.3, Hyperoptic as a builder of FTTP networks in urban areas. CityFibre understands, however, that Hyperoptic's network is primarily fibre to the basement where fibre optic cable is brought to the basement of a multiple dwelling unit and individual premises are then served using CAT5 copper ethernet cabling. In this regard, it is therefore not an FTTP network since the fibre optic connection does not reach into a consumer's premises.

66. Requiring ISPs to set out the underlying technology used and limiting the use of the term “fibre” to FTTP products only is also likely to increase consumer understanding of the underlying technologies. In turn, this will increase transparency in the market, driving competition with consumers able to benefit from that increased competition in terms of price, choice, quality and innovation.
67. The proposed guidance will therefore go some way to addressing the consumer confusion, and resultant consumer harm, which has persisted for some time as a result of existing practices. CityFibre therefore welcomes the action proposed by Ofcom.

(c) Proposed guidance is the least intrusive measure

68. CityFibre agrees that the proposals in the Consultation are a proportionate means of addressing the harm identified by Ofcom. The proposals are the least intrusive means of addressing the consumer harm which Ofcom has identified and should therefore be implemented at the earliest opportunity.
69. CityFibre understands that there is likely to be little cost associated with the inclusion of information relating to the underlying technology at point of sale. Such information is known to the ISP and it is simply a matter of including this in point of sale details. Negligible changes to ISP systems will be required to accommodate the proposed guidance and it is therefore entirely proportionate to do so in light of the significant consumer detriment resulting from current practices.
70. CityFibre therefore fully supports Ofcom’s proposals. However, CityFibre has identified a risk that the proposed guidance could be circumvented by ISPs. Ofcom should therefore make minor amendments to the proposed guidance to ensure that the measures which it puts in place are effective in addressing the consumer harm and ensuring that consumers are protected to the greatest extent possible.

(d) Risk of circumvention of proposed guidance

71. The proposed guidance applies only at point of sale and does not cover any marketing activities undertaken by an ISP. It is therefore plausible that an ISP could continue to market a product which was not FTTP as “fibre” whilst nevertheless informing a consumer that the product was part-fibre at point of sale.
72. For example, BT could continue to market an FTTC product as Fibre 1 as it does now. A consumer would therefore be persuaded that the FTTC product was the most modern, fast and reliable broadband product and would initiate a purchase process on that basis. It is only at final point of sale, when a consumer has followed all the necessary steps to reach the final point of sale screen that they would be informed that the product was part-fibre. A similar example could be provided for Virgin Media O2 cable products which could continue to be marketed as “M125 Fibre Broadband”.
73. In order to ensure that the purchase process was completed in these examples, BT could include a description stating that the product was “delivered using the most up-to-date part-fibre technology” whilst retaining “fibre” in the product name. Similarly, Virgin Media O2 could state “delivered over the latest lightning fast cable network” whilst retaining its own product name including the term “fibre”. Consumers that did not have a good understanding of the differences between the technologies would still be under the impression that they were purchasing the best available products despite the intention of the new guidance. Consumer confusion could therefore persist with the resultant consumer harm and impact on competition.
74. The guidance should therefore be more specific about what claims can and cannot be made about non-FTTP services so as to avoid such a result. For example, the guidance could include a requirement that non-FTTP services do not make claims suggesting that they are delivered over the latest or the fastest technology.
75. Further, to ensure that consumers are fully aware of the technology which they are purchasing, a more prescriptive approach to the description of the

underlying technology would prevent significant divergences between ISPs. Whilst the proposed guidance suggests that terms should be used consistently, it seems unlikely that this could be applied on a cross industry basis in the absence of a more prescriptive approach in the guidance itself. Rather, ISPs will use a consistent term on their own websites although this could differ between ISPs. Should this be the case, consumer confusion is likely to persist.

76. In addition, the guidance should include a requirement that a description of the underlying technology should be sufficiently prominent at point of sale so as to avoid ISPs placing a description of the underlying technology in small print which is rarely read by consumers when purchasing. Such an approach is used already by Ofcom in a number of places throughout the General Conditions and could therefore be implemented easily and effectively.³⁹
77. The suggested changes to the guidance would limit the ability to circumvent the intention of the draft guidance although it would not prevent continued marketing of non-FTTP products as “fibre”. In CityFibre’s view, it is the marketing approach adopted by ISPs which has caused the consumer harm and will continue to do so in the absence of further action on marketing communications.

(e) Information at point of sale alone may not fully address consumer harm

78. Ofcom’s own research shows that about half of respondents agreed that the website is the place where information on technology is most useful, followed by only about two-fifths saying point of sale.⁴⁰ Point of sale information is therefore only of limited value in a consumer’s purchasing decision. By the time that a consumer reaches the point of sale screen, they will have invested significant energy and time in reaching that point. They risk therefore having either already made their mind up regardless of technology or will be reluctant to recommence the process having reached that point.
79. CityFibre notes Ofcom’s aspiration in the Consultation document that “it remains open to broadband providers to take steps to ensure consistency of terms throughout the customer journey to help reduce potential confusion for customers more broadly.”⁴¹ However, despite repeated research and evidence of the consumer harm resulting from ISPs’ practices to date, no action has been taken by ISPs to address those concerns. ISPs have been aware, at the very least since the work of the GigaTAG, that existing practices were causing confusion in the market about terminology and what different terms mean practically. Yet ISPs continue to present non-FTTP products as “fibre”, prolonging customer confusion.
80. In CityFibre’s view, ISPs cannot be relied upon to take action, consistent with the spirit of the Consultation, to adapt their practices to (i) inform consumers of the underlying technology used to deliver broadband products or (ii) cease using the term “fibre” to refer to non-FTTP products. ISPs have had many opportunities to do so and have failed to take action.
81. Following the GigaTAG report, Ofcom began an industry wide process to develop common standards for broadband consumer information. This provided ISPs with the opportunity to develop common standards for the marketing of broadband products on an industry-wide basis to address the consumer confusion identified in the GigaTAG report. Yet, despite similar proposals to those contained in the

³⁹ General Conditions C1.28 (end-of-contract notifications), C1.35 (annual best tariff notification), C2.5 and C2.6 (unbundled tariff number charges), C2.7 and C2.8 (personal number charges), C3.12 (debt collection) C8.3 (sales and marketing of mobile communications).

⁴⁰ Consultation, para A3.15; BDRRC research, slide 23.

⁴¹ Consultation, paragraph 2.19.

Consultation being put forward by Ofcom and by CityFibre, no consensus was reached and the process was halted.⁴²

82. The diverging approaches of ISPs underlines the fact that, in the absence of action by Ofcom, ISPs are unlikely to modify their marketing practices to reflect the spirit of the proposals in the Consultation. It is therefore important that Ofcom take action to ensure that information presented to consumers throughout the purchase journey occurs in a way which is consistent with the proposals set out in the Consultation.
83. CityFibre notes that Ofcom considers that “*advertising (including online advertising on provider’s own websites) falls within the remit of the ASA.*”⁴³ It appears from the Consultation that Ofcom does not therefore consider that it falls within its own remit to take action to address marketing practices. However, Ofcom has a number of ways in which it could itself take action on the marketing of broadband products:
- Ofcom could impose a General Condition to extend the point of sale requirements set out in the proposed guidance to the marketing of broadband products;
 - Ofcom could issue guidance under the Consumer Protection from Unfair Trading Regulations 2008 setting out its approach to enforcement of those Regulations in the marketing of broadband products.
84. CityFibre has previously written to Ofcom setting out how such measures would work in practice and a summary of those proposals is set out in the Annex.

VI. Additional measures to address consumer harm: End-of-contract notifications and annual best tariff information

85. Given the harm to consumers and competition which Ofcom has identified, and the fact that there is only a narrow window of opportunity within which consumers will migrate from legacy products, it is important that the measures adopted by Ofcom deliver the greatest possible impact within the shortest timeframe. Any measures which fall short of this risk perpetuating consumer confusion and dampening consumer engagement, ultimately leading to long-term negative outcomes for those consumers as well as for the competitive landscape more generally.
86. CityFibre has identified limited interventions by Ofcom which could increase consumer awareness and drive beneficial competitive outcomes. In particular, Ofcom already requires ISPs to provide end-of-contract notifications and annual best tariff information to ensure that consumers are appropriately informed as to their existing services and the options available to them at the end of their minimum contract periods. At present, this is primarily focussed on the availability of alternative tariffs with the same ISP.

⁴² Letter from Selina Chadha, Director of Connectivity, Ofcom, 24 March 2022.

⁴³ Consultation, paragraph 2.18

87. However, as Ofcom’s research has identified, the primary factors considered by consumers in making their purchasing decision are not limited to price alone. Consumers also value the speed of products and their reliability. In CityFibre’s view, a relatively small change to the requirements relating to end-of-contract notifications and annual best tariff information to include information around the availability of FTTP products would allow consumers to make better informed decisions as to whether or not to switch to new providers or new services.
88. Such an approach would significantly improve consumers’ ability to decide on the products best suited to their needs and would further drive competition at both the retail and wholesale levels.

(a) Existing requirements for end-of-contract notifications and annual best tariff information

89. General Conditions C1.21- C1.29 require ISPs to send customers end-of-contract notifications when their minimum contract periods are coming to an end. If consumers choose to stay with their provider at the end of their contract period without signing up to a new contract, that provider must then send customers a reminder every year about the best deals available to them, so called “annual best tariff information”.⁴⁴ Annual best tariff information must be provided to customers at least once in every 12 month period.
90. These measures were introduced by Ofcom as research showed that many customers were confused about the status of their contract and were unaware of the options, savings or benefits available to them when their minimum contract period came to an end.⁴⁵ This contributed to “stickiness” in the retail market, with ill-informed consumers failing to make decisions best suited for their needs. In short, Ofcom’s goal was: “[w]e want customers to shop around with confidence, make informed choices and get a fair deal.”⁴⁶
91. End-of-contract notifications and annual best tariff information have already had a positive impact on the market as Ofcom claims that these notifications have led to customers taking out better deals.⁴⁷ With the increasing availability of FTTP services, if consumers are to continue to benefit from better deals, not just in terms of price, but also in terms of quality, those notifications may also be used as a vehicle to inform consumers of the improved services which are now available to them.
92. The existing requirements do not make provision for ISPs to inform customers about the underlying technology which delivers their broadband connection (i.e., full fibre, part-fibre, ADSL or cable), nor are they required to indicate whether superior technology might be available. Therefore, despite these notifications being an important prompt for customers to reflect on their broadband needs and consider switching options, they fail to provide consumers with information which Ofcom’s research in the Consultation shows to be of significance to consumers.⁴⁸
93. Ofcom’s guidance in respect of best tariff information gives ISPs the option - but does not require them – to present customers with suitable upgrade options:

⁴⁴ See General Conditions C1.30-C1.36.

⁴⁵ Helping consumers get better deals - Statement on end-of-contract notifications and annual best tariff information, 15 May 2019, para 1.3.

⁴⁶ Helping consumers get better deals - Statement on end-of-contract notifications and annual best tariff information, 15 May 2019, para 1.1.

⁴⁷ <https://www.ofcom.org.uk/news-centre/2022/end-of-contract-notifications-driving-better-deals-for-customers>.

⁴⁸ See for example, para 57 above.

“When considering whether a service is similar to that which the customer currently receives, providers should make reasonable judgements as to whether a new technology in fact constitutes a similar service and is one of their best tariffs. For example, if a new technology provides a similar or superior experience to that the customer currently receives at no additional cost. We also note that providers have the option to present an upgrade tariff (and, as explained in paragraph 5.83 below, we are no longer specifying that this upgrade tariff needs to be the ‘cheapest’). This could be used to present tariffs based on new technologies or services.”⁴⁹

94. ISPs are also required to provide only their own best tariff information, and there is no requirement to alert customers to the fact that customers may be able to find better tariffs (or better products) by switching to another ISP. Instead, Ofcom’s guidance simply notes that providers “should” provide a general reminder to consumers that they may get a better deal elsewhere:

“The advice should also inform subscribers that some CPs may offer new customers better deals and that they may get a better deal if they bundle the services they have with that or any other CP.”⁵⁰

95. Attachment 4 is an example of an end-of-contract notification received by a TalkTalk customer in January 2023. CityFibre notes the following:

- a. The customer is provided with no information about the technology which underpins their broadband connection other than the name of their current product, “Fibre 65”. The customer has no way of knowing that their current product is not an FTTP product. If the customer was informed of the underlying technology used to deliver their broadband product, they may take steps to investigate whether FTTP products were available.
- b. The notification presents the customer with two options – the “first option” to remain on the same service with TalkTalk out of contract, albeit at an increased price; or the “second option” to re-contract with TalkTalk onto a new contract for 18 months. It is only further down the page that the customer is informed that, after their contract ends, they may switch to another provider. TalkTalk provides no indication that switching provider may enable the customer to secure a better deal, whether that be in terms of price or product (i.e., FTTP).

(b) Strengthening of Ofcom proposals

96. Consistent with the intention of the draft guidance contained in the Consultation, Ofcom’s proposals provide an opportunity to strengthen the impact of these end-of-contract and annual best tariff notifications. However, Ofcom’s draft guidance to the proposals take a more permissive approach:

*“**If** a provider refers to the customer’s underlying broadband technology in an end-of-contract-notification or annual best tariff notification (as per Conditions C1.21-C1.36), they **should** use terms consistent with those in the Contract Information” (emphasis added).⁵¹*

⁴⁹ Helping consumers get better deals - Statement on end-of-contract notifications and annual best tariff information, 15 May 2019, para 5.43.

⁵⁰ Helping consumers get better deals - Statement on end-of-contract notifications and annual best tariff information, 15 May 2019, A2.11.

⁵¹ Broadband information: Guidance under General Conditions C1 and C2 Informing customers about the network technology used to deliver their fixed broadband service, A2.8.

97. Therefore, operators are not currently required to provide detail on the technology which underpins a customer's connection either as part of end-of-contract notifications or annual best tariff information and the new guidance would not compel operators to provide this information. Instead, it simply provides that, if operators do provide such information, the consistent terms set out in the draft guidance "should" be used.
98. In CityFibre's view, the draft guidance should be extended to also cover end-of-contract notifications and annual best tariff information. Consumers must be able to understand not just the options relating to the tariffs which are available from their existing ISP and the possibility of obtaining better tariffs elsewhere. As set out in the Consultation, consumers should also be informed as to their options in relation to the quality of the services (and in particular the reliability of the services) if they are to make fully informed purchasing decisions. Information as to the availability of different underlying technologies will allow them to understand those differences, particularly as awareness of FTTP services grows.
99. Implementing such measures could be done in a relatively simple way. Ofcom already issues guidance on both end-of-contract notifications and annual best tariff information. That guidance could be amended to make clear, in identical terms to the draft guidance in the Consultation, that in order to comply with the requirement for ISPs to provide details of the services they provide,⁵² ISPs must provide a short description of the underlying technology over which a customer's broadband service is provided and that the term "fibre" may not be used to refer to products which are not FTTP.
100. In addition, the guidance could also require ISPs, as part of the options available to the customer,⁵³ to include a statement that FTTP services may now be available to the consumer, possibly directing them to Ofcom's broadband availability checker. If the consumer is already receiving an FTTP service, such a statement would not be required.
101. Where FTTP is available, customers are then able to make an informed choice as to whether to switch. Even where FTTP is not currently available, a consumer's research (prompted by the end-of-contract and annual best tariff notifications) may indicate that FTTP will be arriving in their area shortly. That customer may therefore make an informed decision to remain out of contract and wait for FTTP to arrive in the area rather than re-contract and remain stuck on an inferior technology for the next 12-24 months.

(c) Effect of CityFibre proposals

102. The limited changes to the guidance relating to end-of-contract notifications and annual best tariff information will further address the consumer harm which Ofcom has identified in the Consultation. Consumers will be able to make better informed decisions as their contract comes up for renewal, ensuring that they are purchasing the products which are best suited to their needs.
103. In particular, research by both Ofcom and CityFibre has shown that there are a large number of consumers that are under the impression that they are already receiving FTTP services despite the fact that such services were not available to them at the time the research was conducted. Ofcom's proposals in the Consultation will not inform those consumers that they are not purchasing FTTP nor that it may now be available to them. It is important that consumers are able to make fully informed decisions rather than relying on the long standing practices of the ISPs which have failed to draw any distinction between the different technologies and their characteristics.

⁵² Conditions C1.24(b) and C1.33(c).

⁵³ Conditions C1.24(l) and C1.33(h).

104. The changes proposed by CityFibre will also drive competition in the market as consumers become more aware of the improved FTTP services which are now available to them. Consumers will be encouraged to search for the best available services in terms of price and quality, delivering better competitive outcomes not only at the retail level but also at the wholesale level driving competition on price, choice and innovation for many years to come.
105. CityFibre's proposals are limited in scope and will address the consumer confusion resulting from years of ISP practices which fail to inform them of the underlying technology they are purchasing. Given the scale of the consumer harm, the economic, social and environmental benefits offered by FTTP and the opportunity to address distortions of competition at the wholesale level, CityFibre considers such a minor change would fulfil Ofcom's objectives in a wholly proportionate manner. CityFibre would therefore urge Ofcom to amend the guidance on end-of-contract notifications and annual best tariff information in the manner suggested to deliver real change for consumers and citizens.

Annex

CityFibre proposals for further Ofcom action to address consumer harm

1. CityFibre has previously written to Ofcom setting out proposals to address the consumer harm identified in the Consultation. In CityFibre's view, those proposals are proportionate and represent a pragmatic and holistic means of addressing the consumer harm identified in the Consultation.
2. Ofcom has a number of ways in which it could itself take action on the marketing of broadband products:
 - Ofcom could impose a General Condition to extend the point of sale requirements set out in the proposed guidance to the marketing of broadband products;
 - Ofcom could issue guidance under the Consumer Protection from Unfair Trading Regulations 2008 ("the 2008 Regulations") setting out its approach to enforcement of the 2008 Regulations in the marketing of broadband products.

A General Condition

3. Under section 51(1)(a) of the Communications Act 2003 ("the Act"), Ofcom has the power to set conditions "making such provision as OFCOM consider appropriate for protecting the interests of the end-users of public electronic communications services". Ofcom therefore has a broad discretion under the Act to impose conditions to protect the interests of consumers where it considers it appropriate to do so to prevent consumer harm, including in relation to marketing communications.
4. Indeed, Ofcom has already imposed General Conditions to address concerns related to the marketing of electronic communications products under the same provisions of the Act. Condition C8 relating to sales and marketing of mobile communications services sets out a range of obligations for mobile operators to prevent mis-selling of mobile services. Those provisions include requirements as to point of sale information to be provided and also requires mobile operators to ensure that any information provided when selling or marketing mobile services is accurate and not misleading.
5. Those provisions were put in place to prevent consumer harm resulting from the mis-selling of mobile products. In CityFibre's view, similar concerns arise in relation to the marketing of broadband products where current practices are resulting in consumer harm. In order to address this, Ofcom could impose a General Condition to extend the requirements set out in the Consultation to marketing communications. Ofcom has the powers to do so and such an approach would be entirely consistent with its previous approach to mobile services.

B Guidance under the 2008 Regulations

6. Alternatively, Ofcom could issue guidance, or take enforcement action, under the Consumer Protection from Unfair Trading Regulations ("the 2008 Regulations"). Action under the 2008 Regulations, whether enforcement or guidance, could adopt a similar approach as that set out above under a General Condition and would bring to an end marketing practices which result in consumer confusion.

(i) *Power to enforce the 2008 Regulations*

7. Ofcom has the power to enforce the 2008 Regulations as a result of its designation as a Schedule 13 enforcer under the Enterprise Act 2002

("EA02").⁵⁴ Under section 215 EA02, Ofcom may apply for an enforcement order where it suspects a breach of legislation contained in Schedule 13 EA02. The 2008 Regulations is legislation which is included in Schedule 13 EA02.

8. Ofcom could therefore enforce the 2008 Regulations against ISPs that breached the requirements of the 2008 Regulations. Given that ability to enforce, in order to shape behaviours in the market, Ofcom could provide guidance as to those practices which it considers would amount to a breach of the 2008 Regulations.

(ii) *Regulation 5 – Misleading Actions*

9. Under Regulation 5, the use of the term "fibre" to refer to part-fibre products will constitute a 'misleading action' under Regulation 5(2) if this practice (a) deceives or is likely to deceive the average consumer in relation to the matters set out in sub-paragraph (4) and (b) causes or is likely to cause the average consumer to take a transactional decision which they would not otherwise have taken.
10. To establish a breach of Regulation 5, Ofcom would need to:
 - a. establish who is an "average consumer";
 - b. determine whether an average consumer has been, or is likely to be, deceived by a practice in relation to the main characteristics of the product;⁵⁵ and
 - c. determine the practice has caused, or is likely to cause, the average consumer to take a transactional decision which they would not otherwise have taken.
11. In accordance with the judgment in *R(CityFibre Ltd) v Advertising Standards Authority*, the average consumer is one who is "*reasonably well-informed and reasonably observant and circumspect.*"⁵⁶ The evidence referred to in the Consultation indicates that the average consumer is one who understands that there may be differences between broadband products in terms of speed and reliability. Further, as set out in the ASA's 2017 research, the average consumer has some understanding of the fact that fibre products are likely to be faster and more reliable, and to consider that fibre products are likely to be best in class.
12. Use of the term "fibre" to describe products which are not full fibre is likely to deceive the average consumer in relation to the main characteristics of the product, in particular the benefits of the product, its fitness for purpose and its specification. Use of the term "fibre" is likely to cause the average consumer to believe that the product being marketed is 'best in class' in terms of speed and reliability, when products which are not full fibre are not.
13. Not only is the use of the term "fibre" likely, for these reasons, to deceive the average consumer: the evidence suggests it is also likely to cause them to take transactional decisions which they would not otherwise have taken. If consumers wish to purchase, and believe that they are purchasing, services characterised by the benefits of full fibre products when they are only purchasing part fibre services, they have taken a transactional decision which they did not intend to. The fact that full fibre may not in fact be available to them does not negate the concern: had the consumer understood that a 'best in

⁵⁴ Section 213(5A) EA02.

⁵⁵ The main characteristics of the product are defined in Regulations 5(4) and 5(5) and include the benefits of the product, the fitness for purpose of the product and the specification of the product.

⁵⁶ *R(CityFibre Ltd) v Advertising Standards Authority* [2019] EWHC 950 (Admin) at paragraph 31.

class' service was not available for purchase, they may not have switched provider or upgraded their service at all pending the availability of full fibre.

(iii) Regulation 6 – Misleading omissions

14. Regulation 6 provides:

(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)—

- (a) the commercial practice omits material information,*
- (b) the commercial practice hides material information,*
- (c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or*
- (d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,*

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

(2) The matters referred to in paragraph (1) are—

- (a) all the features and circumstances of the commercial practice;*
- (b) the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and*
- (c) where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.*

(3) In paragraph (1) “material information” means—

- (a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and*
- (b) any information requirement which applies in relation to a commercial communication as a result of [an EU]1 obligation.”*

15. The test for a breach of Regulation 6 is therefore different from that required under Regulation 5. Unlike in relation to “misleading action” under Regulation 5, there is no requirement that the consumer be “deceived” by a misleading omission. Uncertainty or ambiguity are sufficient. In order to establish a breach of Regulation 6, Ofcom would need to:

- a. establish who is an “average consumer”;
- b. determine whether the commercial communications omits material information (i.e. information which the average consumer needs to take an informed transactional decision); and
- c. determine that the omission has caused, or is likely to cause, the average consumer to take a transactional decision which they would not otherwise have taken.

16. The marketing of both full fibre and part fibre services as “fibre” omits to inform the consumer of the differences in speed and reliability between full fibre and other broadband products. Given the importance which consumers attribute to speed and reliability, as set out in the Consultation, those matters are clearly material to their being able to make an informed transactional decision. Full fibre offers significantly enhanced speed and reliability and it is therefore important that consumers are informed what the underlying technology of the product being offered is if they are to make an informed decision. A failure to do so leaves consumers with the impression that all “fibre” products offer similar speed and reliability when this is far from the truth.

17. If a consumer is not provided with information that they require to take an informed transactional decision, that omission must be likely to cause them to take a transactional decision they would not otherwise have taken. Had consumers been informed that the product they were purchasing was not, in fact, full fibre and therefore did not offer the same consistency of speed and reliability, the average consumer is likely to have taken a different purchasing decision, particularly where full fibre is now available to them.

C Course of action available to Ofcom

18. In CityFibre's view, current practices in the marketing of broadband products are likely to fall foul of both Regulation 5 and Regulation 6. Ofcom could therefore take action or could issue guidance as to its enforcement approach under the Regulations, reflecting the position which Ofcom has adopted in the proposed guidance under the existing General Conditions.
19. Guidance would be likely to shape behaviour in the marketing of broadband products and would provide Ofcom with an opportunity to clarify those commercial practices which are acceptable and those which are not. To avoid the risk of regulatory action, operators would ensure that they did not engage in misleading actions or omissions and, as a result, consumers would be better placed to make informed decisions.
20. Not only would such an approach assist in ensuring that consumers made informed transactional decisions; it would also inform consumers in relation to the products which they have already purchased. Those who have purchased part-fibre services would be in a position to understand that they were not receiving a full fibre service and could therefore decide whether to switch to full fibre services as they become available. That approach is entirely in line with the objectives of the Government and GigaTAG in promoting take up of full fibre services.