

# **PROMOTING COMPETITION AND INVESTMENT IN FIBRE NETWORKS: TELECOMS ACCESS REVIEW 2026-31**

**CITYFIBRE RESPONSE TO FURTHER CONSULTATION ON WLA PRICING  
REMEDIES**

## **1 EXECUTIVE SUMMARY**

- 1.1 Ofcom is proposing a radical change to its approach to price regulation through the Further Consultation on WLA Pricing Remedies (“the Consultation”). In adopting the Contract Focussed Approach, Ofcom is effectively delegating enforcement of its regulation to industry and removing the certainty offered by the charge controls proposed in the Telecoms Access Review 2026-2031 consultation (“the TAR”).
- 1.2 Ofcom should not do so lightly. The adoption of the Contract Focussed Approach presents serious risks to consumers and competitors and Ofcom must be confident that such an approach will deliver the objectives which it set out in the TAR. It is not clear from the Consultation that Ofcom has fully considered those risks and CityFibre would urge Ofcom to reconsider.
- 1.3 CityFibre considers that the Contract Focussed Approach would not deliver Ofcom’s objectives and do not offer equivalent protection. Neither would they provide certainty to market participants.
- 1.4 The proposals in the TAR provide clear and transparent regulation over the period 2026-31, allowing ISPs, consumers, competitors and investors to plan with certainty to deliver long term, effective competition at the network level. By contrast, the Contract Focussed Approach seeks to maintain Openreach’s existing pricing structure, with multiple price points, complex discounting structures and uncertainty over future pricing. That uncertainty inevitably creates risk for investors, particularly where enforcement is itself uncertain.
- 1.5 Ofcom considers that the proposals in the Consultation are more proportionate than the proposals in the TAR since they achieve the same objectives but in a less restrictive way. In CityFibre’s view, that is not the case. The Contract Focussed Approach does not achieve the same objectives and, whilst potentially less restrictive for Openreach, are less transparent for ISPs, consumers and competitors.
- 1.6 Given the risks associated with any reduction in regulation, Ofcom must be certain that its proposals will deliver the same outcomes. In the case of the Consultation proposals, it does not appear that there is such certainty.
- 1.7 CityFibre notes in this respect that the Consultation does not consider the effect of the Contract Focussed Approach on wholesale competitors to Openreach. Thatr approach will inevitably create greater uncertainty around Openreach’s ability to use pricing to drive migrations onto its own FTTP network. The approach in the TAR set a clear boundary for the pricing of copper products to limit Openreach’s ability to cretae pricing structures which would undermine competition through accelerated migration. It is far from certain that the Contract Focussed Approach would deliver the same result.
- 1.8 Neither is it obvious what benefit will be realised from the change in regulatory approach. There are no benefits to ISPs, consumers and competitors who will be faced with a less certain regulatory outcome and greater enforcement risk. Indeed, if the Contract Focussed Approach were to

genuinely mirror the outcomes of the charge control, it is not clear what benefits would accrue to Openreach.

- 1.9 In those circumstances, CityFibre would urge Ofcom to reject the Contract Focussed Approach.

## 2 THE CONTRACT FOCUSED APPROACH DOES NOT DELIVER OFCOM'S OBJECTIVES

2.1 The Consultation sets out a view that the Contract Focused Approach is likely to achieve similar outcomes to the charge controls proposed in the TAR, such that Ofcom's objectives for WLA Area 2 and WLA Area 3 would be achieved.<sup>1</sup> The Consultation considers that, on this basis, regulation may not be proportionate since, under commercially negotiated agreements:

- The maximum price is equivalent to the proposed charge control;<sup>2</sup> and
- There is sufficient customer certainty.<sup>3</sup>

2.2 In CityFibre's view, the Contract Focused Approach neither delivers a maximum price equivalent to the proposed charge control nor provides customer certainty. As a result, it cannot be viewed as a less intrusive means of achieving Ofcom's objectives.

### a) **The Contract Focused Approach is not equivalent to proposed TAR charge controls**

2.3 The Openreach proposals considered in the Consultation adopt a pricing structure which would not deliver a maximum price equivalent to the TAR charge controls for WLA products. By implementing a rebate pricing structure, Openreach will benefit from upfront payments at a level above the charge control. For FTTP products, the proposals go yet further by making the maximum price under the charge control subject to the conditions of the Equinox offer.

#### ***The proposed rebate structure is not equivalent to the TAR charge controls***

2.4 Under the Contract Focused Approach set out in Openreach's letter, Openreach would maintain its pricing scheme whereby it sets a list price and provides discounts to ISPs in the form of rebates.

2.5 In the case of FTTC/SOGEA, Openreach proposes to issue a new offer for 80/20 products, maintaining current list prices and discounted prices, with those prices to rise by CPI over the period of the market review. For FTTP, Openreach is proposing a similar approach by issuing full list prices for FTTP products and maintaining the Equinox discounted prices.

2.6 In the TAR, Ofcom proposed an inflation linked charge control for MPF, FTTC and FTTP rentals and connections, with the control set at the prevailing price under existing Openreach discount schemes. As Ofcom noted in the TAR, list prices for 80/20 products were significantly above this level<sup>4</sup> and therefore the

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<sup>1</sup> Consultation paragraph 3.32

<sup>2</sup> Consultation paragraphs 3.33 to 3.35

<sup>3</sup> Consultation paragraphs 3.36 to 3.39

<sup>4</sup> TAR Volume 4, paragraph 1.31

effect of the charge control would have been to reduce list pricing to the Openreach discounted price.

- 2.7 Yet Openreach's proposals would maintain higher list prices for 80/20 products, above the charge control. Such an approach would be a clear breach of the proposed SMP conditions in the TAR if implemented. Openreach may argue that its proposed new offer would deliver a price consistent with the TAR proposals, however Ofcom should be wary of the maintenance of a high list price which serves Openreach's interests.
- 2.8 The reason for maintaining a high list price becomes clear when considering how the proposed offer would work in practice. Openreach's discount offers do not typically provide upfront discounts on the headline price. Since most are conditional, they are generally structured to require purchasers to pay list price at the outset and to subsequently receive a rebate, typically 6 months after initial payment.
- 2.9 Openreach proposes to maintain the rebate approach, with no explanation as to why this is required. Such an approach is beneficial to Openreach, providing improved cashflows to Openreach from the outset at the expense of its customers. As the differential between list prices and discounted prices grows, that advantage becomes more pronounced.
- 2.10 Ofcom considers that "[u]nder the Contract Focused Approach, prices paid by Openreach customers for 80/20 FTTC, SOGEA and FTTP are likely to be equivalent to those under the charge control approach for the duration of the TAR26 period."<sup>5</sup> However, where a rebate approach is adopted, that cannot be the case. Indeed, Ofcom itself recognises that its proposed charge controls would require a change to Openreach's pricing structure to remove the rebate structure.<sup>6</sup> The proposed charge controls in the TAR guard against excessive pricing from the outset. The Contract Focussed Approach fails to do so and should therefore be rejected.

***The FTTP proposals impose conditions on ISPs which are inconsistent with the TAR charge controls***

- 2.11 Openreach's FTTP proposals impose conditions on ISPs in order to receive pricing at the level of Ofcom's proposed charge controls. ISPs will only benefit from pricing at the level of the Equinix offer if they meet the conditions in that offer, in particular the order mix targets. Whilst many ISPs may already qualify for those discounts, not all ISPs will.<sup>7</sup> Those ISPs will be deprived of the protection offered by the proposed charge controls in the TAR, facing

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<sup>5</sup> Consultation paragraph 3.33

<sup>6</sup> "Under the terms of the offers currently in place, ISPs pay the list price and receive a rebate for the difference between that and the discounted price up to six months later. Our proposed charge control would require Openreach to charge no more than the discounted price, which we recognise requires a change from the current payment structure. We invite views on this approach." TAR Volume 4 footnote 9

<sup>7</sup> Ofcom notes in the TAR that "Most ISPs pay the Equinix 2 discounted prices" (TAR Volume 4, footnote 8), suggesting that there are a number of ISPs that do not.

significantly higher list pricing and reducing their ability to compete at the retail level.

- 2.12 The Contract Focussed Approach for FTTP products is not therefore “*equivalent to the proposed charge control*”. Openreach’s proposals remove important protections from ISPs and should not be adopted by Ofcom in the TAR statement.

**b) The Contract Focussed approach does not offer customer certainty**

- 2.13 Neither does the Contract Focussed Approach provide sufficient customer certainty, particularly when compared with a clear charge control. The longstanding approach of Ofcom setting charge control obligations, which BT then implements through its contractual arrangements, is a well-established and well-understood approach. It provides effective protection to consumers and supports regulatory certainty for all stakeholders. This regulatory certainty is further underpinned by well-understood associated enforcement mechanisms.
- 2.14 By contrast, the approach advocated by Openreach through the Contract Focussed Approach raises considerable uncertainty, particularly in relation to enforcement, at a time where promoting regulatory certainty and stability is critically important. Investors will only continue to invest where regulatory outcomes are clear and certain. If Ofcom’s policy of promoting competition and investment is to succeed, it is critical that Ofcom does not take steps which increase regulatory uncertainty.

***Reliance on Openreach letter***

- 2.15 The uncertainty caused by the Contract Focussed Approach arises from the outset as a result of their reliance on a letter from Openreach which is itself unclear and uncertain. The Consultation proposals depend upon a letter from Openreach’s head of regulation committing to changes to Openreach’s contracts with ISPs which it is claimed will deliver the same outcomes as the charge controls proposed in the TAR. The legal standing of that letter is entirely unclear with no indication the Mr Shurmer has powers to bind Openreach.
- 2.16 Moreover, the letter commits to a number of future changes to Openreach’s contracts without providing any detail of the precise contractual wording. In order to be able to meaningfully respond to the Consultation, CityFibre would have expected that Ofcom would provide clear, marked up contractual provisions which would allow respondents to interrogate the effectiveness of those provisions in delivering Ofcom’s objectives. That is the approach which Ofcom is required to follow where it proposes to impose SMP conditions and CityFibre would have expected the same where reliance is placed on Openreach contractual provisions.
- 2.17 This is all the more the case where, as Ofcom recognises, “*the Contract Focused Approach relies on multiple contracts, notices, waivers, price lists and offers that make up the contractual basis for Openreach’s supply of*

services.”<sup>8</sup> Navigating those contracts to understand both the existing and future position is not an easy task, even for well resourced legal teams.

- 2.18 CityFibre and other network providers are particularly prejudiced in this respect. Whilst Openreach’s contracts may be “*well understood by ISPs*”,<sup>9</sup> they are not so understood by CityFibre and others that are not party to those contracts. CityFibre is therefore in the unenviable position of assessing the impact of the Contract Focussed Approach on its business despite being uncertain as to what that will look like in practice, given the multiple contract changes which have taken place and which may not have been notified to CityFibre.
- 2.19 The changes proposed in the Openreach letter are insufficiently precise. Presumably, Ofcom will need to approve the final contract changes before they are implemented to assure itself that this is the case. That would require a further consultation from Ofcom for which there is unlikely to be sufficient time before the current charge controls expire. There is therefore a real risk that the charge controls in the WFTMR expire and no regulation is in place to replace those controls with Openreach contractual changes yet to be implemented. That cannot have been Ofcom’s intention.

#### ***Uncertain enforcement approach***

- 2.20 The Consultation proposes a radical departure from Ofcom’s previous approach to price regulation. Under previous market reviews, Ofcom has imposed charge controls, setting a regulated maximum on the price that may be charged by Openreach for regulated services. That approach provides certainty to market participants and a clear route to enforcement.
- 2.21 By contrast, the Consultation proposes not to include a regulated maximum price in SMP Conditions but instead to rely upon Openreach maintaining a contractual position. Regulation takes the form of an SMP condition requiring charges to be fair and reasonable without specifying the level. Ofcom considers that the guarantees available to stakeholders for enforcement are twofold. First, under the terms of ISP contracts with Openreach and, secondly, through enforcement of the “fair and reasonable” requirement by Ofcom.

#### ***Enforcement in the Courts is inherently uncertain***

- 2.22 The Consultation proposals effectively outsource enforcement to the Courts through ISP claims for breach of contract. If such an approach is to be effective, Ofcom must be confident that the contractual position set out in the Openreach letter is in fact enforceable in the Courts. As set out above, that letter is insufficiently precise in its terms to allow for a meaningful interrogation of the enforceability of provisions in the Openreach contracts to prevent excessive pricing by Openreach.

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<sup>8</sup> Consultation paragraph 3.37

<sup>9</sup> Consultation paragraph 3.37

- 2.23 It is also unlikely that contracts will be enforced through the Courts in any event. Action before the Courts is notoriously expensive and uncertain, making ISPs unlikely to bring claims. The risk of Openreach withdrawing special offers in other markets as a result of such action acts as a further dissuasive factor.
- 2.24 Moreover, the Courts which will hear any contractual claim are not expert in regulatory matters and any breaches will be seen through a purely contractual lens. To the extent that contracts would allow Openreach to set its prices above the level of the charge controls (and that must be a risk), the Courts would not seek to intervene by reference to Ofcom's intentions.
- 2.25 The outcome of any Court procedure is therefore inherently uncertain for ISPs, contrary to the position set out in the Consultation. In addition, the Consultation has failed to consider the consequences of such an approach to regulatory enforcement when it comes to industry participants that are not party to contracts with Openreach but for whom those contracts may have significant impact.
- 2.26 Rival networks to Openreach are placed in a particularly unenviable position in this regard. Openreach could seek to raise prices of FTTC/SOGEA products to drive migrations on its own network, either through an amendment to existing offers or through the introduction of a replacement offer which was not subject to the commitments given in Openreach's letter.<sup>10</sup>
- 2.27 As rival networks are not party to agreements between Openreach and ISPs, there would be no mechanism for those networks to enforce their rights before the Courts. In placing charge controls on 80/20 FTTC/SOGEA products, the TAR provided protection for rival networks against such practices<sup>11</sup> but the Contract Focussed Approach will remove that certainty altogether. It is not clear whether Ofcom has considered this at all in the Consultation. In CityFibre's view, this is a particular lacuna of Ofcom's assessment which fails to consider the impact of the Contract Focussed Approach on competition and investment.<sup>12</sup>

*Enforcement by Ofcom is also uncertain*

- 2.28 In the absence of charge control regulation, the Consultation indicates that Ofcom will rely upon enforcement of SMP conditions requiring charges to be fair and reasonable to prevent excessive pricing by Openreach for WLA products.<sup>13</sup> Ofcom indicates that, for WLA products covered by the Contract Focussed Approach, Ofcom will interpret the fair and reasonable requirement

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<sup>10</sup> For example, where acceptance of such an offer by ISP was a requirement to secure better terms on other products (e.g. further FTTP discounts)

<sup>11</sup> See TAR Volume 4, paragraph 1.67

<sup>12</sup> The lack of meaningful enforcement avenues for rival networks introduces a significant element of uncertainty for investors at a critical time. The approach therefore makes investment less certain at a time when rival networks are attempting to achieve scale to provide long term, sustainable competition to Openreach.

<sup>13</sup> Consultation paragraph 3.27

to mean that Openreach should not set prices that result in excessive pricing.<sup>14</sup> Ofcom proposes to update its guidance regarding the requirement for fair and reasonable charges in the WLA market, so that “*in addition to addressing the risk of price squeeze, it also addresses the risk of excessive pricing on the specific products covered by the Contract Focused Approach.*”<sup>15</sup>

- 2.29 However, enforcement under the “fair and reasonable pricing” obligation by Ofcom remains uncertain. Any action by Ofcom will necessarily be a more complex affair than measuring prices against a single, clear charge control. Knowledge of Ofcom’s approach under the “fair and reasonable pricing” obligation is therefore critical for stakeholders to be able to understand how the regulatory framework will apply.
- 2.30 Yet Ofcom has provided no guidance beyond indicating that it will interpret those conditions as requiring Openreach not to set excessive pricing. At this point, Ofcom has given no indication of how it would assess whether or not a price was excessive and it is therefore difficult to comment on whether such an approach would deliver a satisfactory outcome in practice. If Ofcom intends to implement the Contract Focussed Approach, it must provide stakeholders with an opportunity to comment on regulation in the round before it takes a decision on the appropriate regulatory approach.
- 2.31 CityFibre further notes that, as with Court action, the possibility of raising a dispute before Ofcom is not open to rival networks. Networks such as CityFibre do not receive relevant network access from Openreach and cannot therefore raise a dispute under the Communications Act 2003 in respect of that access. Effective enforcement therefore becomes even less certain for rival networks despite the fact that the pricing of WLA products will necessarily affect their interests and the prospects for competition over the long term.

### ***Enforcement of price squeeze requirements***

- 2.32 In the TAR, Ofcom indicated that it would interpret “fair and reasonable” obligations for FTTP products in such a way as to prevent Openreach from setting prices that would equate to a price squeeze if Openreach reduces its FTTP prices below the level at which a reasonably efficient operator can compete with it in the WLA market.<sup>16</sup> In assessing whether the pricing of FTTP products would amount to a price squeeze, the “*starting point for assessing a dispute is that a sufficient margin should be based on the costs of a reasonably efficient operator.*”<sup>17</sup> Those costs are set out in Ofcom’s fibre cost model which was initially used for the purposes of cross check on proposed charge controls for FTTP services.

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<sup>14</sup> Consultation paragraph 3.28

<sup>15</sup> Consultation paragraph 3.37

<sup>16</sup> TAR Volume 3, paragraphs 4.27 to 4.29

<sup>17</sup> TAR Volume 3, footnote 118

- 2.33 In proposing to lift those controls, CityFibre would be concerned if the effect was for Ofcom to no longer update its fibre cost model to act as a starting point for the assessment of a price squeeze. CityFibre raised these concerns with Ofcom and is satisfied that this would not be the case.
- 2.34 CityFibre understands that Ofcom intends to maintain its approach to the assessment of a price squeeze, as set out in the TAR, by:
- Publishing an updated fibre cost model in the TAR;
  - Using that fibre cost model as a starting point in assessing whether there are *prima facie* concerns with Openreach FTTP pricing; and
  - Where such concerns are identified, taking enforcement action under the “fair and reasonable” obligations.
- 2.35 If, despite the objections set out in this response, Ofcom decides to adopt the Contract Focussed Approach in its final TAR statement, CityFibre would welcome a clear statement from Ofcom that it remains committed to such an approach.