

Geo Analysis Team
Ofcom
Riverside House
2a Southwark Bridge Road
London
SE1 9HA

26/02/2019

Cc: warwick.izzard@ofcom.org.uk

[✂]

Consultation Response: Promoting Competition and Investment in Fibre – Approach to Geographic Markets

Introduction

Gigaclear welcomes the opportunity to respond to Ofcom’s consultation concerning the promotion of investment and competition in fibre networks.

As the UK’s largest rural point-to-point Fibre to the Premises (FTTP) network operator, we are committed to delivering ‘future proofed’ full fibre connectivity in the hardest to reach rural areas.

We believe this goal is shared by Government, particularly in light of the publication of the Department for Digital Culture Media and Sport’s (DCMS) Future Telecoms Infrastructure Review¹ (FTIR) and its explicit commitment to nationwide full fibre coverage by 2033 and an ‘outside in’ approach to rollout.

Delivering full fibre connectivity in rural geographies inevitably requires higher costs of delivery per premise past and longer delivery lead times when compared to network rollout in more densely populated urban areas. The practicalities of rollout are also more complex in these geographies, often carrying more risk due to varied terrain and weather and an absence of pre-existing accessible passive infrastructure.

We then welcome Ofcom’s recognition that investment and competition in fibre networks will vary by geography and consequently, as should assessments of downstream competition and relevant regulation.

As recent announcements from Gigaclear, CityFibre, Vodafone and Hyperoptic attest to, the coming years will see major investment in full fibre networks that can serve both residential and business markets in a similar manner. This commitment to investment in alternative ultrafast networks then warrants a change to Ofcom’s historic approach to regulation. This is because the pre-existing market structure of high entry barriers (that historically warranted a policy focus on promoting greater downstream competition within the current market structure) appear to be more readily overcome. This shift from an ex-post to an ex-ante regulatory approach is further warranted by the FTIR’s commitment to facilitating network competition as a means to accelerating network rollout. It is then both efficient and pragmatic to assess competition in light of enabling entry from a network operator viewpoint, rather than focusing on specific downstream services.

¹ <https://www.gov.uk/government/publications/future-telecoms-infrastructure-review>

In regard to the specific proposals Ofcom has set out, we wholeheartedly support Ofcom's starting position of a 'competitive area' being where there are at least two existing networks in addition to Openreach supplying ultrafast broadband and leased line services. The presence of only one alternative competing network to that of BT Openreach is unlikely to constitute meaningful competition. This is because BT will still have the capability to leverage its scale and incumbency to the point that the alternative operator may not (despite its presence) function as a competitive constraint on BT Openreach's activity. Further, BT's incumbency can also be leveraged to undermine the expansion of a new entrant, particularly where the network rollout plan is publicly available, as is the case under BDUK state aid intervention areas. In these scenarios, BT can quickly act to target upgrading infrastructure ahead of the alternative operators build plans in order to undermine expected levels of take up on the alternative network. An example of this scenario is provided in [X].

However, it is our support of the definition of 'competitive' that leads us to raise concerns regarding Ofcom's definition of 'potentially competitive'. We are concerned that in developing this definition, Ofcom is establishing too low a burden of proof to justify an area being defined as 'potentially competitive', as the current proposals would capture areas where there is little current or planned competitive constraint on BT Openreach activity.

The danger of this position is substantial, as it may result in Ofcom prematurely considering deregulation in these areas. In seeking to enable competition, Ofcom then risks stifling it by permitting the incumbent to target emerging alternative networks. To address this, we urge Ofcom to only consider deregulation where there is clear evidence of pre-existing competitive constraint on BT activity, or it is extremely likely to be so in the very near future. Further, we also ask that Ofcom temper its reliance on its own assessment of where areas may be viable for investment as a means of determining appropriate interventions, as this assessment is likely to be inferior to that of the network operators themselves.

As for the appropriate segmentation of market 'areas', we welcome Ofcom's consideration of both post-code and BT exchange footprints. In [X] we evidence how the incumbent choosing to upgrade infrastructure in even small footprints of only c100 premises can have a dramatic impact upon an alternative network's build plans in that area. We then support Ofcom's decision to rule out larger areas such as local authority boundaries and offer alternative proposals for what a suitable area unit would be.

Our response focuses on the questions most relevant to these concerns.

Background

Based in rural Oxfordshire, Gigaclear was established in 2012 to address the problems that rural homes and businesses had in getting access to fast, reliable internet connections. These issues originated from the long length of copper cables being used to deliver broadband in rural areas and other network operators prioritising network investment in cities and urban towns with higher population densities.

This environment created the opportunity to use new FTTP network technology, where distance has effectively no impact on performance, to deliver a gigabit speed, future proofed service to customers who were willing to pay for superior connectivity. Whilst our initial network builds were purely commercial, Gigaclear subsequently secured and delivered BDUK contracts in Essex, Berkshire and Gloucestershire; the first wholly full-fibre contracts secured under the BDUK programme.

Gigaclear now holds 20 BDUK contracts delivering full fibre connectivity across the South of England.

Q2.1 What are your views on our general approach to regulation and geographic differentiation in this review?

In regard to Ofcom's approach to geographic differentiation, we welcome Ofcom's starting position; that a 'competitive area' is where there are **at least** two existing networks in addition to Openreach supplying ultrafast broadband.

The presence of only one alternative competing network to that of BT Openreach should not be considered as meaningful competition. This is because BT is likely to still have the capability to leverage its scale and incumbency to the point that the alternative operator may not (despite its presence) function as a competitive constraint on BT Openreach's activity. Further, BT's incumbency can also be leveraged to undermine the expansion of a new entrant.

To evidence this point, [X].

Whilst we are then supportive of Ofcom's assessment of what should principally constitute a 'competitive' area, Ofcom propose that 'potentially competitive' areas be defined as where:

- *An alternative ultrafast network or networks is/are present; and/or*
- *Alternative providers have sufficiently specific plans to build in the area; and/or*
- *[Ofcom] consider there is a possibility of network build.*

For the reasons we set out above in support of Ofcom's definition of competitive areas, we are then concerned that the possible presence of only one alternative network rather than two could be enough to define an area as potentially competitive.

This outcome may then define areas as 'potentially competitive' where there is little current nor planned competitive constraint on BT Openreach activity. Whilst Ofcom does not set out consideration of remedies appropriate to the three categories it has set out, by defining areas as 'potentially competitive' when there is little current or likely future competitive restraint on BT's activity, Ofcom risks removing regulation prematurely.

Whilst Ofcom is then right to take an ex-ante approach to regulating fibre markets, we believe the current definition risks defining areas as potentially competitive when there is little evidence for it to be so. To address this, we urge Ofcom to only consider deregulation where there is clear evidence of pre-existing competitive constraint on BT activity, or it is extremely likely to be so in the very near future.

Question 3.1: What are your views on our approach to the geographic unit for our analysis?

Regarding the categorisation of geographic areas, we agree that granular segmentation is required, as even small pockets of upgraded infrastructure can have a dramatic impact on network delivery commercials, design and build schedules.

As an example to illustrate this point, [X].

In light of the above, we welcome Ofcom rejecting a regional or local authority boundary approach to segmentation and are instead looking at a more granular basis. As for which (of post-code or BT exchange footprint) is used to as the building block of defining areas in line with the three categories posed, Ofcom state that ‘rival network deployments are less likely to match precisely to the Openreach exchange area’. Whilst this will no doubt be true given that much of the Openreach footprint has been developed incrementally over many years, there are still powerful incentives for alternative network operators to align to the pre-existing BT Openreach infrastructure. Most notably, full fibre operators in rural areas may seek to fully overbuild the pre-existing exchange footprints in preparation for the deactivation of the copper infrastructure. With that said, these exchange footprints will change dramatically as some are decommissioned and others are utilised to deliver full fibre connectivity.

As for the option of post-codes, these can vary in size dramatically.

Whilst we then support Ofcom’s assessment of suitable granularity, we propose that Ofcom may seek to use ONS census output areas as a viable alternative². Not only are these areas statistically similar in size, but are also freely available and align with wider ONS data gathering. These units can then be used for further social impact analysis.

Question 3.2 What are your views on our approach to the threshold for considering a network to be present within a geographic unit?

Ofcom is prudent to stress that the threshold for considering a network to be present within a geographic unit should be high enough to provide a meaningful competitive constraint, whilst also being unlikely to require 100% coverage in order to do so.

We are then concerned that Ofcom states a preference for a lower threshold as this is ‘more likely to identify an area as potentially competitive’. Ofcom justify this preference on the grounds that it wants to ‘promote network competition’. In doing so, Ofcom admits that this could ‘identify some areas that ultimately are non-competitive areas as being potentially competitive’.

Ofcom should not be pursuing a goal of maximising the amount of areas to be defined as potentially competitive in and of itself. This position is unsound as it is not grounded in evidence-based assessment.

As Ofcom accepts that the threshold should function to set out the point at which competitive constraint is apparent, Ofcom should abandon a teleological preference for a lower threshold and instead seek to define ‘potentially competitive’ areas in line with an evidenced based judgement.

Question 3.3: What are your views on our approach to analysing existing, planned and potential future network rollout

We are concerned by Ofcom’s approach to analysing potential future network rollout, as it comes to the paradoxical position that Ofcom is ‘not in a position to assess the likelihood of network build plans being carried out in part or in full’ whilst also seeking to define areas as potentially competitive where Ofcom’s own economic analysis indicates that ‘future rollout could be economic’.

² <https://www.ons.gov.uk/census/2001censusandearlier/dataandproducts/outputgeography/outputareaproductio>

We disagree with the statement that ‘Ofcom is not in a position to assess the likelihood of network build plans being carried out in part or in full’. In fact, Ofcom is in a suitable position to assess whether data provided is credible, much like the ‘conditionally uncompetitive’ designation that the BDUK tender process utilises (an example of this is set out in [X]). Ofcom is equipped to understand the credibility of future rollout plans through the information it will receive from network operators directly as part of future ‘Connected Nations’ information requests which will capture future build geographies, in light of the Broadband USO and Article 22 of the European Electronic Communications Code. Through this information, it can also assess whether the rate of network expansion is reasonable in line with historic network growth.

Whilst Ofcom is then well placed to assess whether network operator plans are credible, it is the network operators who are best placed to assess the economic viability of rolling out their network in areas that they are yet to commit to. For instance, they will explore factors that Ofcom cannot capture, such as detailed design modelling, the operational capacity of the local authority that grants relevant permits and/or notices, the under-earth composition of the geographic terrain captured through surveys and expected levels of takeup and delivery scheduling for areas with similar terrain and potential customer demography.

Ofcom’s assessment of potential competition will then be inferior to that of the network operators, who are by their nature closer to the commercial reality of network delivery. It is then bizarre that Ofcom appear to be valuing its own assessment of where future network rollout may develop above that of the assessment of active network operators seeking to expand and develop their current network footprint. We then ask that Ofcom specifically utilise its information gathering powers to validate network operator claims. As for wider assessments of ‘economic viability’, we urge Ofcom to prioritise the assessments of network operators and temper reliance on its own analysis.

Summary

On review of Ofcom’s draft proposals, we are concerned that Ofcom are setting too low a threshold for an area being designated as ‘potentially competitive’. This can be seen in the proposed technical definition, Ofcom’s preference for a low threshold to assess network presence and Ofcom’s reliance on its own assessment of where network delivery may be economically viable. Whilst Ofcom does not use this consultation to discuss remedies for any of the three market segments it proposes, any assessment of ‘potential competition’ where there is little evidence of competitive restraint risks removing regulation before competition has effectively taken hold. Such an outcome would then undermine, rather than enable network competition. In light of the concerns we have set out here, we then implore Ofcom to revisit the definition of ‘potentially competitive’ areas.

[X]

[X]

- [X]
- [X]
- [X]
- [X]

[✂]

- [✂]