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## **Consultation Response: Promoting Competition and Investment in Fibre Networks – Initial Proposals: Approach to Remedies**

### **Introduction**

As an organisation, Gigaclear has always endeavoured to respond positively to Ofcom consultations offering what we hope is viewed as a constructive position, balancing the needs of our business with the complexities of the market and its necessary regulation. However, we are extremely concerned by Ofcom's proposed approach to access remedies within this consultation, and we ask that Ofcom reflect on the very real and serious concerns laid out here in the context of our previous responses.

Whilst Ofcom claims to be seeking to 'promote competition and investment in fibre networks'<sup>1</sup>, the ambition set out within the consultation appears to be wholly focused on promoting investment in BT Openreach alone. Throughout the proposals within the document, Ofcom continually defaults to supporting BT Openreach's investment case, giving only a cursory consideration to the role that alternative operators play in the rollout of full fibre connectivity. This is despite alternative networks to BT Openreach delivering half of the UK's current full fibre infrastructure.<sup>2</sup>

The absence of consideration of alternative operators is evident in three crucial areas:

- 1** In consideration of 'non-competitive areas' Ofcom's proposals seek to 'lock out' competition to BT Openreach incumbency, without any consideration of measures that could encourage competition and alternative operator network rollout. In justifying this position, Ofcom moves from accepting that an area may only support one scale fibre network operator (such as in 'Geographic Area 3') to assuming the lack of competition will inevitably result in continued BT incumbency.

With this assumption as its justification, Ofcom propose that BT Openreach is offered a Regulated Asset Base (RAB) remedy model to allow cost recovery across a broader asset base and thereby encourage BT Openreach fibre investment in these areas. Ofcom's best guess at what is a 'non-competitive' area then becomes a self-fulfilling prophecy; Ofcom give no consideration to the RAB model functioning as a substantial barrier to competition to BT Openreach ever emerging in areas defined as non-competitive.

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<sup>1</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf)

<sup>2</sup> <https://www.thinkbroadband.com/news/8364-1-million-premises-passed-with-full-fibre-by-openreach-milestone-reached>

Ofcom does not then acknowledge that the success of operators like Gigaclear has evidenced that even in areas where the market is likely to sustain only one scale full fibre network, that the single fibre network operator may not be BT Openreach.

- 2 Despite acknowledging that there are market segments ('Geographic Area 3') where there is only likely to be a single fibre network operator and the reality that there are an increasing number of BT exchange footprints that have been completely overbuilt by alternative network operators within this market segment, Ofcom only considers a copper switch off process where customers served by the BT Openreach legacy copper network are migrated to the BT Openreach full fibre network.
- 3 Ofcom gives no consideration to BT Openreach's track record of altering its declared rollout schedule when compared to its initial submission through the BDUK Open Market Review (OMR) process, particularly following where an alternative operator has secured the associated state aid contract. On numerous occasions this has resulted in significant disruption to alternative network operator's rollout schedule and increased operating costs. This is despite the European Electronic Communication Code introducing transparency mechanisms to protect alternative operators against incumbents changing their rollout plans to [3].

Rather, Ofcom appear unconcerned by this activity, describing it as BT 'responding to market developments'<sup>3</sup>, [3].

Together, these proposals undermine rather than promote network level competition, as each gives undue preference to BT Openreach's investment case over that of alternative competitor networks. They are then drastically out of step with both DCMS's Future Telecoms Infrastructure Review (FTIR) and its draft Statement of Strategic Priorities (SSP), both of which call on Ofcom to utilise network operator competition to encourage full fibre network rollout.

To address these points in turn, we advise that:

- 1 In non-competitive areas, Ofcom repurpose the 'Hypothetical Ongoing Network Adjustment' (HON) to encourage rollout of full fibre in these areas. This should be done by maintaining the HON adjustment in BT Openreach's pricing but using it to fund a programme to subsidise full fibre rollout in these areas. The fund should then be open to any network operator that rolls out full fibre infrastructure in the relevant geographic area. This would then encourage competition, including additional investment from BT Openreach, without simply reinforcing BT Openreach incumbency.
- 2 Ofcom should consider the process by which a legacy copper exchange footprint could be decommissioned, and end-users moved to a service provided by an alternative network operator. (i.e. a BT Openreach to non-BT Openreach migration journey).
- 3 Ofcom, in collaboration with DCMS, should use the implementation of the EECC to scrutinise where BT Openreach change rollout prioritisation to target areas which they had previously designated as not commercially viable through the BDUK OMR process.

Our response focuses on these three core points.

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<sup>3</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf) (Section 2.39)

## Background

Based in rural Oxfordshire, Gigaclear was established in 2010 to address the problems that rural homes and businesses had in getting access to fast, reliable internet connections. These issues originated from the very long lengths of copper cables being used to deliver broadband in rural areas and other network operators prioritising network investment in cities and 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 more 20 BDUK contracts delivering full fibre connectivity across the South of England.

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 considering the publication of the Department for Digital Culture Media and Sport's (DCMS) Future Telecoms Infrastructure Review<sup>4</sup> (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, the greater impact of 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, 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) are increasingly 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.

## Potentially Competitive Areas

Ofcom defines an area as potentially competitive if any of the following conditions are met:

- Alternative fibre networks are present.
- Alternative providers have specific plans to build.
- Ofcom considers that there is the possibility of network build.

In such areas, Ofcom initially proposes to maintain regulation of wholesale local access services, as these areas are not yet competitive (and BT Openreach would still be designated as having SMP).

Ofcom justifies this continuation by stating that it is to:

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<sup>4</sup> <https://www.gov.uk/government/publications/future-telecoms-infrastructure-review>

*“promote competition in new fibre networks through network investment. With this in mind our regulation of wholesale services in these areas will be primarily about maintaining current regulation around access to key wholesale services. The intention of this is to ensure that access seekers have appropriate incentives to build new networks, themselves or collaboratively”*

Further, Ofcom continues to be concerned that BT Openreach might react to new market entry by deploying pricing measures aimed at weakening competitors’ business cases for the deployment of new networks, such as through geographic discounts, thereby creating a risk that competitors choose to cut back on their investment plans.

Ofcom propose that the benefits to BT from reducing competitive pressures could be substantial and therefore consider it may have an incentive to engage in such discriminatory behaviour. Ofcom then propose to continue to prohibit such targeted discounting.

We welcome this position as it takes an evidence-led approach whilst also maintaining an ex-ante regulatory outlook; Ofcom is acknowledging that areas may become competitive and it will impose remedies accordingly but is insisting that this does not occur until competitive pressure is adequately evidenced. We fully endorse this approach.

Whilst it may be argued that removing regulation and permitting BT Openreach to restrict wholesale local access would create a powerful incentive for investment in rival network operators, this would risk severe detriment to retail competition, to the extent that wholesale incumbency could be leveraged downstream to secure gains in retail market share.

However, concerns arise when Ofcom addresses the final bullet point; where ‘Ofcom considers that there is the possibility of network build’. Whilst Ofcom is equipped with the data it secures through the Connected Nations information gathering process, Ofcom is not as close as network operators to material factors that influence network rollout. For example, Ofcom will have no view as to which local authorities are supportive of or operate to obstruct fibre delivery, or where the results of geological surveys point to high rock density and consequently higher cost per premise past.

We then implore Ofcom to give greater weight to current rollout footprints and the declared rollout plans of network operators, and less emphasis on Ofcom’s own modelled analysis of where rollout may conceptually be viable.

This concern is compounded by Ofcom previously stated preference for a broad definition of potentially competitive areas 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’<sup>5</sup>.

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.

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<sup>5</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0005/130001/Consultation-Promoting-investment-and-competition-in-fibre-networks.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0005/130001/Consultation-Promoting-investment-and-competition-in-fibre-networks.pdf) (section 3.23)

## Strategic Network Deployment

In its consideration of BT Openreach strategically targeting network deployment to undermine competitor investment, Ofcom assume that this danger is one that only occurs in urban areas and infers that BT Openreach's 'Fibre First' programme addresses the problem.

Both positions are inaccurate. Instead, Ofcom should utilise its role in transposing Article 22 of the European Electronic Communications Code to better scrutinise where BT Openreach target competitor networks, particularly when these changes undermine state aid interventions.

As part of its consideration of potentially competitive areas, Ofcom notes that:

*“competing network providers have expressed concerns that BT Openreach will target network upgrades to areas where those competing providers are investing in fibre networks, with the purpose of destabilising competitor’s long term investment strategies”*

Ofcom also notes that operators such as Gigaclear and CityFibre have called for a mechanism by which, under defined circumstances, BT Openreach must explain substantial deviations from its initial build plans.

In response, Ofcom notes that BT Openreach has committed to publishing a 'Fibre First Programme Build Plan', which Ofcom states 'reveals the number of exchanges in specified cities where it plans to deploy over the next two years'<sup>6</sup>, before concluding that a requirement on BT Openreach to justify material deviations from build plans would 'limit BT's flexibility in responding to market developments... and require close regulatory involvement in commercial activities... such an intervention would not then be appropriate on present circumstances'<sup>7</sup>.

Ofcom's conclusion is then overly simplistic, as it omits a consideration of where BT Openreach has already declared an area as not commercially viable, but changes this position when an alternative operator secures the associated state aid contract. As an example of this activity, in [§<], we set out how Gigaclear's Wiltshire BDUK intervention area was initially designed, and the impact that the pockets of BT Openreach FTTP had when they subsequently emerged, despite BT Openreach stating that it had no plans for such rollout within the OMR process.

[§<].

Our concern is that, despite not claiming any plans to upgrade infrastructure for the designated premises through the OMR process, BT Openreach regularly moves to upgrade the lower CPPP premises within Gigaclear intervention areas, thereby increasing the average CPPP within the Gigaclear build plan. This then means the attributed funds (state aid and Gigaclear commercial investment) cover fewer properties, resulting in descoped premises or requests for additional state aid. BT face strong incentives to do this, as such activity frustrates competition build plans, limits competitor network footprint growth and ultimately deters investment in alternative fibre operators to that of Openreach. As long as BT Openreach faces no scrutiny in conducting such activity, there is then little incentive for it to cease doing so.

To resolve this issue, we ask that Ofcom review the evidence we have provided and reflect on the role of Article 22 of the EECC as a means to address this. We see Article 22 as a viable protection against this activity, as BT's targeted rollout changes will then warrant scrutiny if these plans were not initially declared within the initial OMR.

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<sup>6</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf) (section 2.36)

<sup>7</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf) (section 2.39)

Deterring this BT Openreach activity would result in a far more effective build process, as it will allow lower CPPP builds to cross subsidise higher CPPP builds within a single intervention area, resulting in more full fibre connections reaching the harder to reach areas.

## Non-Competitive Areas

Ofcom considers areas to be non-competitive if all the following criteria are met:

- BT Openreach is the only network present;
- No alternative providers have specific plans to build;
- Ofcom does not consider that there is the possibility of network build.

As competitive pressure is not operating upon BT Openreach in these areas, Ofcom rightly propose to continue regulating access to key wholesale services, in order to protect downstream competition and ultimately consumers.

However, as Ofcom concludes that these areas do not have potential to become commercially viable for competitive pressure upon BT Openreach to develop, Ofcom also seeks to 'provide appropriate incentives for BT to invest in a new fibre network', [which will support] 'widespread availability of fibre across the UK, even in the most remote rural areas'<sup>8</sup>.

In justifying this approach to remedies in non-competitive areas, Ofcom highlights that this approach is developed with due regard to the following objectives:

- Preserving the investment incentives faced by BT;
- Protecting customers against the risk of high prices; and
- Promoting retail competition, which will continue to be based on access to Openreach's network.

Critically, Ofcom then exclude the objective of 'ensuring that BT's competitors have appropriate conditions to support their investments'<sup>9</sup>, which it has previously listed as an objective when approaching potentially competitive areas.

The exemption of this objective places Ofcom's proposed approach to non-competitive areas in direct contradiction to DCMS's FTIR. The FTIR gave a clear commitment to encouraging network competition as a means to accelerating network rollout. Within which a package of remedies is discussed to encourage competition in areas where it may otherwise be lacking, as part of an 'outside in' strategy, such as vouchers, anchoring models, state aid etc. None of these measures are designed to exclusively support BT Openreach, rather they are offered to encourage any operator to rollout gigabit capable connectivity in areas that may otherwise not receive it.

The FTIR then acknowledges that some geographies currently lack competition but then proactively points to policy initiatives that may introduce such competition.

Ofcom, in contrast, does not adopt this approach. Rather, Ofcom moves from identifying an area as currently non-competitive, to recommending measures that would only entrench this lack of competition. By recommending a 'Regulated Asset Base' (RAB) model that would permit BT Openreach to leverage its incumbency to recover costs across a broader asset base and invest increased returns into fibre delivery in these areas. Ofcom's lack of ambition is concerning – rather than encouraging competition in non-competitive areas, it is locking it out.

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<sup>8</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf) (Section 3.2)

<sup>9</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf) (Section 3.4)

Ofcom's assessment of what is and what is not a non-competitive area will then become a self-fulfilling prophecy; the introduction of increased returns permitted by the RAB model in the medium term will allow BT Openreach to leverage a position of incumbency to directly fund network rollout in uncompetitive areas. This asset leverage is not available to other operators due to the very nature of their absence.

Further, Ofcom propose that in non-competitive areas, the Hypothetical Ongoing Network (HON) adjustment be removed. The material impact would then be that copper prices could initially fall in non-competitive areas (potentially to a level below what a reasonably efficient operator could charge), but then rise over time as the RAB charge controls operated to increase prices over time.

This 'down then up' price journey would be a considerable deterrent to alternative operators considering network rollout in this area. Copper pricing would initially fall, depressing potential take-up on any new fibre network operator. These prices would then rise to facilitate BT Openreach full fibre rollout, allowing BT to leverage its incumbency; a solution that no other operator can utilise at scale in non-competitive areas.

The short-term impact of price reduction combined with medium to long term price increases timed to compensate BT fibre investment in the area would then be a 'double edged sword' that would inevitably 'lock out' alternative network investment and consequently effective competition.

Ofcom's failure to consider any means of promoting competition in uncompetitive areas, and the lack of reflection of the 'lock out' effect these remedies will have is extremely concerning, as it fundamentally undermines the Government's goals as set out in the FTIR.

Whilst Ofcom does not elaborate as to the justifications for its position beyond what is set out above, it appears that Ofcom's core principle when considering non-competitive areas, is that as some areas can only facilitate a single scale fibre network operator, there cannot then be potential for competition.

There are two fundamental flaws to this approach;

1. It does not consider how geographies may change from uncompetitive to potentially competitive.
2. It jumps from assessing that as the properties of Geographic Area 3 will point to a single scale fibre operator operating in that area, to concluding that that operator will inevitably be BT Openreach.

Regarding the first point, state aid programmes and new commercial models are continuing to make areas viable for investment where they previously were not. Ofcom places great emphasis on working to ensure that public rollout schemes complement a RAB charge by helping to fund deployment of fibre to the hardest to reach areas. Yet there is a clear misalignment; BDUK and wider DCMS programmes have moved away from a closed framework to procurements and schemes open to multiple operators, despite them looking to encourage fibre network rollout in areas that may otherwise be non-competitive. In direct contrast, Ofcom's RAB approach singularly focuses on improving the Openreach rollout.

The RAB approach and public funding approaches then risk acting to counter each other, whereby the RAB in one area will undermine aid in nearby areas where the Government awards work to anyone other than BT Openreach.

On the second point, some exchange footprints in Geographic Area 3 are already fully covered by fibre network operators other than BT Openreach, with many more likely to be covered as alternative operators expand their network footprint.

As it is evidenced that previously uncompetitive areas have and continue to become competitive, be that through state aid programmes, reduced barriers to network rollout or continued innovations in network delivery, there is substantial risk that in choosing to designate areas as uncompetitive and in permitting a RAB model that allows this lack of competition to become entrenched, the outcome would be to stifle further competition. Such an outcome risks deterring further investment in alternative operators and consequently slowing the rollout of full fibre networks across the UK.

## Consistency of Ofcom Approach to Scrutinising BT Openreach Rollout

In assessing whether a RAB model would be viable, Ofcom explores multiple design choices, which ultimately seek to incentivise BT to commit improved margin secured through RAB to fibre investment in uncompetitive areas. This is pursued to avoid BT simply resting on unchallenged market share and using benefits of RAB to further invest in competitive areas and deferring investment or discounting longer term projects to further exploit its Significant Market Power.

As part of that thinking, it is acknowledged that Ofcom would need to take a closer role in understanding Openreach rollout; whereby Openreach would need to propose a charge control mechanism for fibre rollout in uncompetitive areas, which would need to balance the risk of BT over-recovering its costs against the risk that the model does not give sufficient incentive for BT to deliver the proposed works.

There is, therefore, a contradiction in Ofcom accepting that to support BT's rollout, it must get closer to scrutinising the BT Openreach investment case while, in contrast, when reacting to concerns from alternative operators regarding BT changing plans to target them, Ofcom refuse on grounds that it would require scrutiny of BT's planned rollout. Ofcom does not explain why such a task is acceptable in supporting BT Openreach rollout, but is not a reasonable requirement to support alternative operator rollout.

## Avoiding Competition 'Lock Out' and Unstable Copper Pricing

In the above, we highlighted the dangers of Ofcom's proposed RAB model:

- Locking out competition – only BT Openreach would be likely to provide fibre
- Unable to react to changing commercial environment (changing geographic area segmentation)
- Unstable copper pricing due to removal of HON adjustment

To address these concerns, we propose that the HON adjustment is not removed. Rather, the adjustment is repurposed and funds raised from the adjustment are repurposed to encourage full fibre rollout in uncompetitive areas by any operator.

The primary benefit of repurposing the HON to fund the rollout of fibre in uncompetitive areas is that it encourages fibre rollout whilst remaining agnostic to the network operator delivering the fibre. In doing so, it operates to encourage any entrant to roll out infrastructure in that area by improving the business case for doing so. It then seeks to encourage competition as a means of facilitating roll out, including the potential to encourage BT Openreach to increase their investment in full fibre, but crucially without locking in BT's incumbency.

Further, it avoids the price volatility associated with the combination of removing the HON adjustment and adopting a fibre RAB. Fluctuations in legacy copper pricing will create multiple pains for ISPs, who face the risk of increased churn if they passed on such price changes directly onto consumers mid-contract.

If competition is to be encouraged through a repurposed HON, the national pricing obligation must remain, as competition would need to be protected from targeted regional price reductions by the incumbent.

There are multiple different models through which the HON could be repurposed to support fibre network rollout, such as gap funding, voucher schemes or tenders for anchor sites. Whichever is considered, alignment with current and future BDUK programmes should be prioritised when selecting the preferred model/s.

## Retirement of the Copper Network

A further reflection of Ofcom's failing to adequately consider the role of alternative fibre network operators is its omission of considering a copper switch-off process that may result in such an alternative operator taking a position of incumbency.

Such a possibility is a logical extension of two points:



1. There are market segments where the population density is so sparse that there is only likely to be one scale fibre network (likely to fall within Geographic Area 3).
2. Some of these areas, such as those that have received state aid funding through the BDUK superfast programme, are already served by a scale full fibre network that is not BT Openreach.

Unless the commercial reality of network delivery in these areas dramatically changes, it is then plausible that BT Openreach may never deliver full fibre in these areas. Consequently, the deactivation of BT Openreach infrastructure in this area may result in the migration of end-users from BT Openreach legacy infrastructure to an alternative full fibre operator. It is then deeply disappointing that Ofcom, despite stating that it seeks to encourage alternative network operator investment, has not considered this reality and has only proposed a 'BT Openreach to BT Openreach' process for retiring the copper network.

Whilst such a scenario would be wholly dependent on BT Group and the alternative operator coming to a commercial agreement for such a scenario, the reality of the two points above should compel Ofcom to consider how such a procedure could progress.

To address this issue, we ask that Ofcom explore the above scenario, with particularly attention given to product provision requirements<sup>10</sup> and appropriate pricing.

On pricing, we agree that an appropriate uplift from legacy copper charges should be accepted on the grounds of the value of additional benefit provided. We then ask that Ofcom clarify that such value will vary by geography and market segment. We believe that this would be a logical extension of Ofcom's position, as the provision of fibre connectivity would be of higher comparative value in areas of pre-existing poor broadband speeds than in comparison to areas where superfast services are available.

We would welcome Ofcom's clarification that this principle would still apply when migrating customers from a BT Openreach exchange to an alternative operator network who exclusively focused on such areas of high value.

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<sup>10</sup> 'Point to Point' fibre networks offer synchronised speeds. An obligation to offer a 40/10 service would then require the artificial restriction of upload speeds.

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[X]

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