
Three's response to Ofcom's consultation on Promoting competition and investment in fibre networks

Initial proposals – Approach to remedies

Non-confidential

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Three.co.uk

Executive Summary

- 1.1. Three welcomes the opportunity to respond to Ofcom's initial proposals for remedies to promote competition and investment in fibre networks. This Consultation sets out Ofcom's goal to promote investment and competition in ultrafast fibre networks to as many people and businesses as possible.
- 1.2. It is essential that as part of this Consultation, Ofcom ensures Mobile Network Operators have access to dark fibre nationwide, enabling timely and efficient 5G rollout. We agree with Ofcom's general approach of classifying areas into different categories based on the level of network competition and applying different remedies in them. Ofcom correctly proposes that in areas where BT faces two rival networks, competition is likely to deliver dark fibre, and that in around one third of areas, BT is likely to remain the only provider and as such additional measures are needed to ensure good outcomes for consumers, including 5G mobile services.
- 1.3. However, Ofcom's specific proposals for potentially competitive areas are concerning to Three, and no doubt to other MNOs. By wrongly proposing that having BT and Virgin present in an area is enough for an area to be categorised as potentially competitive, Ofcom has created a risk that MNOs will not have access to dark fibre in large parts of the country.
- 1.4. We have [X] mobile sites in areas that Ofcom proposes to define as potentially competitive. Even accounting for the build plans of network operators, nearly [X] of these sites will be served in areas where just BT and Virgin will operate in the future. It is highly unlikely that we will have access to dark fibre for these [X] sites, which will hinder our 5G rollout in these areas.
- 1.5. Ofcom should consider imposing additional remedies in potentially competitive areas where BT and Virgin operate and where there is no prospect of further entry. It is essential that MNOs have access to dark fibre in these areas.
- 1.6. We explain that Ofcom can identify these areas and take a different approach to them, contrary to its arguments in its December 2018 Consultation. We demonstrate that this better meets Ofcom's objectives in terms of protecting investment incentives of BT and its rivals, protecting consumers from excessive prices and poor quality and maintaining competition based on Openreach's network.

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1. Dark fibre is critical for 5G but Ofcom's proposals mean it will not be available in large parts of the country.

1. Executive Summary.

- 1.1. We support the general principle of Ofcom's proposals, namely to group areas into categories based on similarities in the level of network competition and apply different remedies in each. However, the specifics of Ofcom's proposals mean that dark fibre will not be available in large parts of the country.
- 1.2. In particular, if areas with only BT and Virgin present are categorised as potentially competitive, there will be no access to dark fibre in them. This historic duopoly has not delivered the key input that MNOs need for 5G, namely dark fibre, and where these providers face no prospect of a third network, they have very little incentive to offer such services.
- 1.3. Ofcom's proposals make it highly likely that we will not have dark fibre access at [X] of our mobile sites. This will severely limit our 5G in these areas because dark fibre is needed to meet the growing data needs that 5G devices and networks will bring.
- 1.4. We support Ofcom's proposals relating to competitive and non-competitive areas, in terms of how they are defined and the regulatory approach.

2. Ofcom wrongly proposes that having BT and Virgin present in an area means that it is potentially competitive.

- 2.1. Ofcom proposes that having BT and Virgin present in an area is enough to classify it as potentially competitive, even if no other network operator has plans to build and Ofcom's analysis suggests a third network is not economic. This is at odds with Ofcom's proposal that having BT and two rival networks is enough to deem an area as competitive.
- 2.2. While having BT and Virgin's networks present in an area may be sufficient to ensure competition in the retail broadband (residential) market, it will not ensure competition for the delivery of wholesale business services such as dark fibre access.
- 2.3. The historic duopoly of BT and Virgin has not delivered the key input that we and other MNOs need to deploy 5G services, namely dark fibre. While Virgin has recently indicated that it is considering offering providers wholesale access to its ultrafast broadband network¹, this is only due to network competition from entrants such as CityFibre. BT and Virgin have very little incentive to offer dark fibre services where they do not expect another rival to enter.
- 2.4. BT has never provided dark fibre or, to the best of our knowledge, considered doing so for commercial reasons. It had prepared to offer dark fibre services but

¹ <https://www.ispreview.co.uk/index.php/2019/04/virgin-media-ponders-opening-up-uk-network-to-rival-isps.html>

only in response to direct regulation from Ofcom, which was subsequently not implemented. [§].

- 2.5. This is not surprising: dark fibre services decouple the cost-capacity relationship and so threaten BT and Virgin's existing leased line businesses. In the absence of a rival offering dark fibre services, neither has an incentive to cannibalise their own leased lines by offering dark fibre services. The situation is different for providers other than BT and Virgin, because they have in part built their business models on offering dark fibre services, and these entrants do not have large leased line volumes which could be threatened.
- 2.6. Looking ahead, the fact that Fixed Wireless Access services need dark fibre for the necessary backhaul further weakens BT and Virgin's incentives to sell dark fibre to providers like Three. Doing so would allow us and their other rivals to offer FWA services more widely and at a lower price, which would then compete with the retail fixed broadband part of BT and Virgin's operations.
- 2.7. Ofcom accepted in its December 2018 Consultation, *Promoting investment and competition in fibre networks; Approach to geographic markets*, that its proposed definition of potentially competitive areas will include a wide range of scenarios.² It also stated that "not all areas" in the potentially competitive category "may ultimately see sufficient network rollout to be considered effectively competitive".³ We agree with this statement.
- 2.8. Potentially competitive areas would include at one extreme areas that already have two existing networks (BT and a rival) and other network providers have build plans for the area. At the other extreme will be areas with only BT and Virgin present, with a third network unlikely, or areas with no rival networks but where Ofcom considers that another entrant is economic.
- 2.9. Ofcom can and must change its approach to potentially competitive areas where only BT and Virgin are present, without a reasonable prospect of a third network. Ofcom should treat these areas differently and additional remedies should be imposed in them. We explain this in detail in Section 2.

3. Ofcom's proposals make it highly likely that we will not have dark fibre access for nearly [§] of our mobile sites, which will severely hinder 5G rollout.

- 3.1. Ofcom proposes to rely on the prospect for competition in potentially competitive areas, which make up two thirds of areas. As such, it does not propose regulated access to dark fibre. We accept that this is the right approach in areas that are genuinely potentially competitive, which in line with Ofcom's proposals means a reasonable likelihood of having three networks.
- 3.2. We also welcome the incoming DPA remedy⁴, which will make it quicker and cheaper for rivals to roll out fibre networks and offer dark fibre services and agree that Ofcom should promote competition where possible. However, even with this remedy, there will remain areas with only BT and Virgin present.
- 3.3. Figure 1 below shows the different network providers that will be able to serve our mobile sites, accounting for their future build plans.⁵ BT can serve [§] of our mobile sites, and while many could also be served by Virgin and CityFibre ([§]), nearly [§] of our mobile sites will be served by only BT and Virgin.

² Para 2.23, https://www.ofcom.org.uk/_data/assets/pdf_file/0005/130001/Consultation-Promoting-investment-and-competition-in-fibre-networks.pdf

³ Para 2.22, https://www.ofcom.org.uk/_data/assets/pdf_file/0005/130001/Consultation-Promoting-investment-and-competition-in-fibre-networks.pdf

⁴ Page 1, https://www.ofcom.org.uk/_data/assets/pdf_file/0020/149330/volume-1-pimr-draft-statement.pdf.

⁵ This is based on responses to our Request for Proposal to provide connectivity to our mobile sites.

Figure 1: There are nearly [X] of our sites that we expect will only be served by BT and Virgin in future.

[X]

- 3.4. Ofcom's proposals create a risk that Three will not have access to dark fibre in these areas, which will severely hinder rollout plans.⁶ We do not have the necessary data to reproduce Ofcom's analysis, focusing on the number of areas that are potentially competitive due to BT and Virgin being present, but with no build plans from rivals and where Ofcom does not think rival build is possible (economic). We expect Ofcom to conduct this analysis before proceeding with its current approach. We propose an alternative in Section 2.

⁶ Ofcom and industry expect mobile data usage to increase significantly in coming years, largely due to 5G networks and devices being rolled out. Active services, e.g. those bought from BT or Virgin Media, are not suitable to meet this extra demand because costs increase with capacity. Dark fibre decouples the cost-capacity relationship and so is key in supporting this growth in mobile data usage. Dark fibre also allows for more efficient network design, e.g. loop-based architectures that allow MNOs to densify their networks by 'breaking out' from a loop connected to a new mobile site, rather than relying on a new point-to-point connection to the nearest BT exchange (which may be much further away from the new site).

2. Ofcom must take a different approach in areas likely to remain as BT and Virgin only, as they are not potentially competitive.

4. Executive Summary

- 4.1. In this Section, we explain that Ofcom can take a different approach in different potentially competitive areas. Specifically, Ofcom should carve out areas that are likely to only ever have BT and Virgin present and ensure that they have access to dark fibre. Contrary to what Ofcom claims, such an approach is possible.
- 4.2. Ofcom could add a fourth category to cover areas that currently or in the future will only have BT and Virgin present without a reasonable likelihood of a third network. In these areas, Ofcom should ensure MNOs have access to dark fibre. This approach also better meets Ofcom's objectives relating to investment incentives, protecting consumers from excessive prices and poor quality and maintaining competition on Openreach's network.

5. Ofcom should distinguish between different areas within the potentially competitive category.

- 5.1. Ofcom accepted in its December 2018 Consultation (on defining geographic areas) that its proposed potentially competitive category would contain a wide range of competitive conditions. It therefore explained that in principle, it could distinguish between existing, planned and potential build, and between areas where it expects one, two or more alternative networks to eventually be present. However, Ofcom did not consider it appropriate to identify narrower subcategories because:
 - It cannot assess the likelihood of build plans being carried out (in part or in full) or the extent to which existing or planned networks will provide effective competition to Openreach; and
 - It cannot accurately predict the number of networks that will emerge in a given area.⁷
- 5.2. While these statements are correct, the arguments are internally inconsistent with Ofcom's proposals. Ofcom proposes to use build plans to classify areas as potentially competitive in the first place and argues that having two rival networks in addition to BT is enough to classify an area as effectively competitive.
- 5.3. Similarly, nothing prevents Ofcom from taking a more granular approach to potentially competitive areas. Below, we suggest such an approach which does not require Ofcom to predict the number of networks likely to emerge. This would

⁷ Para 2.23: https://www.ofcom.org.uk/_data/assets/pdf_file/0005/130001/Consultation-Promoting-investment-and-competition-in-fibre-networks.pdf.

allow Ofcom to reflect the wide range of competitive conditions that it accepts will exist in potentially competitive areas.

6. Ofcom must take an alternative and more granular approach to potentially competitive areas.

- 6.1. Ofcom proposes that having two rival networks in addition to Openreach in an area is enough to classify it as effectively competitive. Therefore, Ofcom should take a different approach in areas it expects to only ever have BT and Virgin present in.
- 6.2. Ofcom could put areas with only BT and Virgin, with no build plans or potential build (as identified by Ofcom) into a fourth category. In these areas, Ofcom should impose looser regulation than in non-competitive areas but tighter regulation than in potentially competitive areas. Ofcom should ensure that these areas have access to dark fibre.
- 6.3. As a logical consequence of this, Ofcom should redefine the potentially competitive category as shown in the table below to ensure all scenarios fit into a category.

	Three’s proposed potentially competitive areas	Three’s proposed additional category
Definition	Change to any of the following met: <ul style="list-style-type: none"> • BT plus a non-Virgin network present • BT plus specific build plans from a non-Virgin network 	All of the following met: <ul style="list-style-type: none"> • BT plus Virgin present • No specific build plans from another rival • Ofcom does not consider network build by another rival is economic
Remedies	Same as Ofcom’s proposals	Ofcom should ensure these areas have access to dark fibre

Our suggested approach better meets Ofcom’s stated objectives

- 6.4. While our proposals involve an additional category compared to Ofcom’s proposals, they are still straightforward for Ofcom to implement and for industry to adopt. The key benefit of our proposals is that it will eliminate the risk of MNOs not having access to dark fibre in many areas of the country.
- 6.5. It is possible under our proposal that Virgin would have slightly weaker incentives to enter and expand in areas that would fit into the new category, but this will depend on the exact remedies imposed in these areas and is in any case limited by the number of areas in which BT is currently the only network provider.
- 6.6. However, the incentives for non-Virgin providers will remain unchanged, because as soon as they planned to enter an area (or successfully entered), the area would revert back to Ofcom’s potentially competitive category. Our proposals also better protect consumers against excessive prices and poor quality and improve competition on the Openreach network, as well as facilitating rather than hindering competitive and efficient 5G rollout.
- 6.7. Ofcom explains in this Consultation that it will have regard to four objectives when considering its approach to remedies in potentially competitive areas. The table below sets out these considerations and explains how our proposal compares to Ofcom’s against them.

Ofcom's consideration	Our proposals
Ensure BT's rivals have conditions to support investments	<ul style="list-style-type: none"> • As explained above, our proposals only change Virgin's investment incentives in a very particular scenario. • As soon as a rival network had detailed plans to offer dark fibre, or these plans were delivered, the area would be classified as potentially competitive with no regulated dark fibre from BT, so rivals would still have incentives to enter areas and expand their networks.
Ensure BT has appropriate conditions to invest in fibre	<ul style="list-style-type: none"> • Given that in the vast majority of cases, rivals' incentives to invest and expand are unchanged and using the same logic as Ofcom's Consultation, BT's incentives to invest will also be largely unchanged.
Protect consumers against excessive prices and poor quality	<ul style="list-style-type: none"> • In areas that are still classified as potentially competitive, there is no change. • In areas with just BT and Virgin with no planned build and where Ofcom does not consider another rival network is economic, providers will get regulated dark fibre from BT, which will lead to lower retail prices and higher quality of service.
Maintain retail competition based on access to Openreach network	<ul style="list-style-type: none"> • In areas that are still classified as potentially competitive, there is no change. • In areas with just BT and Virgin with no planned build and where Ofcom does not consider another rival network is economic, regulated dark fibre from BT will enhance competition on the Openreach network by reducing rivals' costs.

3. Our comments on the RAB model, geographic pricing, Openreach's build plans and reclassifying areas.

7. Executive Summary

- 7.1. In this Section, we explain our support for Ofcom's proposals relating to a Regulatory Asset Base (RAB) model in non-competitive areas, Ofcom's proposals to ban Openreach from geographic pricing in potentially competitive areas and Ofcom's proposals that Openreach should not have to publish detailed build plans and justify material deviations from them. We also urge Ofcom to give more clarity on how and when it might reclassify areas and how it would rely on different stages of build plans in classifying areas.
- 7.2. Ofcom's proposed RAB model will incentivise BT to deploy FTTP in areas that are not economic (non-competitive areas), by recovering the costs over copper and fibre services. Given that this build will only occur in non-competitive areas, BT would then be required to offer access to dark fibre services (at cost), which we support.
- 7.3. We support Ofcom's proposal to ban Openreach from charging different prices in different potentially competitive areas. Openreach has the ability and incentive to do so with the intention being to deter rival network build, which would be harmful in the long-term to providers and consumers.
- 7.4. While we understand some providers' concerns that Openreach builds strategically in response to their build plans, trying to undermine future rival entry, requiring Openreach to publish build plans and justify deviations from them could still be used to deter rival entry. It may also act as a focal point for network operators to split the market and potentially not compete in certain areas. We therefore agree with Ofcom's proposals not to require Openreach to do so.
- 7.5. Lastly, Ofcom has not made clear how and when it might consider reclassifying areas and how it would rely on build plans in classifying areas in different ways. We urge Ofcom to provide more clarity in its decision.

8. We agree with Ofcom's proposed Regulatory Asset Base (RAB) model in non-competitive areas.

- 8.1. Ofcom proposes a RAB model in non-competitive areas to provide BT with stronger incentives to invest in fibre to the premises (FTTP). This would be achieved by spreading the costs of new fibre services across those consumed by consumers of both fibre and copper (legacy services) in non-competitive areas.
- 8.2. This would likely have the effect of increasing the amount of fibre that BT builds in non-competitive areas by subsidising the build from the aforementioned services. Given that this new build will be in non-competitive areas, under Ofcom's proposals BT would then be required through regulation to offer access to dark fibre services (at cost).

- 8.3. The proposed RAB model involves trade-offs within non-competitive areas, with increases in the charges for MPF and FTTC services being balanced against increased availability of FTTP services. The detail of how costs are allocated to different services is important and Ofcom must ensure that this does not lead to significant distortions.
- 8.4. We support the proposed RAB model, as long as Ofcom maintains its position that BT would have to offer access (at cost) to dark fibre services.

9. We agree that BT should be banned from geographic pricing in potentially competitive areas.

- 9.1. Ofcom proposes that Openreach would have to implement uniform pricing within potentially competitive areas, i.e. that it would be banned from charging higher or lower prices in certain potentially competitive areas.
- 9.2. Ofcom is right that BT could use geographic discounts to try and prevent rivals' build in potentially competitive areas. While this could be beneficial in the very short run, as providers might benefit from significantly lower prices in some areas, in the long term there would be harm to providers and consumers through reduced network competition. The benefits to BT of preventing increased network competition would be substantial and we believe that BT would have the incentive and ability to do so.
- 9.3. Therefore we agree with Ofcom's proposals to ban BT from geographic pricing in potentially competitive areas. Ofcom should also consider whether Openreach could use volume-based discounts, rather than strictly geographic pricing, to deter rival entry in areas with a reasonable prospect of competition. This could occur if the geographic areas most attractive to enter would also have the largest volumes, such that offering a specific volume-based discount would to all intents and purposes be like a geographic discount in a particular area.

10. We agree that Openreach should not have to publish detailed build plans and justify any deviations from them.

- 10.1. Despite calls from some network operators, Ofcom proposes that Openreach should not have to publish detailed plans of its network rollout and justify material deviations from them. While we understand the concerns of some network providers, namely that Openreach as the incumbent may respond strategically by building its network in areas that rivals announced they are going to build in, requiring Openreach to publish detailed plans might actually dissuade alternative network build.
- 10.2. Openreach would, if anything, have an incentive to overstate its build plans. If Openreach could predict areas which rivals were likely to build in, it could announce that it would build there or overstate existing plans, with the intention of preventing rivals from also doing so. While Openreach's ability to do this would be constrained by having to publish material deviations from any published build plans, the incentive for it to behave in this way would remain and to make changes that weren't obviously material.
- 10.3. Such a requirement may also act as a focal point for network operators to split the market and potentially not compete in certain areas. We therefore agree with Ofcom's proposals not to require Openreach to publish detailed build plans and justify any deviations from them.

11. Ofcom has not made clear how and when it might reclassify areas and how it would rely on build plans.

- 11.1. Although Ofcom has explained how it proposes to define each area as competitive, potentially competitive or non-competitive, it has not made clear:

- Under what circumstances Ofcom would reclassify an area and how often it would revisit the classifications;
- How much notice providers would get if any regulatory remedies were being removed; and
- What would happen to contracts already in place, e.g. if an area was reclassified from non-competitive to potentially competitive but a provider had been buying dark fibre from BT (or was about to).

11.2. Ofcom explains the importance of predictable regulation to BT in this Consultation.⁸ The same arguments apply to MNOs: they need certainty as they invest over the long term in their networks and backhaul solutions, preparing to meet the demands of 5G services.

11.3. Ofcom has not made clear whether any build plans (covering at least 65% of the area) are sufficient to classify an area as potentially competitive, or whether Ofcom would only classify an area this way if build was expected to be completed within a certain timeframe. Further, Ofcom has not explained what would happen if the building provider significantly changed its build plans, such as by reducing the scope, delaying the timings or even cancelling the plans.

⁸ Paragraphs 1.14 to 1.19:

https://www.ofcom.org.uk/_data/assets/pdf_file/0018/142533/consultation-promoting-competition-investment-approach-remedies.pdf.