



FAO: Ben Harries
Ofcom
Riverside House
2a Southwark Bridge Road
London
SE1 9HA

BY EMAIL ONLY

16 November 2020

Dear Ben Harries,

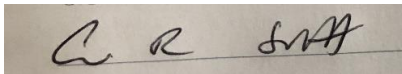
WFTMR: Local Access Discounts and Ofcom's policy for evaluation

1. We are writing further to Ofcom's Wholesale Fixed Telecoms Market Review 2021-26 consultation ('WFTMR') published on 8 January 2020.
2. As we discussed in our meeting between Ben Harries and David Matthew on [xx] October 2020, Vodafone and CityFibre agree with Ofcom that nascent alternative network deployment, particularly in its early stages, is vulnerable to conduct on the part of BT. While such rival networks are being established, and during the current phase of UK fibre network deployment in which the state of competition is nascent and fragile, we agree that it is reasonable, proportionate and necessary to limit BT's commercial behaviour. This is entirely consistent with the approach taken by Ofcom's predecessor in applying heightened rules during the earlier period of services liberalisation, which led to the successful flourishing retail market seen today. Without appropriate constraints on BT's behaviour, promoting competition and investment in the UK's full fibre networks is at risk.
3. Ofcom's stated intention behind the SMP conditions is to *'prohibit any commercial terms which pose a substantial threat to emerging competition without compensating benefits'*. Ofcom aims to achieve this by placing restrictions on BT's ability to offer discount schemes in areas 2 and 3 by, very broadly speaking: (a) requiring Ofcom's consent in the case of geographic discounts; and (b) requiring a 90 day notice period in relation to other, non-geographic discounts, to allow Ofcom the opportunity to direct whether a discount scheme can be offered or not - with a shorter 28 day notice period for any discounts *'relating solely to a reduction in the price of existing network access (including, for the avoidance of doubt, the introduction of a Special Offer)'*.
4. As we discussed at our meeting, for Ofcom to promote these aims and SMP obligations with sufficient transparency and certainty for all stakeholders involved, it is critical for Ofcom to issue clear guidance on how Ofcom will approach its assessment of BT's discount schemes.

5. Guidance is a well-established tool for supplementing existing regulation and something which Ofcom is well versed in. Guidance in this context would help achieve Ofcom's stated policy objectives of promoting competition and full fibre investment. It would also reduce the scope for future disputes over any of BT's discount schemes by creating more certainty both for BT, nascent competitors and retail ISPs who may be affected. Setting out, in clear terms, how Ofcom will approach BT's discount schemes will ultimately benefit consumers and the shape of the UK's future full fibre networks.
6. In our discussions with Ofcom, we explained that Vodafone and CityFibre had given significant thought to the concerns such guidance might usefully address. Ofcom agreed that it was helpful for us to be – to the greatest extent we can – specific about the guidance we think would be useful and that would strike a balance between flexibility and regulatory certainty for all players.
7. With that request in mind, we have included in the Annex to this letter our suggestions in the form of a draft policy. As we discussed with you, we took the approach of providing an 'indicative example' of such a policy, in light of the limited timeframe for Ofcom to consider the document, and to make it as easy as possible for Ofcom to consider and to form the basis of discussion. This document has been drafted in the first-person voice. We chose this approach in order to a) put ourselves in Ofcom's shoes, in terms of how the issue of guidance could be approached, and b) enable this analysis to (should Ofcom wish) be more quickly and easily converted into an Ofcom document, e.g. the WFTMR Statement. We appreciate that the substance, format and approach taken in any guidance is a matter for Ofcom and that, in any event, Ofcom will want to consider and consult before adopting any final form of guidance.
8. Nevertheless we hope that this draft assists Ofcom in carrying out its functions in this area, by illustrating how guidance could offer a balance between the different perspectives of a nascent network competitor (CityFibre) and a smaller retail ISP seeking to grow market share (Vodafone). We hope this draft provides a clear sense of what these two types of players would hope to see from Ofcom, and how and in what form guidance might help to achieve Ofcom's strategic objectives in relation to fibre deployment.
9. The draft guidance aims to:
 - a. provide more detail to the analytic framework which Ofcom has set out in the WFTMR for the consideration of geographic discounts, and other commercial terms, and the procedural steps which Ofcom might adopt to operationalise its review of Openreach commercial terms. The draft policy therefore fully adopts Ofcom's stated framework and concepts; and
 - b. expands on the definitions used by Ofcom in the WFTMR and clearly sets out their meaning and scope. For example, it suggests some definitions for terms such as 'nascent network competitor' and provides some more targeted tests to give specificity to the principles Ofcom set out in the WFTMR.

10. We look forward to Ofcom's response and ongoing dialogue in relation to our proposal. We are ready to provide any further support and feedback that Ofcom may need, and we are ready to answer any questions that you may have.

Yours sincerely,

A rectangular box containing a handwritten signature in black ink. The signature appears to be 'C R Scott'.

Colin Scott, Vodafone

A handwritten signature in black ink, consisting of a large initial 'C' followed by a series of loops and a long horizontal stroke.

Charlie Vlieland-Boddy, CityFibre

Annex

Local Access Discounts

This document has been prepared on behalf of Vodafone and CityFibre as an indicative example for Ofcom of (i) the type of guidance which is necessary for industry in light of Ofcom's WFTMR proposals to deal with harmful Openreach discounts; and (ii) the content within that guidance which will be necessary to promote consumers' interests by supporting competitive FTTP investment.

This document has been drafted in the first-person voice. We chose this approach in order to a) put ourselves in Ofcom's shoes, in terms of how the issue of guidance could be approached, and b) enable this analysis to (should Ofcom wish) be more quickly and easily converted into an Ofcom document, e.g. the WFTMR Statement.

Contents

1.	Executive summary	6
2.	Introduction and general principles.....	8
	Summary of SMP conditions	11
	Purpose of guidance.....	13
	The process and standard we will apply when assessing offers	14
	Monitoring and anti-circumvention	15
3.	Non-geographic discounts	17
	Process	17
	Analysis Ofcom will adopt	19
	Worked examples.....	25
4.	Geographic discounts.....	29
	Process	29
	Analysis Ofcom will adopt	29
5.	Offers which do not fall for analysis under the processes outlined above.....	31

1. Executive summary

- 1.1 Our approach in the Wholesale Fixed Telecoms Market Review is to 'support investment in very high-speed networks through network competition where this is viable' (A15.15). We have concluded that consumers will benefit most in the long run through competition between high speed network infrastructure.
- 1.2 Wholesale discounts may provide short-term benefits to some ISPs, and therefore consumers, and may in some cases provide longer-term benefits. However, we are concerned that Openreach may adopt wholesale discounts or other commercial terms which would deter or undermine competition in the wholesale market (specifically, by harming nascent competitors or foreclosing them from competing) or may offer discounts which pose a material risk to competition in the retail market.
- 1.3 We set out in the WFTMR our proposal for ex ante regulation. We said that:
 - a. Openreach is prohibited from discriminating by targeting geographic discounts except where we explicitly consent; and
 - b. We were also concerned about other ways that Openreach might structure its contracts that could have a significant impact on deterring entry.
- 1.4 This policy sets out the procedural and analytical framework we intend to adopt in assessing geographic discounts and other relevant commercial terms. This policy also clarifies key concepts we have used in the WFTMR such as the definition of 'nascent network competitors'.
- 1.5 We do not expect that all potential competitive impacts will necessarily be easily or immediately identifiable. Accordingly:
 - a. we expect to take a precautionary approach, withholding consent and/or taking steps to prevent implementation of any discount proposal until we are appropriately satisfied; and
 - b. our general approach will be one of maximum transparency. We expect Openreach to provide its full suite of internal documents relevant to any discount proposal, and we will publicly consult on our provisional views regarding the proposal.
- 1.6 Our analysis of whether to prohibit a discount scheme will assess whether the scheme poses a material risk to competition which is not outweighed by compensating benefits. In relation to non-geographic discounts:
 - a. First, we would assess the potential risk to nascent network competitors, and relevant effects on retail markets (including any potential risks to ISPs' ability to place large volumes with such competitors, and/or any unfair constraints on smaller ISPs ability to maintain and grow market share).

- b. Secondly, if we conclude that (i) any impact on nascent network competitors is unlikely to be material and (ii) smaller ISPs have no real risk of facing unfair constraints on their ability to maintain and grow their market share, we will move onto an assessment of whether there are compensating benefits sufficient to justify the discount scheme.
- 1.7 We intend to adopt a similar analytical framework in relation to geographic discounts. However, in light of the greater dangers to competition of geographic discounts, we would need to see compelling, positive evidence that the geographic discount scheme would not pose a material risk of deterring alternative network investment, limiting incentives for ISPs to place large volumes with such competitors, and/or placing unfair constraints on smaller ISPs' ability to maintain and grow market share. We would expect to further require that the proposal is (i) beneficial to consumers; or (ii) can be objectively justified.
- 1.8 This guidance is not intended to be comprehensive, however, our intention is to provide a sufficient level of up-front clarity in the way in which we intend to apply the SMP conditions, and how we intend to analyse and assess offers, in practice. It does not follow that a discount will be allowed simply because Openreach may have implemented such a scheme, or a similar scheme, in the past.
- 1.9 We plan to continue to monitor commercial terms proposed by Openreach on an ongoing basis and, where necessary, we will intervene (including through our direction powers under SMP conditions). We will also continue to respond where necessary and proportionate to any complaints raised by other stakeholders.

2. Introduction and general principles

2.1 Our approach in the Wholesale Fixed Telecoms Market Review¹ is to ‘support investment in very high-speed networks through network competition where this is viable’ (A15.15). We have concluded that consumers will benefit most in the long run through competition between high speed network infrastructure.

2.2 However, as we stated in the WFTMR, this vision requires significant investment by nascent network competitors. These competitors face special risks from conduct by Openreach at this early stage, as they work to overcome Openreach’s incumbency advantages:

nascent alternative network deployment is relatively fragile while it establishes scale and reputation. In these early stages we consider that it is potentially vulnerable to conduct on the part of Openreach. Openreach faces a substantial erosion of its market share where new networks are built, and therefore it is likely to have incentives to deter new build. (A15.5)

2.3 Specifically, we have explained in the WFTMR that we are concerned that Openreach may adopt wholesale discounts or other commercial terms which would deter or undermine competition in the wholesale market (specifically, by harming nascent competitors or foreclosing them from competing).

2.4 We are equally concerned that Openreach may also offer discounts which pose a material risk to competition in the retail market, for example by adopting discounts which favour specific retailers or types of retailer. In the longer term, such strategies may constrain competition and possibilities for differentiation in the retail market. In particular, concentration in the retail market may lead to fewer opportunities for nascent network competitors to attract ‘anchor tenants’ and therefore to acquire scale. We note, in this respect, that the largest four fixed broadband providers² have consistently maintained approximately 90% market share over many years,³ and that two of those providers (BT and Virgin Media) seem likely to continue to rely on their own access networks rather than serve as ‘anchor tenants’ for nascent network competitors. In this context, we consider that there is a real risk that any diminishing of the intensity of competition in the retail market – particularly if it limits the ability or willingness of potential ‘anchor tenants’ to commit to large volumes from nascent network competitors, or limits the potential growth of smaller players who are key to driving

¹ Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26: Market assessment, 8 January 2020 (“WFTMR”) see <https://www.ofcom.org.uk/consultations-and-statements/category-1/2021-26-wholesale-fixed-telecoms-market-review>.

² We refer to retail fixed broadband providers in the remainder of this document as ‘internet service providers’ or ‘ISPs’.

³ See Ofcom, *Communications Market Report – Interactive Data (2019) – Fixed telecoms – Lines and connections*.

innovation and decreasing concentration in the market. We therefore take the view that any reduction in the intensity of competition in the retail market may itself harm the prospects of wholesale level competition. We therefore see effective competition in the retail and wholesale markets as interconnected and mutually reinforcing.

- 2.5 Accordingly, we consider that our objective of ‘incentivising widespread fibre investment’ to deliver the benefits of network competition where possible across all parts of the UK (WFTMR para 2.11), is best served by ensuring that Openreach’s commercial terms neither (i) directly deter or undermine competition in the wholesale market; nor (ii) constrain competition or lead to greater concentration in the retail market.
- 2.6 Discounts may provide short-term benefits to some ISPs, and therefore consumers, and may in some cases provide longer-term benefits, for example as part of trials of new service elements or to incentivise the consumption of new products. Furthermore, discounting may be a legitimate means of Openreach competing in the market. Accordingly, we acknowledge that there are circumstances in which discounting by Openreach may be beneficial for consumers and consistent with Ofcom’s objective. However, if discounts undermine alternative network build (by directly deterring nascent competitors or by reducing the intensity of competition in the retail market), we would expect that they will be contrary to the interests of consumers in the long-term.
- 2.7 We therefore set out in the WFTMR our proposal for ex ante regulation. We said that:
- a. We would make it ‘*clear that Openreach is prohibited from discriminating by targeting geographic discounts except where we explicitly consent*’ (A15.29) and that in considering whether to explicitly consent, we would consider any objective justification and consistency with our overall policy objectives (including to promote network competition) (A15.55); and
 - b. We were also concerned about ‘*other ways that Openreach might structure its contracts that could have a significant impact on deterring entry*’ (A15.59). We intend to consider here both immediate and direct constraints, and also the impacts of ‘signalling’ – for example, contractual terms or structures which do not currently impose direct constraints but may do so in future. We said that we would consider such commercial terms and our starting point is that any barrier to use of alternative network operators ‘*would only be justified where: a) the impact on nascent network competitors is unlikely to be material; and b) the arrangements will generate clear and demonstrable benefits*’ (A15.61). This will also apply to contractual terms which may become barriers in future.
- 2.8 This policy sets out how we expect to consider both geographic discounts (which we have said we must explicitly consent to) and other commercial terms (which we may direct Openreach not to implement) in line with these considerations. This policy also clarifies key concepts we have used in the WFTMR such as the definition of ‘nascent network competitors’.

- 2.9 This policy sets out the procedural and analytical framework we intend to adopt. However, we will apply the policy using a principles-based approach - focusing on the question of whether any Openreach proposal is consistent with our policy objective of supporting investment through network competition. We therefore do not intend to apply this policy or the frameworks herein in an unduly rigid manner.
- 2.10 As we noted in the WFTMR, *'we do not consider that the restrictions on Openreach's commercial terms resulting from competition law or other SMP obligations are sufficient to protect nascent entry'* (A15.18). We went on to say that:

...our concern goes beyond Openreach setting potentially anti-competitive prices within the meaning of competition law and extends to the broader impact that commercial terms may have on alternative network operators' incentives to invest in FTTP.⁴

[...]

We do not consider that competition law, which would focus on considering whether Openreach has abused a dominant position, would be sufficient protection to address our concerns. Ex ante regulation can more effectively address the risk of specific types of conduct occurring in the market review period.⁵

- 2.11 Our principal statutory duty is to further the interests of consumers, where appropriate by promoting competition.⁶ As set out in the WFTMR, we consider that it is appropriate to promote competition in relation to alternative FTTP deployment. In particular, we consider that incentivising network competition 'is the best way to meet the growing demand for high speed and data intensive communications services and will provide a platform for innovative new services to develop'.⁷
- 2.12 Accordingly, we intend to protect the conditions and incentives for investment in alternative FTTP deployment and for sustainable competition across the breadth of the wholesale and retail markets. Without a competitive wholesale market, the retail market will be impacted, which in turn will ultimately impact consumers. In the long term, we expect network competition to put downward pressure on prices,⁸ enabling greater wholesale choice and lower prices for the retail market, and ultimately lower prices for consumers.

⁴ WFTMR, A15.5.

⁵ WFTMR, A15.22.

⁶ Communications Act 2003, s 3.

⁷ WFTMR, vol 1, para 2.11.

⁸ WFTMR, Volume 4, 120(c).

2.13 We therefore recognised in the WFTMR that, after an extensive market assessment, greater constraints on Openreach's behaviour than might otherwise be appropriate in other circumstances were justified:

...while rival networks to Openreach are becoming established, we consider it appropriate to limit Openreach's commercial flexibility to a greater extent, including pricing arrangements that might normally be regarded as legitimate commercial reactions.

2.14 This recognises that 'nascent alternative network deployment is relatively fragile while it establishes scale and reputation' and is at this stage 'potentially vulnerable to conduct on the part of Openreach'.⁹ It also recognises that nascent network competitors are also dependent on effective competition across the breadth of the retail market. Given the degree of concentration in the fixed broadband market, it is necessary that:

- a. the small number of ISPs which can deliver significant volumes to nascent network competitors do not face inappropriate constraints on their choice of wholesale suppliers. In particular, we consider it important that retail ISPs are not constrained from switching their customers en masse from one wholesale supplier to another (in areas where such wholesale suppliers overlap), in order to ensure wholesale suppliers are disciplined by countervailing buying power; and
- b. smaller ISPs face similar freedom of choice and are not constrained in their potential growth or innovation, so that they have scope to deliver significant demand for nascent network competitors in future. In this respect, we will be concerned at any provisions which appear likely to limit the willingness or ability of consumers to switch from established providers.

2.15 The aim of any *ex ante* regulation is to promote competition in markets to the point at which such *ex ante* regulation is no longer required and can be removed entirely. At which point (and consistent with the 2014 EC Recommendation) *ex post* regulation alone (in the form of competition law) should be sufficient.¹⁰

2.16 We consider that the SMP conditions, as outlined below, are proportionate to achieve this long term aim.

Summary of SMP conditions

2.17 To address our concerns, the WFTMR sets out the SMP conditions we have decided to impose on BT (and which therefore apply to Openreach). These SMP conditions intend to allow us to 'prohibit any commercial terms which pose a substantial threat to emerging competition

⁹ WFTMR, A15.5.

¹⁰ EC 2014 Recommendation, Recital 1.

without compensating benefits'. Under normal conditions, where the market is competitive, undertakings can change their commercial terms freely, provided they are within the bounds of competition law. These SMP conditions recognise that ex ante constraints on Openreach's behaviour are required due to the strong incentives it has to deter market entry by introducing commercial terms it might not otherwise have imposed absent the threat to its SMP.

2.18 In summary, the relevant SMP conditions include the following:

- a. Openreach¹¹ is subject to an overarching requirement not to unduly discriminate.
- b. Openreach may be deemed to have shown undue discrimination if 'it charges different prices in different geographic areas for rental services'. We have therefore proposed to restrict Openreach's ability to geographically target price reductions as follows:
 - i. FTTP, FTTC and G.fast – prohibit geographic discounts on rental charges in each of Area 2 and Area 3.
 - ii. Leased lines – prohibit geographic discounts on rental charges in Area 2. This prohibition would not apply in the CLA or HNR areas.
- c. Openreach must provide at least 90 days' notice of any relevant change in access conditions where 'the price or other contractual conditions are conditional on the volume and/or range of services purchased'.
- d. Openreach must provide at least 28 days' notice of any relevant change in access conditions 'relating solely to a reduction in the price of existing network access (including, for the avoidance of doubt, the introduction of a Special Offer)'. The definition of 'Special Offer' requires such an offer to be 'applicable to all customers on a non-discriminatory basis'. It does not distinguish between 'undue discrimination' and 'allowed discrimination'. Therefore, we note that to qualify as a Special Offer, the offer must apply (not just be 'available') to all customers; it must be genuinely unconditional (for example, it could not be applicable only in certain geographic areas or only to 'migrations'); and it must apply to all services of the same type.
- e. Network access must be provided by Openreach on 'such terms, conditions and charges as Ofcom may from time to time direct'. In addition to the discounts above, we have

¹¹ It is BT that is the 'Dominant Provider' on whom the SMP conditions are imposed, although they also apply to BT's subsidiary, Openreach. Because the relevant services are currently exclusively provided by BT via Openreach, we use 'Openreach' in this text to refer to BT acting as the supplier of regulated access services and wholesale FTTP access to ISPs (to reduce the need to refer to 'BT or Openreach') and, unless the context otherwise dictates, use 'BT' to refer to BT Group plc and/or BT's other downstream businesses.

said that we ‘expect to prohibit any commercial terms which pose a substantial threat to emerging competition without compensating benefits’.¹²

2.19 These SMP conditions therefore:

- a. In the case of geographic discounts, require us to proactively consent to a proposed discount by Openreach. This reflects our starting point that ‘to provide protection for new entrants, we plan to prohibit Openreach from offering geographically-targeted discounts’ (WFTMR, vol 1, p 3); and
- b. In the case of non-geographic discounts, require Openreach to provide notification and allow us to direct that the discounts not be offered. As we have said, our purpose is to ‘allow us to assess their impact and acceptability before they take effect’ and we ‘would expect to use our existing powers to intervene to prohibit any arrangements which we consider would deter alternative network rollout’ (WFTMR, vol 1, p 4). As we have discussed above, we consider that this requires us to address both direct impacts on nascent network competitors, and any potential reduction in the intensity of competition at the retail level.

Purpose of guidance

2.20 The purpose of this guidance is to set out how we intend to preclude BT from adopting ‘commercial terms which pose a substantial threat to emerging competition without compensating benefits’, by setting out how we will apply these SMP conditions in practice – both in terms of the process we intend to apply and the substantive analysis we intend to adopt, when deciding whether to consent to a proposed geographic discount scheme, or to impose a prohibition on a particular (non-geographic) commercial offer.

2.21 Accordingly, our intention is to provide greater clarity and certainty to Openreach, ISPs, nascent competitors, investors, and to the market as a whole about how we intend to assess Openreach’s proposed commercial arrangements and when we will apply our powers of direction to grant consent or prohibit discounts proposed by Openreach. Nothing in this policy is intended to fetter our discretion or to limit our ability to adapt our proposed processes in particular cases or to examine each case on the merits.

2.22 For the avoidance of doubt, the mere fact that we decide to direct BT not to implement a scheme, or withhold consent, does not necessarily mean that BT has breached its SMP conditions merely by seeking Ofcom’s approval for the scheme. Accordingly, we do not intend to approach our analysis (or the burden of proof) as we might in enforcement proceedings. Our approach will instead be guided by our principal statutory duty of protecting consumers by promoting competition. BT will be in breach of its SMP conditions, however, if it proceeds to

¹² WFTMR, A15.4.

adopt commercial terms to which we have not consented (in the case of a geographic discount scheme) or have directed BT not to implement (in other cases).

- 2.23 This guidance is not intended to be comprehensive. However, our intention is to provide a sufficient level of up-front clarity in the way in which we intend to apply the SMP conditions, and how we intend to analyse and assess offers, in practice.
- 2.24 In providing this guidance, we are conscious of the risk of ‘market signalling’. As we recognised in our infringement decision for Royal Mail, and as is recognised in case law, signals to the market are capable of impacting competition and affecting stakeholders’ decision making – not just where they have a direct and immediate effect, but also where they may indicate future intentions. It follows that ‘signalling’ may itself harm competition.¹³ Accordingly, we consider that this guidance will be useful for Openreach to guide its formulation of any proposed offers, and most especially by ISPs to be able to pre-emptively assess whether any proposed discounts or changes to commercial terms announced by Openreach are likely to be permissible given the SMP conditions set out above. It also follows that discount schemes (or elements of such schemes) Openreach has previously introduced should not necessarily be understood to be permissible in future.

The process and standard we will apply when assessing offers

- 2.25 As we said in the WFTMR, incentivising network competition is, in our view, ‘the best way to meet the growing demand for high speed and data intensive communications services and will provide a platform for innovative new services to develop’.¹⁴ Openreach discounts could be used to undermine this outcome – with long-term detriment for consumers. Openreach discounts could achieve this if they directly deter or undermine alternative network rollout, impact the freedom of choice of an ISP who can currently serve as an ‘anchor tenant’ for a nascent network provider, or impact a smaller ISPs’ ability to maintain or grow market share. We intend to take steps to ensure that Openreach may only implement discount proposals once we have satisfied ourselves that:
- a. We can understand the likely competitive impact of the discount proposal on relevant markets – both at retail and wholesale levels; and
 - b. The impact is consistent with the aim of promoting competition at the retail and wholesale levels. As we have set out below, where there is a material risk to nascent competitors, or distortions to the retail market such as adverse impacts on smaller ISPs or on larger ISPs’ ability and willingness to place large volumes with nascent network competitors, we will not consent (or will disallow) the discounts. Where there is no such

¹³ Ofcom – Royal Mail Infringement Decision CW/01122/01/14 (14 August 2018) para 5.104(b); see also *Case C-8/08 T-Mobile Netherlands BV v Dutch Competition Authority* EU:C:2009:343 [2009] ECR I-4529.

¹⁴ WFTMR, vol 1, para 2.11.

material risk, we will assess whether there are any compensating benefits which justify any risk to competition in the wholesale or retail markets.

- 2.26 We intend to apply these tests using a principles-based approach, focusing on the possible market outcomes should the discounts be implemented.
- 2.27 We do not expect that all potential competitive impacts will necessarily be easily or immediately identifiable. Accordingly:
- a. we expect to take a precautionary approach, withholding consent and/or taking steps to prevent implementation of a discount proposal until we are appropriately satisfied; and
 - b. our general approach will be one of maximum transparency. We therefore expect that Openreach will provide full and comprehensive documentation when notifying us or seeking consent, and we will, as quickly as we can, publish redacted versions of this documentation while we are forming our provisional views. In turn, we will publicly consult before granting consent or allowing a proposal to be implemented, in order to enable all stakeholders to provide input, and to allow us to understand the possible competitive impacts from a variety of perspectives. We set out our proposed timeframes for conducting our assessment in the sections below. As noted below, we would not expect to commence the consultation process until we were satisfied with the sufficiency of the documentation provided by Openreach (and we would, if necessary, use our statutory information gathering powers to collect information before commencing the consultation process). In line with our approach in other circumstances where we must consult (e.g. when consulting on variations to undertakings under s 155 of the Enterprise Act 2002) we expect that the detail of our consultation documents will generally be proportionate to the complexity and potential harm. We will publish our decisions and our reasons.

Monitoring and anti-circumvention

- 2.28 The SMP conditions that we have imposed are targeted at conduct we consider is most likely to give rise to the risk of undermining nascent competition, as noted above. While we consider it important to ensure our regulatory approach is proportionate, we are aware that Openreach may retain incentives to implement other commercial arrangements which might have the effect of deterring or undermining effective competition. For the avoidance of doubt, we recognise that these mechanisms may include both price (e.g. changes to connection charges or other ancillary fees) and non-price strategies. This is why, in the WFTMR, we have referred generally to ‘commercial terms’.
- 2.29 We have said that we plan to ‘monitor commercial terms proposed by Openreach on an ongoing basis and, where necessary, intervene including through our direction powers under SMP conditions’ (A15.4). We will also continue to respond where necessary and proportionate to any complaints raised by other stakeholders. We reserve the right, where necessary, to

investigate the impact of Openreach commercial terms and use our powers to intervene including by using:

- a. our powers of direction under the SMP conditions. We note, in this respect, that our powers to direct BT as regards its terms, conditions and charges is not limited to geographic or non-geographic discount schemes. We intend, if necessary, to use the principles and general framework above to guide any future decisions about whether to use these. We would consider enforcement action in relation to any failure by Openreach to comply with SMP conditions or Ofcom directions;
- b. our powers to amend the SMP conditions if Openreach appears to be undermining the purpose of our analysis and assessment of discounts by taking advantage of our focussed approach; and
- c. our general competition law powers.

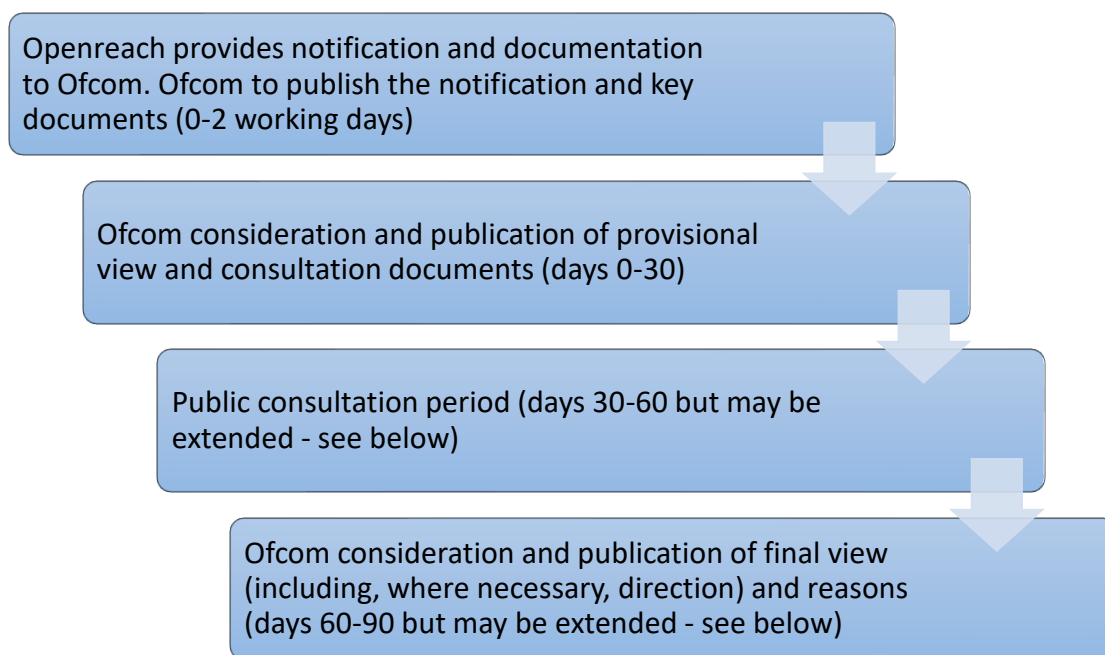
2.30 We address these matters in more detail in section 5 below.

3. Non-geographic discounts

Process

- 3.1 Under the new SMP obligations, Openreach will be required to notify us of any proposed discounts (at least 90 days before it becomes effective) which are ‘conditional on the volume and/or range of services purchased’ so that we may assess the proposals and, if necessary, direct Openreach not to implement them. This reflects our concern that ‘Openreach does not introduce other loyalty-inducing commercial terms that could undermine competitive network entry’ (para 2.41).
- 3.2 A summary of our proposed approach is set out below:

Figure 1: Summary of process for non-geographic discounts



- 3.3 To provide further detail on each stage:
- a. Openreach notification [0-2 working days]: we expect Openreach to provide its full suite of internal documents relevant to the discount proposal. At a minimum, we would expect this to include all internal governance documents setting out the rationale and expected impacts for the discounts; any internal forecasts of take-up; and self-certifications by an appropriately senior individual (such as the CEO of Openreach) of the business objectives and justifications for the offer. We expect all relevant documents will be provided, not merely a selected sample designed to support the case for approval. Ofcom will publish redacted versions of the Openreach notification and details of the

proposal on its website. Ofcom anticipates it will (and is duty-bound to) use its formal information gathering powers to support decision-making in this area.

- b. Provisional view and consultation [days 0-30]: in general, we propose to consider Openreach's notification and supporting documents to form a provisional view. This provisional view will then be the basis of a public consultation process. If our provisional view includes a direction, we will also publish our proposed direction at this time and consult for not less than one month after the day of publication.¹⁵ Notwithstanding that provisional view, we will keep an open mind at that stage, and it is possible that our final view will be different to (or the opposite of) our final view. In preparing the consultation documents, we may also choose to engage with other ISPs or stakeholders whose interests we consider are likely to be materially affected. ISPs who have seen the Openreach notification may choose to provide input of their own accord.
- c. Public consultation [days 30-60]: It is important that we are able to fully understand the potential impact of the offer on competition. Much like a competition law assessment when determining whether there has been an abuse of dominance, we will focus on the *effects* on competition if the offer were to be launched. Sources of relevant information to consider the likely impacts include:
 - i. Network providers – that is, Openreach itself and competitors to Openreach (each of whom will be uniquely placed to provide information about the elements necessary for their business case, such as minimum take-up requirements and strategies to achieve such take-up).
 - ii. Access purchasers – that is, ISPs (given that it is the retail market process that ultimately confers benefits on consumers).

Accordingly, we intend to publicly solicit feedback about our provisional views in all cases, and we will be interested in, for example, understanding how the discount offer impacts on nascent competitors and ISPs' commercial strategies (in order to understand any likely longer term detriment to consumers if nascent competition is hindered).

In light of the potential impact of discounts on the market and on the achievement of Ofcom's vision for infrastructure-based competition, we anticipate consulting for a period of not less than 30 calendar days (which is also consistent with the minimum period for consultation on other matters under the access regime of similar complexity). As noted below, in cases where the offer, or its effects, are especially complex or

¹⁵ Communications Act 2003, section 49A.

material, we may increase the length of the public consultation period. In deciding on the period for consultation, we will have regard to our relevant guidelines.¹⁶

- d. Consideration and final view [days 60-90]: after consideration of the consultation responses, we would reach a final view. Where this final view is to prohibit the discount offer (in whole or in part), we would inform Openreach and other stakeholders of that outcome promptly. We will always publish our final decision and reasons.
- 3.4 We intend to proactively extend the period of consideration if we consider this to be necessary before we reach a final view. We may do so, for example, if:
- a. Openreach does not provide the full set of documents we require when it notifies us of the proposed offer, delaying the commencement of our consideration; or
 - b. We need to obtain further information from Openreach or another stakeholder before we can reach a final view and we have not received that information; or
 - c. We consider the issues raised by, or the potential effects of, the offer to be sufficiently material that a 30-day consultation period would be insufficient and as a result we are not able to make a decision before the discount would be implemented.
- 3.5 We would do so by using our powers under BT's SMP conditions to direct it not to implement the proposed offer for a specified period (i.e. until we expect to be able to reach a final view). We may use these powers multiple times, if required, until we can reach a final view.
- 3.6 If, in the course of our assessment, Openreach withdraws its notification or otherwise indicates that it does not intend to proceed with the proposed discount, we will decide whether to carry on with our assessment and provide a final view. Our starting point will be that it is important to conserve Ofcom's resources for those issues where there is a direct impact on the interests of consumers. But it might be helpful to complete a review by publishing an indication of what our final view on a discount scheme would have been (or the stages of the analytical assessment that we have completed) even if that has been withdrawn in some circumstances – for example if other stakeholders have provided evidence about the impact of that scheme and/or Ofcom's analysis is far-advanced, and it would be helpful to Openreach and others to have clarity about the decision we would have reached.

Analysis Ofcom will adopt

- 3.7 Our analysis of whether to prohibit a discount will assess whether the discount scheme poses a 'material risk' or a 'substantial threat' to competition 'without compensating benefits' (A15.4). In doing so, we will not look at the scheme in isolation (for example, we will look at the

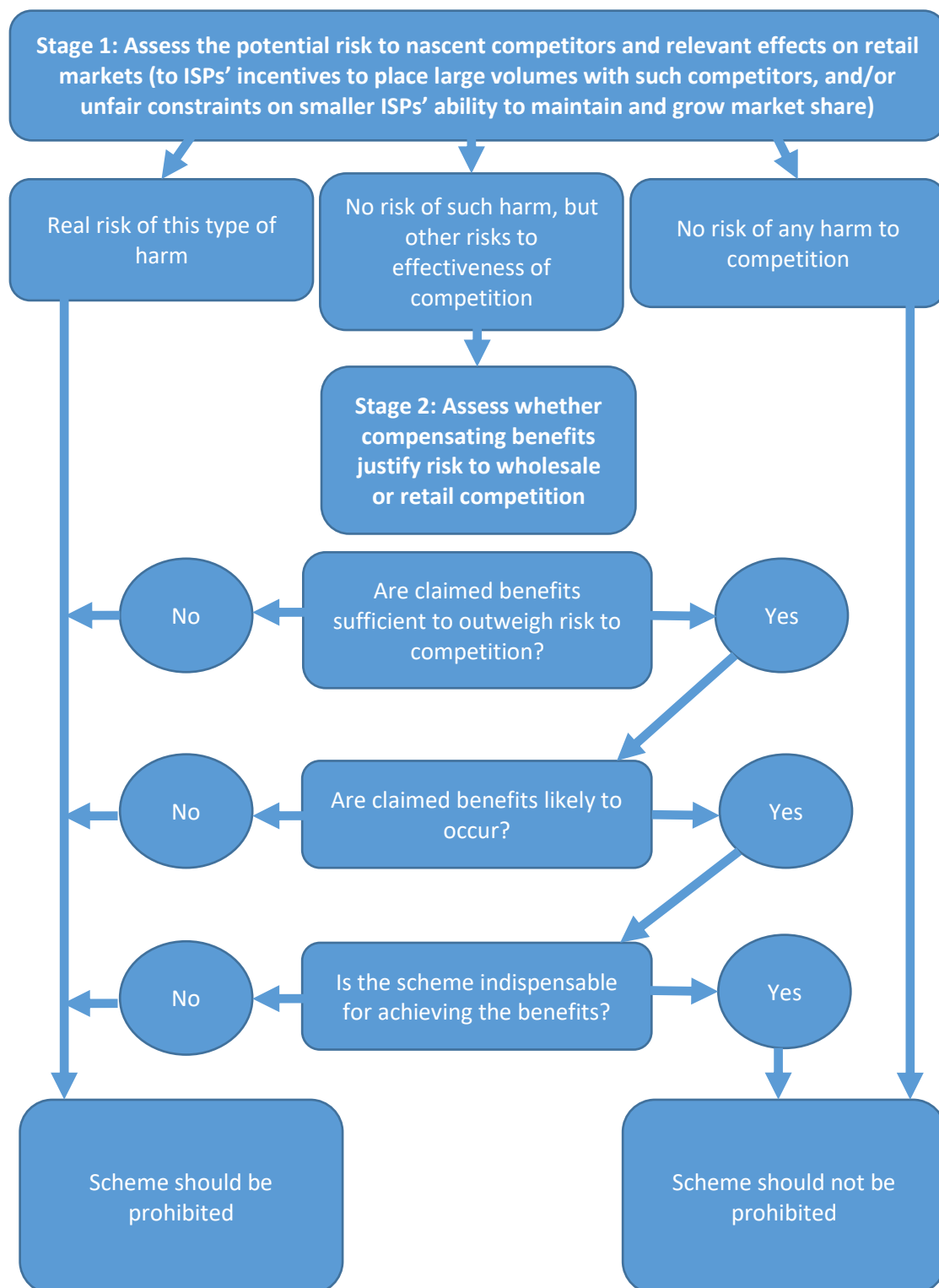
¹⁶ Ofcom's consultation principles (9 July 2010).

broader context of the market including the cumulative effects of multiple offers in the market).

- 3.8 We acknowledge, in this respect, that Openreach has called for us to allow 'commercial deals with ISPs where the deals are important to support investment in new or expanded networks and/or facilitate lower long-term prices or other benefits to consumers'. We agree these considerations may be relevant. However, we will also expect Openreach to be able to explain to our satisfaction that such commercial deals:
- a. are unlikely to have a material impact on nascent network competitors, on the incentives and ability of ISPs to place large volumes with nascent network competitors, or on the ability of smaller ISPs to maintain or grow their market share;
 - b. will have benefits for consumers such as generating new investment in fibre rollout;
 - c. those benefits would not otherwise be realised; and
 - d. the benefits outweigh any potential risk to wholesale or retail competition generally.

We will then perform our own assessment of whether these criteria are met, which will involve a multi-stage assessment which we set out in the following diagram and then describe in more detail below.

Figure 2: Summary of multi-stage assessment for non-geographic discounts



3.9 First, we would assess the potential risk to nascent network competitors, and relevant effects on retail markets (including any potential risks to ISPs' ability to place large volumes with such

competitors, and/or any unfair constraints on smaller ISPs ability to maintain and grow market share).

Nascent network competitors

- 3.10 We have already said that any scheme could only be justified if the impact on nascent network competitors is ‘unlikely to be material’.
- 3.11 For this purpose, we consider ‘nascent network competitors’ to comprise providers of full-fibre infrastructure:
- a. whose networks are still being widely deployed across the UK – in other words, we consider that such competitors must still be engaged in a meaningful level of network rollout, such that Openreach discounts schemes are capable of impacting their future investment and rollout; and
 - b. who do not have any significant established non-FTTP fixed access networks – in other words, we do not consider that ISPs such as Virgin Media or Openreach itself, which can already connect customers using their own widespread fixed-line access networks, face the same vulnerable position as newer full-fibre entrants. By ‘established’ we mean that the provider’s network investments have, to a material extent, been in place longer than the investment payback period, and that the network has an established and significant customer base.
- 3.12 We have defined ‘nascent competitors’ in this way on the basis that these providers are critical to future infrastructure competition, will be materially impacted if they do not have sufficient certainty to justify their significant future investment decisions, and have a special vulnerability to discounting due to their ongoing investment in network build and the need to establish a sufficient customer base on that network to enjoy economies of scale. As we noted in the WFTMR, the ISP customers of such nascent competitors will likely remain dependent on Openreach for at least some of their wholesale needs to service end users. Therefore, Openreach retains the ability to leverage its role as a necessary wholesale provider into non-competitive areas, in order to undermine the future rollout of these nascent competitors.
- 3.13 In assessing whether an impact is ‘material’, we mean to assess whether the discount would create a real risk of causing a nascent network competitor to reduce or change its investments. We recognise there will be various ways this could be achieved and we will take account of both immediate, short-term impacts (e.g. a nascent network competitor deciding not to rollout in an area it had indicated it would) and longer-term impacts (e.g. a reduced return on investment will give nascent network competitor less incentive to make investments ‘on the margin’, and is therefore likely to lead to less competitive build in the UK overall). We would recognise that damage to existing investments may serve to dissuade nascent competitors from making future investments. For example, if a nascent network competitor decides to

change its network rollout as a result of an Openreach scheme, we may assume that this results in 'thrown away' costs and therefore reduces returns on investment.

- 3.14 In assessing whether an impact is 'material' in the retail market, we mean to assess whether the discount could create a material constraint on the competitiveness of an ISP. We would consider in particular the commercial consequences for an ISP which might seek to move existing consumers, or place future orders, with a nascent network competitor to a significant extent. In relation to smaller ISPs (beyond the largest four) we would consider the extent to which such an ISP would face difficulties in maintaining or growing market share as a result of the scheme, for example whether larger ISPs were able to enjoy any systemic cost advantage which a reasonably efficient smaller ISP competitor would not be able to similarly achieve. We will be focused on the impacts of economies of scale in this respect, and will pay particular attention to whether any cost differential is likely to have long-term effects on the smaller ISP's ability to build scale.
- 3.15 In assessing whether the potential impact of discounts is material, we would take into account factors such as (i) the extent of the discounts; (ii) the time period (if any) over which the discounts are provided; and (iii) the way in which the discounts are targeted.

ISPs' ability to place large volumes with such competitors

- 3.16 We would also consider at this first stage any impact on ISPs' ability to place large volumes with nascent network competitors. As we have noted above, only four ISPs comprise approximately 90% of the retail market, and two of those (BT and Virgin Media) seem likely to continue to rely on their own access networks rather than serve as 'anchor tenants' for nascent network competitors.
- 3.17 We are therefore conscious of the limited number of ISPs which are available to nascent network competitors to act as 'anchor tenants' – i.e. guaranteeing significant enough volumes to reduce investment risk and support the nascent competitor's business case.
- 3.18 Existing widespread access networks (Openreach and Virgin Media) have been rolled out by vertically integrated undertakings and they both have significant market shares. We therefore acknowledge the importance to nascent network competitors of securing anchor tenants. Accordingly, we will be especially attentive to the risk of any Openreach discount scheme reducing the incentives or ability of the small number of other larger ISPs to move large volumes of demand to nascent network competitors.

Unfair constraints on smaller ISPs' ability to maintain and grow market share

- 3.19 The nature of the retail ISP market (with four players having made up 90% of market share for a consistent period of time) is relatively concentrated. In particular, this means that there are a limited number of ISPs realistically capable of acting as 'anchor tenants'.
- 3.20 Our view is that it is therefore indispensable for network competition that smaller ISPs do not face unfair constraints on their ability to maintain and grow their market share, given that

almost all such ISPs could also act as anchor tenants, subject to their market shares being sufficiently significant. We will therefore scrutinise carefully the impact of any Openreach scheme on smaller ISPs. As an example, we will be alert to the possibility that such a scheme may result in smaller ISPs, as a result of their lack of scale, being systemically 'shut out' from the lowest wholesale prices from Openreach. We intend to be alert to the risks that this will prevent additional ISPs growing in scale and being able to create demand for nascent network competitors.

Stage 1 conclusions

- 3.21 If we are satisfied that there is a risk of a discount scheme having a material impact on nascent competitors, on ISPs' ability to place large volumes with such competitors, and/or on smaller ISPs having unfair barriers to maintaining and growing market share, we would not need to go on to consider any broader impacts to wholesale and retail competition and whether those impacts can be justified. We would conclude that we should direct Openreach not to implement the discount, given the risk of material harm to competition identified.
- 3.22 If we are satisfied that there is not a real risk of such harm, we would nevertheless go on to consider other potential risks to competition arising from the discount offer. This could include, for example, impacts on different categories of competitors (those that do not fall under the definition of nascent competitors), or different types of harm, and associated competitive impacts. We would quantify any risk before moving onto the next stage of our analysis.
- 3.23 Secondly, if appropriate, we will move onto an assessment of whether there are compensating benefits sufficient to justify the discount scheme.
- 3.24 As we said in the WFTMR, the arrangements must 'generate clear and demonstrable benefits', such as being (i) essential for the business case for fibre rollout; or (ii) indispensable to offer more efficient prices from which consumers will benefit. We will therefore need to ask several questions.
- 3.25 First: how material are the benefits which Openreach claims, and could they be sufficient to justify the risks to wholesale or retail competition? In assessing risks, we would consider whether Openreach had properly consulted with a representative range of ISPs and genuinely taken their views into account; we would also consider the question of the extent to which these benefits will actually accrue to consumers. We would be unlikely to allow a discount to proceed where Openreach had not consulted properly with ISPs, unless we achieve sufficient confidence from our public consultation process of the risks involved, or where we were unconvinced that benefits to ISPs would in fact flow-through to consumers. We would take a long-term view in assessing whether the claimed benefits were sufficient to outweigh the risks and allow consumers a fair share of the resulting benefits. For example, we will balance the benefit of lower prices in the short term against the risks of less competition (at infrastructure or retail level) in the long term. We will, in particular, have regard to potential commensurate

reductions in investment by other network builders (even if those network builders are not 'nascent competitors').

- 3.26 Secondly: how likely is it that the discounts will in fact generate the claimed benefits? We will expect any benefits which Openreach claims to be clear, demonstrable, and objective, rather than speculative or subjective (for example, demonstrable improvements to efficiency, not just an improvement to Openreach's business or market position absent any clear procompetitive benefits). We do not expect to take into account any claimed benefits unless we can positively verify and conclude that they are likely to be realised. Any claimed cost benefits must be reasonably calculated and the methodology behind those calculations disclosed. Any claimed non-cost benefits must be explained in sufficient detail, so that they can be carefully examined. Any projections (whether in relation to claimed cost or non-cost benefits) must also be clear, demonstrable, and objective.
- 3.27 Thirdly: are the discounts 'indispensable' for achieving the claimed benefits? In other words, could the claimed benefits (even to some extent) be achieved in a manner with less potential adverse impacts on competition? This question goes to the question of proportionality. We would expect to see business assessments from Openreach which demonstrate that the discounts are essential to justify an investment, or more efficient prices to consumers, for example, and that Openreach has examined (in appropriate detail) an appropriate range of alternative options to allow the investment or more efficient prices to go ahead. Where appropriate, we would expect Openreach to have discussed alternative options with relevant customers and partners and to disclose the details of those discussions to us. In general, we would not expect that discounts are 'necessary' where Openreach has failed to demonstrate to our satisfaction that the investment could generate an acceptable return without resort to discounts, or that alternative arrangements could be made to achieve efficient prices that would still deliver benefits to consumers.
- 3.28 After applying this analysis, we will be in a position to conclude whether to direct that Openreach does not implement the scheme.

Worked examples

- 3.29 Below, we provide a list of examples of some of the characteristics of non-geographic discount offers and indicate how we would be likely to approach such characteristics. This list should not be considered a comprehensive set of characteristics which may be of concern to us; we will examine each offer on a case by case basis which may raise concerns not listed here.
- 3.30 In general, we will be especially concerned by any commercial arrangements which appear liable to reduce the intensity of competition at either the network or the retail level. As we noted in the WFTMR (para A15.12), for example, we are concerned that Openreach 'could design commercial terms which mean access seekers face a significantly higher average charge for services purchased from Openreach if they also purchase from an alternative network

operator'. We would be likely to conclude that any such scheme would have a material impact on nascent competitors.

3.31 Our approach will be governed by the principle that retail and wholesale ISPs *'should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it'*.¹⁷

3.32 As is evident from this discussion, we consider that schemes which generate 'loyalty' effects – that is, creating incentives for ISPs not to place orders or move consumers to nascent network competitors – will deprive such competitors of demand and therefore are likely to undermine competitive investment. We consider that this is also true of schemes which disadvantage or 'lock out' ISPs who may in future serve as 'anchor tenants', such as smaller ISPs. These effects may be particularly significant in relation to long-term agreements, although we recognise too that short-term agreements may also have damaging effects on competition, for example if their effects coincide with 'strategic decision points' for ISPs or nascent network competitors.

- a. Discounts which 'segment' the market, including those which tend to coalesce existing market shares or preclude smaller ISPs from maintaining or growing market share: We would be concerned about discount structures which tend towards shaping the infrastructure or retail markets, including by 'locking out' smaller ISPs. Schemes which give the largest ISPs the greatest level of discounts would appear difficult to pass our Stage 1 assessment. However, we will also critically examine schemes which create different potential prices for different ISPs, or which otherwise benefit different ISPs to different extents – for example, schemes which target discounts at particular products and which may, in effect, advantage different ISPs to different extents depending on each ISP's customer base. There may be many cases where, on the basis of such analysis, we would conclude that there is a real risk that the potential adverse impacts on nascent competitors, on ISPs' incentives and ability to choose wholesale providers, or on the ability of smaller ISPs to maintain or grow market share, could be material. If we do not reach such a conclusion, we will nevertheless consider carefully the potential for such schemes to distort or reduce the intensity of competition at the wholesale or retail levels, for example by constraining the ability of wholesale providers or ISPs to fairly compete on the merits.
- b. Discounts based on future purchasing commitments: We will examine the extent to which such discount schemes could effectively result in ISPs reducing their potential purchases from nascent competitors. We are likely to be particularly concerned by:

¹⁷ *Case C-549/ IOP Tomra Systems v Commission* (19 April 2012) at [42].

- I. Volume commitments which, by being sufficiently challenging to reach, mean that ISPs may reduce their purchases from nascent competitors to any material degree (or future commitments for such purchases). We will look not just at reductions against current volumes, but also against the volumes the ISP may have in future committed to purchase in the absence of the Openreach offer. We will be especially alert to the risk that any commitments that ISPs are required to make to Openreach are not excessive such as to unfairly preclude nascent competitors (who will be less able to enjoy economies of scale) from acquiring customers. In particular, we will be alert to risks that any volume commitments could comprise a ‘loyalty rebate’, i.e. a rebate which is ‘conditional on the customer’s obtaining all or most of its requirements - whether the quantity of its purchases be large or small - from the undertaking in a dominant position’.¹⁸ It is well established that such rebates may amount to abuse of a dominant position.¹⁹ However, for the avoidance of doubt, we do not consider that it is necessary for a discount scheme to comprise a ‘loyalty rebate’ or otherwise to be contrary to competition law in order for us to conclude that it ought to be prohibited. For example, we do not consider that it is necessary for us to conclude that the scheme makes ‘market entry very difficult or impossible for competitors of the undertaking in a dominant position’.²⁰ It could also, for example, make market *expansion* by nascent competitors more difficult or impossible;
 - II. ‘Stepped discount’ structures which may impose compelling incentives on ISPs to increase purchases from Openreach at the expense of nascent competitors; and
 - III. Schemes with retroactive effects (i.e. those where discounts apply to all volumes purchased from Openreach, including those already purchased before the offer took effect). Schemes with retroactive effects may be especially likely to result in Openreach taking advantage of its position as an unavoidable trading partner for ISPs, and leveraging its strength in non-competitive areas. This has been recognised by the Court of Justice, which has recognised that under a retroactive scheme, ‘*the average price obtained by the dominant undertaking may well be far above costs and [still] ensure a high average profit margin*’ while creating a ‘*suction effect*’ to deprive competitors of demand.²¹
- c. ‘New to Openreach discounts’ and migration incentives: We acknowledge the potential benefits of discounts to encourage customers to migrate to fibre-based services – for

¹⁸ *Case C-85/76 Hoffman-La Roche & Co AG v Commission* (13 February 1979).

¹⁹ *Case C-23/14 Post Danmark v Konkurrenceradet* [2015] 5 CMLR 25 (6 October 2015).

²⁰ *Case C-23/14 Post Danmark v Konkurrenceradet* [2015] 5 CMLR 25 (6 October 2015) at [65] and [66].

²¹ *Case C-549/10P Tomra Systems v Commission* (19 April 2012) at [78].

example, where such discounts apply only to consumers migrating from Openreach copper to Openreach fibre services. We recognise that such discounts may have objective justification for Openreach, including by lowering its cost base. However, we will carefully assess the likely impacts of such discounts and we expect to be especially concerned with any discounts applying to new-to-Openreach connections. In particular, we will assess the extent to which discounts for new connections are likely to (i) deprive nascent competitors of existing customers; or (ii) result in customers migrating from nascent competitors to Openreach, in order to determine whether there is a real risk of the discount scheme having a material impact on nascent competitors. In this context, we will also consider the extent to which nascent competitors could match such offers, given that they do not have the existing advantages (for example, network advantages, economies of scale) that Openreach has. Where we do not consider there is such a real risk, we will nevertheless need to be satisfied that Openreach has designed such discounts in a manner which achieves the claimed benefits with the least possible adverse impacts on competition.

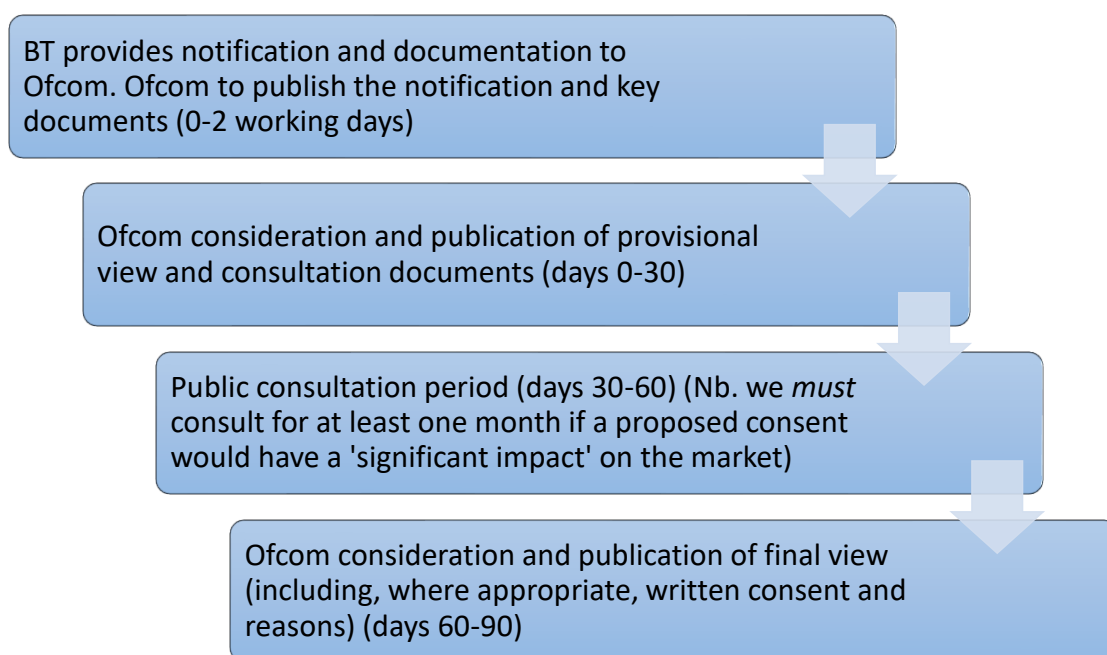
- d. Any express or implicit restrictions on the amount of services which can be taken from alternative network providers, or which otherwise may effectively constrain alternative network provider rollout. We do not foresee any circumstances in which such provisions could be properly justified, or where the claimed benefits of such provisions could outweigh their harm on competition. In these cases, even if the restriction is unlikely to apply to any alternative network provider in the short term, we will pay proper attention to the risk of the restriction acting as a 'signal' to ISPs and therefore impacting their engagement with alternative network providers.
- 3.33 Any offer that includes any of the above characteristics will likely result in a conclusion by us that the discount scheme has a real risk of materially impacting nascent competitors. If we do not reach such a conclusion, and go on to assess whether the benefits outweigh any risk to competition, we will expect Openreach to clearly and objectively demonstrate that the purchasing commitments required to access discounts are the minimum required in order for the claimed benefits to be realised (for example, for any planned investment to be taken forward). We note that it would be difficult for discounts with certain characteristics (such as schemes with retroactive effects) to be justified in this way.
- 3.34 As will be clear from these examples, it does not follow that a discount will be allowed simply because Openreach may have implemented such a scheme, or a similar scheme, in the past.

4. Geographic discounts

Process

- 4.1 As noted above, Openreach is generally precluded from charging 'different prices in different geographic areas' for relevant services and markets unless we otherwise grant consent. Therefore, unlike for non-geographic discounts, Openreach requires our express consent before it can implement a relevant geographic discount offer.
- 4.2 We intend our process to follow the approach for non-geographic discounts described above, and set out below, but with the outcome potentially including the granting by Ofcom of consent to implement the proposed geographic discount scheme rather than a written direction.

Figure 3: Summary of process for geographic discounts



Analysis Ofcom will adopt

- 4.3 As with non-geographic discounts, our analysis of whether to prohibit a geographic discount scheme will assess whether the scheme poses a material risk to competition which is not outweighed by compensating benefits. We therefore intend to adopt the same criteria and analytical approach as for non-geographic discounts.
- 4.4 The primary differences to our analysis in respect of geographic discounts will be as follows:
- 4.5 We expect our regime for geographic discounts to be 'relatively simple to implement and monitor' (A15.30). We have also said that any discount may be acceptable 'where it would not

deter alternative investment and could be beneficial to consumers or where it can be objectively justified' (A15.54). We therefore intend to adopt a requirement that there must not be any material risk of deterring alternative network investment, limiting incentives for ISPs to place large volumes with such competitors, and/or placing unfair constraints on smaller ISPs' ability to maintain and grow market share. We would expect to see as a further requirement that the proposal is (i) beneficial to consumers; or (ii) can be objectively justified.

- 4.6 We consider that geographic discounts have a greater danger of having a material impact on nascent competitors, since such schemes are more likely to result in Openreach leveraging market power in non-competitive areas to areas with potential or nascent competition.
- 4.7 In light of this danger, we would need to see compelling, positive evidence that the geographic discount scheme will not materially impact alternative investment. In this context, a key question may be whether the discount scheme applies only in areas that are unlikely to see alternative full-fibre network rollout. As we implied in the WFTMR, this must be a forward-looking assessment and undermining competition could occur *'both where Openreach reduces prices ahead of build occurring (e.g. in response to an announcement of rollout) or where Openreach reduces prices after rollout has occurred'* (A15.7). We will be especially alert to the possibility that some full-fibre rollout by nascent competitors may occur in Area 3 over time, in particular having regard to existing business models of nascent competitors. We do not intend to readily conclude that no competitive investment is capable of occurring. We would not expect to reach such a conclusion other than in exceptional circumstances.
- 4.8 As we said in the WFTMR, once we are satisfied that a geographic discount *'would not deter alternative investment'*, we would then go on to consider whether it *'could be beneficial to consumers or ... it can be objectively justified'* (A15.54) and whether it is consistent with our policy objectives (A15.55). We have already confirmed that *'The onus is on Openreach to demonstrate that its proposed geographic pricing'* satisfies these requirements (A15.56).
- 4.9 For the avoidance of doubt, a discount should be considered a geographic discount regardless of how the geographic area in which the discount applies is determined – e.g. whether by Openreach, the relevant ISP (as with Openreach's previous Localised Marketing Offer), or by a third party or predetermined criteria. In each case, the competitive effects will be assessed in the same way.

Accordingly, it does not follow that a geographic discount will be allowed simply because Openreach may have implemented such a scheme, or a similar scheme, in the past.

5. Offers which do not fall for analysis under the processes outlined above

- 5.1 As we have noted above, our analysis and assessment will give particular attention to specific types of offers where we consider there is an especially high risk of damage to nascent competitor network deployment, and in turn adverse impacts on consumers. We consider that such a targeted approach is proportionate.
- 5.2 However, we are conscious of the risk that such a targeted approach may allow Openreach scope to use different pricing strategies, outside of the scope of the analysis and assessment outlined elsewhere in this policy, to damage nascent competitor deployment. As we have noted above, we will also be alive to the risk of Openreach using non-pricing strategies to materially impact nascent competitors. This may include, for example, Openreach:
- a. discriminating in relation to quality of service for ISPs who are customers of nascent competitors;
 - b. designing its own rollout plans primarily to harm nascent competitors rather than in an economically rational manner; or
 - c. using its scale to prevent nascent competitors accessing essential inputs such as contractors.
- 5.3 While we consider this important to ensure our regulatory approach is proportionate, we are aware that Openreach will retain incentives to deter or undermine nascent competitors or otherwise affect wholesale or retail competition through mechanisms which may not be caught by the SMP conditions referred to above.
- 5.4 Accordingly, we intend to proactively ‘monitor commercial terms proposed by Openreach on an ongoing basis and, where necessary, intervene’ (A15.4). We reserve the right, where necessary, to investigate the impact of such terms and use our powers to intervene, including by using:
- a. our powers of direction under the SMP conditions. We note, in this respect, that our powers to direct Openreach as regards its terms, conditions and charges is not limited to geographic or non-geographic discount schemes. We intend, if necessary, to use the principles and general framework above to guide any future decisions about whether to use these;
 - b. our powers to amend the SMP conditions if Openreach appear to be undermining the purpose of our analysis and assessment of discounts by taking advantage of our focussed approach. As we said in the WFTMR, for example, we may decide to ‘prohibit specific commercial terms which in our view would deter alternative network rollout, except where we give explicit consent’ (A15.4) if this is necessary to provide sufficient certainty; and

- c. where appropriate, our general competition law powers. We may do so where we consider that the Openreach conduct may be in breach of competition law; however, for the avoidance of doubt, we may nevertheless use our powers under the SMP conditions (or decide to amend the SMP conditions) in parallel or as a substitute, if we consider that competition law remedies may not be sufficient to address the problem. This may be the case, for example, where we consider that use of the SMP conditions is more consistent with promoting competition and would enable more certainty for the market more quickly than reliance on competition law powers.
- 5.5 Our intention in using our powers under SMP conditions will be to promote competition, including the long-term benefits we consider are likely to arise from infrastructure-based competition. We intend to conduct any assessment about the proposed use of our SMP powers using the analytical framework set out above, subject to any necessary or suitable adaptations.
- 5.6 Examples of the types of changes to pricing and non-price terms that we would intend to analyse and assess include:
- a. discounts on connection or ancillary fees which appear to us to circumvent our concerns about discounts on rental fees;
 - b. nationwide aggressive discounting or price reductions, even if these are not conditional on the volume and/or range of services purchased; and
 - c. schemes which impose a high degree of complexity and operational resources on ISPs and could therefore impact those ISPs' ability or capacity to simultaneously manage relationships with other wholesale suppliers.
- 5.7 We will be particularly concerned by pricing changes where the timing, or nature of the change, appears to be potentially designed to harm nascent competitors.