

CityFibre

CityFibre Response to Ofcom's consultation: Promoting network competition in superfast and ultrafast broadband

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1 Executive Summary

- 1.1.1 We welcome Ofcom's proposal to impose a specific non-discrimination clause prohibiting Openreach from introducing geographically differentiated rental prices for its VULA-based wholesale services.
- 1.1.2 CityFibre was one of the respondents who brought up the risk to FTTP investment from potential anticompetitive pricing by BT/Openreach in our response to the March WLAMR consultation. Since then, CityFibre has announced a strategic partnership with Vodafone to commence the delivery of FTTP services to 1 million premises, with the intention to extend that to 5m premises. Those plans are critically dependent on being able to offer the FTTP services to end-consumers under fair competitive conditions.
- 1.1.3 CityFibre therefore welcomes Ofcom's recognition of the potential for BT to engage in exclusionary pricing with the objective of reducing or preventing CCP FTTP deployment. CityFibre believes, however, that Ofcom needs to go further to both minimise the risk of anti-competitive action by BT and to shore up investor confidence in alternative FTTP deployment. The measure proposed by Ofcom is targeted only at a very narrow subset of BT's potential pricing options, namely the introduction of geographically differentiated rental pricing for VULA-based wholesale services.
- 1.1.4 Ofcom explicitly excludes FTTP pricing from its measure and it limits the scope of the measure to regional pricing of rental services, thus also excluding national pricing and connection/migration pricing. CityFibre presents clearly in this response that the limited scope of the proposed measure is likely to cause BT to simply redirect its anti-competitive pricing tactics to one of the many price components that are not covered.
- 1.1.5 Ofcom rules out certain courses of conduct by BT on the basis of some high-level assumptions about the costs and benefits of excluding competitive rivals. CityFibre is surprised at the absence of analysis to support Ofcom's reasoning on this point and has submitted, in confidence, some indicative analysis it considers Ofcom should have performed. [redacted]. CityFibre urges Ofcom to reconsider its position on the need for stronger controls on BT's [redacted] any additional analysis Ofcom would be able to make, using its existing data and its data collection powers.
- 1.1.6 [redacted]. We reiterate that it is both unfair from first principles and inconsistent with Ofcom's own strategy to allow BT to overbuild rivals' FTTP before a fit for purpose DPA product is available for use in scale.

2 Introduction

2.1 About CityFibre

- 2.1.1 CityFibre provides fibre connectivity services through designing, building, owning, and operating fibre optic network infrastructure. The Group is a wholesale operator of fibre networks in towns and cities outside London which provide open access, shared fibre infrastructure that enables gigabit-capable connectivity for service providers and mobile network operators, who in-turn deliver digital connectivity solutions to their end customers spanning the public sector, business, mobile operator and residential markets.
- 2.1.2 CityFibre operates across the UK, and currently has full fibre optic metropolitan area networks in 42 towns and cities including: Aberdeen, Bristol, Coventry, Edinburgh, Glasgow, Manchester, Milton Keynes, Peterborough, and York. Furthermore, the Company owns and operates a long-distance fibre-optic network that interconnects 24 of its current towns and cities. In York, we are a partner in a joint venture that has constructed a Fibre to the Premises (FTTP) network connecting homes, small businesses and public buildings. In July, CityFibre raised a further £200m in order to commence construction of FTTP across our towns and cities and to expand our networks into further towns and cities, regulatory conditions permitting. In November, CityFibre announced a Strategic Partnership with Vodafone to commence construction of FTTP to 1 million premises, potentially expanding to 5 million premises if regulatory conditions permit.
- 2.1.3 CityFibre is a provider of ‘full fibre’ infrastructure, meaning there is no copper or co-axial cable used for the provision of data connectivity services in CityFibre’s networks. This sets it apart from other infrastructure competitors, who rely heavily on legacy copper and co-axial cables connecting to premises on all but a small percentage of their networks.
- 2.1.4 CityFibre’s network is constructed to provide high capacity fibre infrastructure that serves four primary market verticals:
- Public sector – fibre connectivity to council buildings, schools, hospitals, CCTV;
 - Business – fibre connections to enterprises and SMEs;
 - Mobile operators – fibre connections to mobile base stations and small cells for 4G and future 5G mobile services; and
 - Consumers – fibre connections to homes. The York trial, referred to above, is a first step in what we expect to be a substantial expansion of our networks to deliver ‘full fibre’ (FTTP) in a growing number of the towns and cities where we have physical presence (see below).
- 2.1.5 As at 31 December 2016, CityFibre operated 2,244 kilometres of metro local access duct and fibre networks across 42 towns and cities, as well as a 1,139 kilometres national long distance network connecting 22 towns and cities to data centres in London and the UK regions, as illustrated in the map below.



2.1.6 CityFibre is about to commence rollout of FTTP during 2018 in up to 10 towns and cities, totalling not less than 1 million homes. We expect to complete that phase of network build by 2020. This is the first phase of our FTTP rollout to homes. We will at the same time be expanding our network rollout to a further 8 cities. During 2019 and 2020, if regulatory conditions permit, we plan to commence a second phase of FTTP rollout within that expanded 50 city footprint, giving us the potential to expand FTTP to circa 5.0 million premises by no later than 2024.

3 Ofcom's proposal

- 3.1.1 Ofcom proposes to introduce an additional non-discrimination condition (Condition 4.4 – 'the Condition') into the legal instruments designed to implement the WLAMR outcome. The proposed Condition reads as follows:
- 3.1.2 *"In this condition, the Dominant Provider will be deemed to have shown undue discrimination if it charges different prices in different geographic areas for rental services used to provide network access to VULA other than VULA that is provided over GEA-FTTP, or for other rental services where those services are being provided in conjunction with such a VULA service for the purposes of providing electronic communications services to end users."*
- 3.1.3 CityFibre notes the following limitations to Ofcom's proposal:
- The Condition does not limit BT's ability to introduce/maintain low national prices (whether for VULA-based or FTTP-based services), which would have the same effect as targeted geographic discounts;
 - The Condition applies only to VULA-based services, not to FTTP-based services (even if the same speeds are delivered over the different technologies);
 - The Condition applies only to rental charges. Ofcom does not discuss the potential impact of BT introducing geographic discounts on connection/migration and/or other ancillary charges.
- 3.1.4 CityFibre considers that the three pricing options outlined above are all attractive to BT and that Ofcom should put in place conditions to prevent BT from pursuing them in addition to preventing targeted geographic rental prices for VULA-based broadband services. This response presents analysis which demonstrates that BT has strong incentives to pursue each of the three pricing options above, for which Ofcom is proposing to impose no restrictions. Whilst we do not know what background evidence Ofcom has considered, it is not evident from the consultation that this kind of analysis has been conducted and, if so, how Ofcom drew from it the conclusion that the limited control being proposed is sufficient to address the competition concerns that Ofcom has identified.
- 3.1.5 The scope of the proposed Condition seems clear from the wording of the Condition itself, but the consultation document leaves scope for confusion and potential misinterpretation of the Condition¹. CityFibre's understanding is that the Condition prohibits any and all geographically differentiated rental pricing by BT of the VULA-based broadband services², whether temporary, permanent, a discount or any other form of pricing vehicle. We would welcome Ofcom's confirmation that this is indeed Ofcom's intention.

¹ See Annex B for CityFibre's comments on the scope for misinterpretation and other comments on the Condition.

² Unless Ofcom issues a separate derogation under Condition 4.1.

4 Ofcom's justification for its narrow remedy

- 4.1.1 To support its proposals to limit the scope of the Condition to geographically defined rental price variations on VULA-based services, Ofcom presents the follow arguments:
- a) There is no need to impose restrictions on the national pricing of VULA-based services as the costs to BT of pricing VULA-based services at a level that would damage CCP FTTP investments would be so high that it would be an unattractive strategy to pursue. Additionally, Ofcom states that there is no evidence that BT plans to target its roll-out of G.fast services in areas where CCPs plan to or are rolling out FTTP networks³;
 - b) There is no need to impose restrictions on the pricing of FTTP-based services, because BT does not have a large existing installed base of FTTP services for which it can change prices and that the limited FTTP roll-out by BT during the period covered by the review would be unlikely to have significant overlap with the FTTP roll-out of CCPs⁴; and
 - c) It would be disproportionate to impose retail price regulation, there is no need to impose price regulation at the retail level as that market is presently considered competitive and unregulated, and, in any case, there is limited scope for BT to set retail prices at an anticompetitive level as prices not covered by the WLAMR charge control are subject to a fair and reasonable charges obligation, effectively prohibiting excessively high charges and prices that result in a margin squeeze.
 - d) Ofcom offers no argument for excluding connection/migration charges from the Condition. In fact, such charges are not discussed in the consultation at all.
- 4.1.2 Ofcom provides no analysis to support its exclusion of national pricing, FTTP pricing, connection/migration pricing and retail pricing from the scope of its chosen remedy. The extent of analysis performed by Ofcom (if any) is not described in the document. This results in a document that appears to be based on a series of assumptions about how BT would and could price and what the likely outcomes would be. If Ofcom has substantive analysis to support its conclusion, then CityFibre urges it to share that analysis to enable a transparent consultation and decision-making process.

³ See consultation paragraphs 4.15 through 4.18.

⁴ See consultation paragraph 4.8.

5 BT's superfast and ultrafast deployment plans

- 5.1.1 BT has published plans to deploy G.fast-based broadband services to cover 10m premises and to deploy FTTP to cover 2m premises by 2020. Openreach also conducted a consultation with CPs, Ofcom, Government and other stakeholders during the summer/autumn of 2017 on the possibility of rolling out FTTP to 10m or even 20m premises in the UK. A preliminary statement resulting from that consultation was planned before the end of 2017, but has not yet been issued. CityFibre, however, understands that BT is considering reducing the number of premises to be served by G.fast in favour of increasing the number of premises served by FTTP. (As evidence of this, Openreach chairman Mike McTighe stated at the INCA Annual conference in Newcastle on 16 November 2017 that his personal wish was to reverse the ratio of G.fast to FTTP).
- 5.1.2 Whilst it is recognised that G.fast can be deployed much more quickly than FTTP (and therefore BT would be able to offer higher speed broadband services to large parts of the country relatively quickly if using G.fast), Openreach recognises in its consultation that a pure-fibre network offers significant benefits over a hybrid copper-fibre network. In particular, the operation of a pure-fibre network is well-known to be significantly more efficient than a copper network. For BT to operate a hybrid network alongside a pure-fibre network for an extended period of time would inevitably result in operational inefficiencies even beyond those of operating a hybrid network only. There are therefore substantial incentives for BT to move to pure-fibre network as quickly as possible. This is also set out in the Openreach consultation, which advocates a 'cut-over model' rather than a demand-led migration to a full-fibre network.
- 5.1.3 Although not as yet announced by BT, CityFibre expects that BT will be adjusting its G.fast and FTTP targets in favour of an increase in FTTP deployment in the short term. It is therefore possible that Openreach will not offer G.fast-based services to 10m premises, as assumed by Ofcom, but instead a more accelerated FTTP deployment will be initiated.
- 5.1.4 As Openreach is lagging behind others such as CityFibre in terms of FTTP, it follows that the corollary of a strategic switch by Openreach towards FTTP would be efforts to frustrate alternative FTTP deployment. In this scenario, G.fast is no longer the centrepiece of Openreach's network upgrade strategy [8].

Given the scope for BT to revise its G.fast and FTTP deployment plans, it is important that Ofcom's analyses do not assume that the latest version of BT's published goals will definitely come to fruition. There is a clear possibility that BT will modify its plans on an ongoing basis to reflect the prevailing market and regulatory conditions at any point in time. Ofcom should model such potential scenarios to fully understand the potential consequences of its actions. In particular, Ofcom should consider the plausible scenario that, as its chairman has indicated he would like, Openreach reverses the current proposed ratios of G.fast to FTTP deployment and uses G.fast tactically to frustrate planned altnet FTTP deployments.

6 BT's incentive to damage the investment case for alternative FTTP deployment

- 6.1.1 In July 2017, Openreach issued a consultation document "Upgrading the access network with FTTP" (the Openreach FTTP consultation) in which it asked CPs in the UK to commit to taking up BT's FTTP services, once these are available. The Openreach FTTP consultation suggested that Openreach needs commitment from all large downstream CPs to use its FTTP services, or the price of FTTP wholesale services would become considerably higher than the current VULA-based wholesale services⁵.
- 6.1.2 From the Openreach FTTP consultation, it seems clear that the marginal business case for FTTP deployment is weak. Not only is Openreach seeking substantial increases in wholesale charges, it is also implicit from its analysis that a viable plan requires it to capture as much of the broadband access market as possible, in order that it can justify FTTP investment that can offer ultrafast broadband services at a price level that can attract a high level of take-up. Attrition of the actual or potential customer base as a result of downstream CPs consuming FTTP from CCPs is therefore highly inimical to this business plan. And, with CCPs announcing ambitious FTTP deployment plans, it is difficult to imagine that BT would not fight with all the tools it has available to frustrate those plans and retain as much of the broadband access market as possible.
- 6.1.3 Openreach's consultation advocates a 'cut-over' model, by which all customers are moved across to an FTTP platform at the same time, and that all customers should pay for the FTTP network even if they remain on speeds that can be supported by the legacy network. The purpose of those approaches is to reduce the incremental costs per connection per month from app. £25/connection/month to app. £7/connection/month⁶.
- 6.1.4 Those calculations are made using the current Openreach customers base. If CityFibre, Virgin Media, Gigaclear and Hyperoptic roll out FTTP networks according to their published plans and targets, at least an additional 7-8m⁷ premises will have the choice of connecting to an FTTP network not operated by Openreach. Assuming that at least 30% of those premises are connected to the CCP FTTP network⁸, Openreach would see a substantial reduction in its customer base and a corresponding reduction in the

⁵ See paragraphs E6 through E15 in the Openreach FTTP consultation.

⁶ Ibid.

⁷ Gigaclear had announced a target of 100,000 households, Hyperoptic's published target is 5m households, Virgin Media's Project Lightning target is 4m households (of some have already been passed) and CityFibre's target is 5m households. Assuming a certain level of overbuild between the CCPs it is reasonable to assume that approximately 8m additional households will have access to FTTP at least one FTTP network.

⁸ If the network is a wholesale only then the proportion of premises connected to it is likely to be higher as several retail CPs would market connections to that network.

number of connections over which it can spread its FTTP costs, if using the cut-over model⁹. [redacted]¹⁰.

- 6.1.5 On the revenue side, BT also has strong incentives to prevent or limit the deployment of competitive access infrastructure. CityFibre has performed high-level indicative analyses of the value to BT in the longer term of pricing super/ultrafast services low in the short term, compared to a scenario where BT prices its super/ultrafast services at the same level as indicated by their trial G.fast deployment pricing, with those prices only decreasing later as a consequence of competitive pressure. [redacted].

⁹ CityFibre considers it appropriate to assume that there would be extensive overlap between the BT 10m FTTP rollout and the CCP FTTP rollout. This is because operators naturally target the lower cost areas first. As Ofcom is not proposing to limit BT's ability to overbuild CCP FTTP networks, this is a likely scenario although the BT overbuild could in itself prevent CCP investment.

¹⁰ [redacted].

7 BT's options for exclusionary pricing

7.1.1 BT could seek to damage the case for competitive FTTP investment by anticompetitive pricing in a number of ways, namely: pricing of VULA- and/or FTTP-based-services; through national or geographically specific pricing; and/or through rental or connection/migration charges. We describe each of those options briefly below, but first we consider:

7.2 Pricing of VULA- and/or FTTP-based services

7.2.1 BT could choose to reduce prices for both VULA-based services and FTTP-based services or just one of those. If BT proceeds with the deployment of G.fast services to 10m premises by 2020, then the cost of reducing the G.fast price (that is, the lost revenues) would be significant. As pointed out by Ofcom, the G.fast 10m deployment would cover a much larger geography than the areas where CCPs would deploy new fibre networks, so by reducing G.fast prices, BT would offer lower prices to many customers in locations where BT did not face infrastructure competition. Ofcom argues that the cost of reducing prices to such a large number of customers would be too high for BT to wish to engage in exclusionary pricing for G.fast services at a national level. [§].

7.2.2 On the other hand, BT could choose to discount prices for its FTTP services only. BT only has limited FTTP coverage at present and the deployment of FTTP networks takes significantly longer than deployment of G.fast. In practice, we doubt that Openreach can mobilise sufficient capital and construction resources to significantly increase the amount of FTTP it constructs over the existing plan of 2 million, largely clustered in new build developments, by 2020. In other words, even if the scale of Openreach's FTTP ambition changes substantially it is unlikely that this will lead to large-scale, immediate FTTP deployment.

7.2.3 Ofcom states that, because BT does not have a large installed base of FTTP connections for which it could quickly reduce the pricing, and that it would take time to increase the FTTP coverage significantly, BT's ability to use FTTP pricing to deter CCP FTTP investment would be limited. Notwithstanding our analysis that, in this charge control period, it is unlikely that Openreach can substantially accelerate its FTTP rollout, CityFibre does not agree with that assessment. In order to understand this, it is necessary to recognise that the key 'consumers' in this network construction phase are not end-users but the downstream CPs who consume FTTP on one network or another. [§].

7.2.4 [§].

7.2.5 [§].

7.2.6 In either case, CityFibre considers that Ofcom's position that BT cannot distort and foreclose the market through FTTP pricing is wrong and urges Ofcom to reconsider that position.

7.2.7 [§]¹¹.

7.3 Pricing at a local or national level

¹¹ [§].

- 7.3.1 CityFibre agrees with Ofcom that it would be most attractive for BT to only reduce pricing in locations where CCPs are deploying (or planning to deploy) new fibre networks. This would clearly reduce the costs (lost revenues) to BT of an exclusionary pricing strategy, allowing BT to set commercial prices for the remainder of the country.
- 7.3.2 The fact that local or regional pricing would be most attractive does not, however, mean that it would not be attractive for BT to reduce pricing nationally. [X].

7.4 Reducing rental or connection/migration prices

- 7.4.1 The two main charges levied by Openreach are rental charges and connection/migration charges. Viewed from the perspective of the end consumer, the connection/migration charge is an often significant, one-off barrier to switching to a new broadband service or service provider. The rental, on the other hand often represents a significant portion of the household disposable income and needs to be justified against competing demands for that disposable income. Both charges are therefore important in the end-consumer's decision-making process, of whether to move to a faster broadband connection.
- 7.4.2 Ofcom's consultation document does not mention connection/migration charges and the potential for these to be used to deter investment in competitive FTTP networks at all. The Condition is clearly intended to apply to rental charges only, but Ofcom has offered no analysis or explanation for arriving at that conclusion. BT frequently introduces special offers that waive or substantially reduce connection/migration charges, so Ofcom will be aware of this being a favoured pricing tactic for BT and CityFibre urges Ofcom to review its decision to exclude connection/migration charges from the scope of the condition. [X].

8 BT overbuild of CCP FTTP networks

- 8.1.1 CityFibre has on a number of occasions made submissions to Ofcom (written and verbal) in relation to the impact of possible overbuild by BT of CCP FTTP networks. CityFibre is also aware that Gigaclear (providing FTTP services in rural areas) has submitted evidence to Ofcom and Government of BT overbuilding its FTTP networks, despite these being in rural areas that BT had not previously considered commercially viable for FTTC deployment.
- 8.1.2 The prospect of BT being able to overbuild nascent FTTP networks represents a substantial risk to FTTP investment and CityFibre is disappointed that Ofcom has not also proposed a remedy to prevent or limit the scope for this taking place.
- 8.1.3 From first principles, it is highly questionable whether it is economically rational for passive fibre infrastructure (for mass-market broadband delivery), offered on an open access basis, to be overbuilt. In contrast with the business connectivity market, the competitive benefits that derive from having infrastructure competition for broadband delivery (as opposed to dedicated tailored and highly resilient point-to-point services) are largely achieved through the ability to compete and differentiate at the 'active' wholesale layer. Building parallel passive fibre infrastructures increases cost and disruption for little additional economic benefit.
- 8.1.4 The ability to differentiate end-consumer broadband services based on the architecture of the physical duct network are limited. Whilst some FTTP networks may be designed and dimensioned to deliver point-to-point connections or GPON connections with different levels of aggregation/contention to each customer site, such characteristics can often be modified after the network is built, providing that it is a modern network with sufficient duct capacity¹².
- 8.1.5 In December, with this thought in mind, we wrote to Openreach offering to commence discussions with them on Openreach wholesaling services across FTTP networks constructed by CityFibre. Whilst we hope to receive a favourable response to that approach, we of course recognise that Openreach is currently entitled to overbuild its own FTTP infrastructure where CityFibre has constructed or is constructing FTTP.
- 8.1.6 However, when the incumbent has a clear commercial objective to maximise return on its existing investment, and is therefore not inclined to invest in new infrastructure unless forced to do so by competition, it is necessary to create conditions that are sufficiently de-risked to encourage investment by market entrants. This is particularly important when the new infrastructure forms a critical component of the future national infrastructure.
- 8.1.7 CityFibre is disappointed that Ofcom has not included proposals for prohibiting or limiting overbuild by BT in this consultation. The title of the consultation "Promoting network competition in superfast and ultrafast broadband" suggests that the consultation addresses all relevant issues identified as threatening the development of

¹² On the contrary, for the delivery of point-to-point business connectivity services the level of resilience in the network (whether it is using a ring-architecture, for example), the specific physical routes and the route distance of a connection between two points constitute points of significant differentiation between providers of such services. In those circumstances, the existence of several physical networks offers substantial economic benefits.

network competition, but an evaluation of the impact of BT overbuild is conspicuous by its absence.

- 8.1.8 Whilst Ofcom may not have concluded that it can or should introduce any measures to prevent or limit overbuild, the inclusion of the issue in this consultation would show that Ofcom has listened to stakeholders and understands that it is a significant issue.
- 8.1.9 At a minimum, CityFibre considers that, as an FTTP deployment by BT would naturally rely significantly on the use of BT's existing ducts and fibre infrastructure, BT should not be allowed to overbuild a CCP FTTP network until such time a fully functioning PIA remedy is in place to create a level playing field for CCPs to also use BT's duct and fibre infrastructure. Until such time as such a remedy exists, there is no 'level playing field' for FTTP construction, even if rivalrous construction is regarded as desirable. Moreover, such a rule would at a stroke reverse Openreach's incentives on DPA, which are currently oriented towards blocking the introduction of the remedy and/or 'working to rule' on its development.

9 Ofcom's proposal to not impose retail regulation to protect network competition

- 9.1.1 Ofcom proposes that retail regulation would be disproportionate, given that the retail broadband market is considered competitive and that BT is subject to a 'fair and reasonable' pricing obligation at the wholesale level.
- 9.1.2 CityFibre is not active at the retail level, but our customers are and we therefore have a keen interest that our customers are able to consume our products and make a reasonable return without being squeezed at the retail level and potentially forced to purchase (potentially inferior) BT/Openreach products simply because that is the only way they can offer commercially acceptable and competitive broadband services to retail customers.
- 9.1.3 CityFibre considers that, given the very limited proposal for regulation at the wholesale level, there may be scope for BT to introduce retail offers in specific geographies where CCPs are deploying fibre networks. It is not clear to CityFibre that such initiatives would necessarily be prevented by the fair and reasonable wholesale Condition and CityFibre therefore believes that Ofcom should undertake more detailed analysis of potential retail pricing initiatives that BT could introduce and consider the likely effect on competition.
- 9.1.4 CityFibre has a strong preference for the development of sufficiently robust regulation at the wholesale level to ensure that no retail regulation is required. Our analysis in this response demonstrates clearly, however, that Ofcom's proposed Condition will not address the range of exclusionary pricing options open to BT. Our proposal that Ofcom reconsider its proposal to not regulate at the retail level is based on Ofcom's proposed Condition remaining unchanged. Should Ofcom reconsider its proposal and introduce remedies to address the other options for exclusionary pricing at the wholesale level, then CityFibre would not advocate that any retail regulation is introduced.

10 Annex A – [X]

- a) [X];
- 1. [X][X].
- 2. [X].
[X].
- 3. [X].
- 4. [X].
- 5. [X]:
- 6. [X][X].
- 7. [X].
- 8. [X]:

[X]

- 9. [X].
[X]
- 10. [X][X]
- 11. [X][X].
- 12. [X].
- 13. [X][X].
- 14. [X].
- 15. [X].
- 16. [X].
- 17. [X].
- 18. [X][X].
- 19. [X].
- 20. [X].
- 21. [X].
- 22. [X].
- 23. [X][X]

[REDACTED]

24. [REDACTED].

25. [REDACTED].

26. [REDACTED].

11 Annex B – Analysis of the proposed Condition

1. The successful implementation of the Condition is very important to the investment case for FTTP in the UK. CityFibre has therefore taken a careful look at Ofcom’s proposed remedy and how robust and resilient that is likely to be, should it be challenged in court. This annex looks at how clear the proposed Condition is and whether there is any scope for misinterpretation, including interpretation based on the wording of the consultation document.
2. Ofcom proposes the new Condition 4.4 in an effort to prevent BT from introducing regional rental pricing for high-speed broadband services delivered using a VULA-based connection (i.e. it excludes services delivered using an FTTP connection). The Condition reads as follows:

“In this condition, the Dominant Provider will be deemed to have shown undue discrimination if it charges different prices in different geographic areas for rental services used to provide network access to VULA other than VULA that is provided over GEA-FTTP, or for other rental services where those services are being provided in conjunction with such a VULA service for the purposes of providing electronic communications services to end users.”

The use of a non-discrimination remedy

3. Ofcom’s choice of remedy appears unusual. Non-discrimination remedies are typically used to protect downstream access seekers, in case the dominant access provider attempts to discriminate between such downstream access seekers. The competition problem identified by Ofcom, however, is the potential for exclusionary pricing and the resulting foreclosure of the upstream market for new fibre networks.
4. Whilst the underlying legislation and the Access Directive may provide a broad foundation for the use of non-discrimination remedies outside the typical scenario as described above, it would be helpful if Ofcom were to explain why a non-discrimination remedy is the most appropriate remedy in this particular circumstance. CityFibre could see arguments being made that Ofcom has not done enough to provide such explanation and CityFibre encourages Ofcom to do so in its Final Statement.
5. Ofcom’s references to BEREC’s Common Position text appear equally vague, as regards whether the Common Position text referred is in fact directly applicable to the specific circumstances and the competition problem Ofcom is trying to remedy.
6. In the interest of ensuring that the Condition is robust (even with its very limited scope) CityFibre encourages Ofcom to bolster its legal tests section and remove any doubts as to whether the choice of remedy is appropriate and suitable.

The scope of the Condition

7. Ofcom does not present any analysis to support its decision to exclude non-rental charges from the scope of the Condition, but it seems clear that it is the intention that the Conditions should cover rental pricing only. CityFibre has already presented its analysis and comments regarding the harm that could result from BT waiving connection/migration charges or reducing those substantially.
8. The concern we seek to raise here is that the consultation document talks extensively about targeted discounts and the harm that could result from those, but the Condition itself does not refer to discounts, simply to “*different prices in different geographic areas*”, suggesting that the Condition is applicable to all types of regional pricing. CityFibre considers it correct that the Condition should cover all types of regional pricing and, assuming that this is Ofcom’s intention, CityFibre urges Ofcom to make this clear in its Final Statement.

The impact of Condition 4.1

9. Further, it would seem that Condition 4.1 (which was already included in the draft legal instruments proposed in the WLAMR consultation), may be used by BT request dispensation from Condition 4.4. Unfortunately, as there is no guidance or transparency as to the parameters Ofcom would use if BT were to request a derogation, this introduces additional uncertainty to an already very narrow and potentially weak remedy.
10. CityFibre requests that Ofcom provide transparency as to the kind of situations that could qualify for a derogation. CityFibre notes that footnote 24 of the Consultation document states: *“We recognise that there are variations in costs by geographic area. It is possible that areas where entry occurs are relatively low cost. However, targeted price reductions may nevertheless be regarded as discriminatory, for example if prices were reduced not for all areas that have lower costs, but only for those areas where rivals may want to build networks.”*
11. CityFibre asks that Ofcom provides clarification as to whether Ofcom means that, if BT were to introduce reduced prices in all areas which have lower costs, this would be acceptable? If that were so, then BT could introduce reduced pricing in a subset of the country that targets the majority of new FTTP deployment by CCPs, as it is natural that initial deployments will target lower cost locations.
12. [X].