CityFibre

Annex: CityFibre's assessment of Openreach FTTP offers with geographic pricing

Non-confidential version

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Table of Contents

Introduction

1.1 In the 2021 WFTMR Statement, Ofcom introduced a new *ex ante* regime regarding geographic discounts and other commercial terms. In this Annex CityFibre provide some commentary on that regime, including the criteria and assessment process Ofcom has outlined.

1.2 CityFibre then takes the existing Openreach geographic offers (which Ofcom is consulting on) and uses them as case studies, in order to start to consider how (going forward) such offers could be assessed by Ofcom. In doing so, it identifies some of the key issues and questions that would arise when undertaking an effects-based assessment of such offers. CityFibre hopes that the issues and questions it identifies are useful to Ofcom in supporting its ongoing thinking on these matters, ahead of any future assessments of new or amended Openreach geographic discounts or other commercial terms.

1 The regulation of geographic discounts and other commercial terms

1.3 Ofcom set out a clear approach to the regulation of geographic discounts in the 2021 WFTMR Statement. Before going on to consider how the regulation might be applied in respect of the schemes currently before Ofcom, if such schemes were to be introduced anew, it is helpful to recap the position which is set out in the 2021 WFTMR Statement.

1.1 Competition concerns arising from Openreach conduct

1.4 In the 2021 WFTMR Statement, Ofcom set out a range of decisions which were designed to promote competition and investment in gigabit-capable networks – bringing faster, better broadband to people and businesses across the UK.[1] In particular, Ofcom's approach to supporting investment in gigabit-capable networks is focused on encouraging competition between different networks where viable, which will provide high quality services, choice and affordable broadband for consumers throughout the UK.[2]

1.5 For Ofcom's strategy to be effective in delivering network competition, and the resulting benefits for consumers, it is important not only to ensure that rivals to Openreach are able to deploy fibre networks over Openreach's physical infrastructure but also to ensure that Openreach is not able to undermine competing network investment through an approach to pricing which unfairly incentivises access seekers, the ISPs, to remain with Openreach. Whilst discounted pricing may, in the short-term, reduce ISPs' costs (and potentially be passed through to consumers in the form of lower retail prices), the longer-term effects will be significant. Anti-competitive pricing by Openreach could deter investment by alternative network operators, eliminating the nascent network competition which is now emerging.

1.6 In the 2021 WFTMR Statement, Ofcom identified a specific risk that Openreach might stifle competition through the use of geographic discounts.[3]

1.7 Rolling out FTTP is resource intensive and it is not possible to roll out in all areas simultaneously. If, therefore, Openreach were to target discounts at areas where alternative new network is being built, this could reduce competitors' returns and ultimately curtail their wider investment plans. Openreach would therefore be able to deter large scale alternative network rollout (and face reduced competition over a wider area) by reducing prices in relatively few local areas. Openreach intends to roll out FTTP on a large scale. Even if reducing prices locally results in lower returns in some areas, this may not be significant in the context of its overall FTTP investment.[4]

[1] 2021 WFTMR Statement, Volume 1, section 1.
[2] 2021 WFTMR Statement, Volume 1, section 1.
[3] 2021 WFTMR Statement, Volume 3. para 7.11.
[4] 2021 WFTMR Statement, Volume 3, para 7.12.

1.8 In the 2021 WFTMR Statement, Ofcom set out those concerns in detail, noting that the potential financial gains to Openreach from such a strategy are large.[5]

1.9 Ofcom also identified the risk that Openreach could use other commercial terms which are not geographically differentiated, such as exclusivity discounts, to undermine new network build. Ofcom considered that pricing structures with these terms are likely to be contrary to the interests of consumers in the long-term because they could deter access seekers from switching demand to new alternative networks.[6] Whilst Ofcom did not expressly regulate such loyalty-inducing practices, the 2021 WFTMR Statement provides an indication that such practices are likely to constitute a breach of Openreach's obligation not to unduly discriminate.

1.2 Regulation of geographic discounts imposed in the 2021 WFTMR Statement

1.10 In respect of the use of geographic discounts by Openreach, Ofcom considered that competition law alone would not address the concerns identified and imposed a prohibition on the use of geographic discounts by Openreach for both FTTC and FTTP products (as well as for leased lines).[7]

Lack of effectiveness of competition law to address Ofcom's concerns

1.11 Ofcom considered that competition law would be insufficient to address its concerns regarding geographic discounts for two reasons.

1.12 Firstly, the purpose of competition law is not to promote competition but to prevent anti-competitive conduct. The next few years will be critical for alternative network build and competition law would only seek to preserve existing competition, not to promote greater competition[8], effectively protecting a market status quo which may itself not be the most competitive outcome.

1.13 Secondly, competition law investigations take time to complete (usually many years), by which time the detrimental effects on competition may have become irreversible. By contrast, SMP regulation can open up markets to competition thus increasing consumer benefits in terms of price, choice and innovation. Indeed, this is precisely what Ofcom is seeking to do through the imposition of the requirement on Openreach to provide access to its ducts and poles in the PIA Remedy, a remedy which could not have been imposed through competition law alone.

1.14 Ofcom recognises that alternative operators building new networks face considerable challenges in becoming established and overcoming the incumbency advantages of Openreach. For example, Openreach benefits from high existing customer volumes and therefore economies of scale, meaning it has lower unit costs than an entrant.[9] As a result, nascent competitors are especially vulnerable in the early phases of rollout to anti-competitive foreclosure.

1.15 There is a relatively small window of opportunity to encourage new network build and uncertainty around the regulatory approach to Openreach's pricing may result in alternative operators being unable to secure sufficient access seekers/end users over a reasonable time period and consequently it is unlikely they will be able to secure funds from investors for their FTTP rollout plans.

1.16 CityFibre agrees that competition law would be insufficient to address the concerns which Ofcom has identified. Competition law investigations take time and by the time that a decision is reached, the point of no return may have been reached.[10] The *TNT/Whistl*[11] case is particularly instructive in this respect. In that case, Ofcom's investigation took over four years and an appeal against that decision took a further fifteen months. Despite Ofcom's efforts to promote competition in the postal sector, Whistl was forced to exit the market as a result of anti-competitive conduct by Royal Mail. Reliance on competition law alone to protect alternative network build may have a similar effect with rivals being undermined to such an extent that they may exit the market before any decision can be reached. Given

[5] 2021 WFTMR Statement, Volume 3, para 7.13.
[6] 2021 WFTMR Statement, Volume 3, para 7.29.
[7] 2021 WFTMR Statement, Volume 3, para 7.34.
[8] 2021 WFTMR Statement, Volume 3, paras 7.53 and 7.54.
[9] 2021 WFTMR Statement, Volume 3, para 7.45.
[10] 2021 WFTMR Statement, Volume 3, para 7.56.
[11] *Complaint from Whistl UK Limited in relation to the prices, terms and conditions on which Royal Mail plc is offering to provide access to certain letter delivery services*, https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01122

the small window of opportunity for network competition to develop, that position may be incapable of being remedied by the time a decision is forthcoming.

Ensuring consistency of the *ex ante* regime with competition law principles

1.17 When considering how *ex ante* regulation should be applied, regard must still be given to the competition law principles which underpin the legal and economic frameworks for assessing abusive behaviours. As Ofcom is aware, a dominant undertaking has a special responsibility not to allow its conduct to impair or undermine effective competition, and in doing so must compete 'on the merits'.[12]

1.18 The concept of abuse as established in case-law is "*an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators,* ***has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition***".[13] (emphasis added)

Imposition of *ex ante* regulation

1.19 SMP Condition 4.1 prevents Openreach from engaging in undue discrimination in relation to the provision of network access for wholesale SMP products unless Ofcom has consented to such conduct in writing. In order to ensure transparency, promote regulatory certainty and provide alternative networks investors with confidence to invest,[14] having identified specific concerns around geographic discounts, Ofcom decided to impose a prohibition on their use.

1.20 Ofcom therefore imposed SMP conditions 4.4 and 4.5 pursuant to which Openreach will be deemed to have engaged in undue discrimination where it charges different prices in different geographic areas for rental services used to provide network access to VULA (including over FTTP) in WLA Areas 2 and 3.[15] Ofcom also decided to impose SMP Condition 4.6 to prohibit geographic discounts on rental charges for Ethernet and WDM services in the LL Access Area 2 market.

Approach to granting consent

1.21 Exemptions from the prohibitions introduced by SMP Conditions 4.1, 4.4 and 4.5 can be sought by Openreach in respect of geographic discounts by requesting that Ofcom grant its consent in writing. In the 2021 WFTMR Statement, Ofcom stated that it would expect Openreach to explain both the purpose of the scheme and why it would not deter new alternative network build in any request for consent.[16] The burden is therefore on Openreach to justify its geographic discounting. Ofcom states that a general exemption for existing offers would not be appropriate.[17]

1.22 Whilst the 2021 WFTMR Statement recognises that the assessment of individual requests for consent will need to be conducted on a case-by-case basis reflecting the context and circumstances,[18] Ofcom nevertheless considered it appropriate to set out a general approach to the granting of consent for offers containing geographic pricing elements under SMP Condition 4.1. In particular, Ofcom indicated that, in assessing whether to consent to geographic pricing, it would consider:

- any objective justification provided by Openreach for the differential pricing; and

[12] Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 57; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 112.
[13] Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 91; Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 70; Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 69; and Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 111.
[14] 2021 WFTMR Statement, Volume 3, para 7.57.
[15] SMP Condition 4.6 contains an equivalent prohibition for Ethernet and WDM Services in LL Area 2.
[16] 2021 WFTMR Statement, Volume 3, para 7.130
[17] 2021 WFTMR Statement, Volume 3, para 7.143
[18] 2021 WFTMR Statement, Volume 3, para 7.133

- whether such pricing is consistent with Ofcom's overarching policy objectives (including the strategy to promote network competition).[19]

1.23 Such an approach is entirely consistent with the approach to abuse of dominance (under competition law) where it is incumbent upon the dominant undertaking to provide an objective justification for conduct which may have a detrimental effect on competition.[20] That objective justification must be expressed in specific terms as to the objectives which a particular pricing measure is designed to achieve and a quantification of the benefits (in particular, any alleged efficiencies[21]) of the pricing must be put forward.

[19] 2021 WFTMR Statement, Volume 3, para 7.129

[20] *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ 2009/C 45/12, paragraph 31

[21] Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, paragraphs 55 and 26

2 CityFibre's assessment of Openreach geographic offers

2.1 In this section we set out analysis we have conducted to consider the effects on competition of the existing Openreach geographic offers (which Ofcom is consulting on). We do this in order to inform the debate about how (going forward) such offers could be assessed by Ofcom. We therefore seek to identify key issues and questions that we consider Ofcom should have in mind when undertaking an effects-based assessment of such offers.

2.2 The current consultation concerns three existing Openreach offers which would be prohibited by the geographic discrimination prohibition unless Ofcom provides consent.

2.3 The Openreach offers covered by SMP Condition 4.8 are:

- The GEA Volume Offer, on GEA-FTTC, G.Fast and GEA-FTTP, introduced in 2018 and due to run until September 2023;
- The FTTP Only Offer v2, which applies rental discounts until 30 September 2022; and
- The Local Marketing Offer (or '**LMO**'), which was available from November 2019 to 30 June 2020 and from 1 February 2021 to 31 March 2021, which applies rental discounts until 30 September 2022.

2.4 The 2021 Consultation indicates Ofcom's intention to grant a consent in relation to these specific offers, meaning that it would permit the existing geographic pricing to continue until the current offer period expires. CityFibre's position is that the relevant offers have been operating for some time now and, to the extent that they are harmful to competition, they have already produced most of their adverse effects on the market.[22] On that basis, CityFibre does not propose that these schemes should now be prohibited.

2.5 However, having assessed the offers in detail, CityFibre considers that were such offers introduced now (or going forward), they would likely have a material detrimental impact on alternative networks' build plans. In the remainder of this section CityFibre sets out its thinking in terms of effects on competition, in regard to each of these three offers.

2.1 GEA Volume Offer

Description of the offer

2.6 Under the GEA Volume Offer, ISPs can benefit from discounted rental prices where they meet certain targets for volume and bandwidth mix of services purchased and forecasting accuracy. ISPs can also benefit from greater discounts if they agree to sign up to a longer-term offer (five years instead of three).

2.7 As shown in Table 1 below, these discounts amount to significant reductions in monthly rental prices.

[22] CityFibre notes however that these offers are capable of extension and amendment. For example, the LMO may be extended "on commercial grounds" by the parties (see clause 3.3 of the contract) To the extent that Ofcom may grant its consent on the basis that an offer is limited in scope, CityFibre would welcome clarity from Ofcom that such consent does not extend beyond the contractual term and does not apply to any extension or amendment.

Table 1: GEA volume offer monthly rental discounts

Variant (Mbps)	Standard monthly rental (£)	Discounted monthly rental (£)	Discount
40-10	4.99	4.99	0%
55-10	8.40	5.99	29%
80-20	9.95	5.99	40%
160-30	11.49	7.99	30%

Note: discounts based on a five-year contract, available to ISPs with <50% current take-up of fibre with Openreach. Standard monthly rental prices from Openreach's GEA price list [LINK]. List prices as at 19 April 2021.

2.8 The key targets ISPs must reach in order to benefit from the discounts are:

- **Volume and mix target** which is comprised of three elements:
    - Total Fibre Volume Target, calculated over a six-month period as a percentage of an ISP's current broadband base or as a percentage of an ISP's current fibre run-rate;
    - 80/20 mix requirement, specifying the percentage of the ISP customer base required to be on the 80/20 Mbps variant; and
    - an ultrafast (G.Fast and FTTP) target specifying the percentage of the fibre base which must be on ultrafast products.
- **A forecast accuracy requirement** where the maximum discount can only be achieved if cumulative net demand falls within -10% to +25% of the forecast submitted by the ISP.

2.9 In the case of the volume and mix target, superfast (or faster) connections with a qualifying alternative network in an Openreach fibre area will reduce the volume targets accordingly. CityFibre understands that a qualifying alternative network is one which had superfast (or faster) products available to less than 25% of premises in the United Kingdom on 28 February 2019. The list of qualifying alternative networks is available on request by ISPs but is not published by Openreach. CityFibre further understands that Virgin Media is the only network operator which is not a qualifying alternative network.

2.10 The GEA Volume Offer is primarily focused on discounts for FTTC rentals, as all FTTC lines are within scope of the offer. In contrast, FTTP rentals are within scope only for certain categories of premise:

- BDUK premises, including both pre-existing (at the time of offer launch) and ongoing BDUK build; [23]
- New sites e.g. at new housing developments; and
- Premises that are part of Openreach's legacy FTTP footprint, built prior to July 2018.

CityFibre's assessment of the GEA Volume Offer

2.11 In the 2021 Consultation, Ofcom set out an assessment of the different types of premise to which discounted FTTP prices would apply (i.e. BDUK areas, new sites, and Openreach's legacy footprint). CityFibre considers this to be a useful approach for assessing this type of offer and sets out below its thoughts on each.

[23] [✂].

BDUK areas

2.12 CityFibre understands that the GEA Volume Offer applies to both existing and future BDUK contracts. This is an important consideration given that BDUK will shortly commence an extensive new 'Outside In' programme intended to gap-fund rollout of gigabit-capable networks to up to five million additional premises. Thus the impact of the GEA Volume offer, if permitted to be applied to FTTP in BDUK areas, may be far wider ranging than what is covered today. A significant proportion of the BDUK programme may take effect within the lifetime of the GEA Volume Offer.

2.13 It is plausible that Openreach will win some, but not all of the Outside In subsidy 'bundles'. It is not clear whether Ofcom has considered an outcome in which Openreach does *not* win a bundle, and whether it should nonetheless be permitted to apply its GEA Volume Offer within the area as part of an 'overbuild' strategy. Given that any award must follow an Open Market Review which has established that Openreach, and other operators, have no intention to build commercially in the intervention area, a decision by Openreach to subsequently overbuild would in our view be anti-competitive in nature. Such a strategy should certainly not be additionally reinforced by being able to utilise the GEA Volume Offer. It would be helpful for Ofcom to clarify this position.

2.14 Where Openreach is the successful bidder, and therefore an Open Market Review has determined that no rival build in the area is currently planned, there seems a reasonable argument to permit Openreach to provide incentives to its customers to switch to its FTTP network. This could include geographic discounts. However, even in such a scenario, CityFibre believes it would still be necessary to conduct an assessment of the effect of these offers on alternative network build. This is because build plans evolve over time and it is not possible to know exactly where alternative networks will build in the future.[24] The Open Market Review is also limited to a period of three years. It therefore appears possible that a proportion of premises earmarked for inclusion in Outside In bundles may be within clusters that could support alternative network build in the future.

2.15 Given this, Ofcom should be wary of granting any blanket consent for geographic pricing in BDUK areas without considering in more detail how this might impact alternative networks over time. The BDUK programme is designed to ensure faster rollout to those areas where network build is currently challenging, but it does not mean that competing networks will not enter those areas at a later date.

New sites

2.16 As with BDUK locations, in new build areas, it will be necessary not just to assess Openreach's *ability* to target discounts so as to undermine alternative network investment, but critically to consider the *effect* on alternative network operators' build plans.

2.17 Such an effects-based analysis would need to consider whether the discount scheme has loyalty-inducing effects which risk harming alternative operators' build plans, as this could ultimately have the effect of undermining incentives for alternative network operators to invest in new build specifically, or in areas with high proportions of new builds.

2.18 Indeed, certain alternative full fibre networks' business models are based on rolling out to new builds (e.g. multi-dwelling units), and these business plans would be undermined by any Openreach offer discounts at such premises. In other words, Openreach can still target offers in a way that undermines rival build, even if it does not know the specific geographic locations (i.e. postcode sectors) where rivals would seek to deploy. This raises a fundamental question about what constitutes 'targeted' geographic discounting.

2.19 We finally note that, new build sites constitute a material number of premises. ONS data suggests that on average there are 150k – 200k new dwellings built per year.[25] Over a five-year period, this equates to 750k to 1 million. Furthermore, the UK Government have stated its plans to ensure that all new builds (especially multi-dwelling units) have full fibre installed. The net effect is that new builds will present a very important opportunity for alternative fibre networks.

[24] 2021 WFTMR Statement, Volume 3, para 7.139.
[25] https://www.ons.gov.uk/peoplepopulationandcommunity/housing/datasets/ukhousebuildingpermanentdwellingsstartedandcompleted

Legacy FTTP footprint

2.20 While Openreach's legacy FTTP footprint is limited in scale, CityFibre still considers that only through an effects based assessment can one conclude on the impact of any such offer on rival build. In addition, Ofcom's strategy in the 2021 WFTMR Statement is to prohibit any discounts which adversely affect new alternative network build unless Openreach can provide an objective justification for the differential pricing.[26]

2.21 The number of premises covered is not indicated in the 2021 Consultation for reasons of confidentiality. It is not therefore clear to CityFibre what the threshold for materiality might be for such assessments. Whilst CityFibre understands that it might not be possible to provide definitive thresholds as to materiality, it wishes to note that even small geographic areas can have very large impacts on an altnets business plans. For instance, if an altnet has based its business plan on building full fibre to 1 million premises, across ten towns (of approx. 100k premises) then a single town represents a material part of its build plan.

2.22 Any targeted offer that undermines a single town (of 100k premises) would in that case be in CityFibre's view material, in terms of undermining rival network build.

Volume commitment reduction

2.23 The volume and mix targets allow ISPs to count connections with "qualifying alternative networks" towards their targets under the GEA Volume Offer. CityFibre understands that a qualifying alternative network is one which is available to no more than 25% of premises in the UK. Under Openreach's original proposal, this figure stood at just 10% and regulatory intervention was needed to ensure that Openreach's approach did not affect new entrants. As far as CityFibre is aware, only Virgin Media falls outside the definition of qualifying alternative network at this time.

2.24 CityFibre welcomes Ofcom's statement in the 2021 WFTMR Statement that terms which allow ISPs to qualify for discounts provided the size of alternative networks remains below certain limits could be a concern.[27]

2.25 Going forward, CityFibre would urge Ofcom to consider carefully the aim of the 25% threshold. Whilst Ofcom may be less concerned about the effect of the 25% threshold on a well-established operator like Virgin Media, the effect of the GEA Volume Offer may be very significant for nascent competitors. As such, altnets could be dissuaded from rolling out to more than 25% of premises as a result of such an offer.

Objective Justification

2.26 The 2021 WFTMR Statement sets out Ofcom's expectation that it would be incumbent upon Openreach to put forward an objective justification for any and all terms that form a geographic discount offer. It however remains unclear to CityFibre what the objective justification for the 25% threshold is.

2.27 For instance, CityFibre has not to date heard from Openreach as to why volumes with certain operators should reduce the volume targets while volumes with others should not. CityFibre can only assume that the aim of the threshold is to target larger rivals to Openreach and thereby reduce their competitive threat.

2.28 CityFibre's experience has been that [✂].

2.29 CityFibre's experience is therefore that [✂]. This is a critical component to the effects of any offer in terms of how it would impact alternative networks' build plans.

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[26] 2021 WFTMR Statement, Volume 3, para 7.129.
[27] 2021 WFTMR Statement, Volume 3, para 7.172.

2.2 FTTP Only Offer v2

Description of the offer

2.30 The 'FTTP Only Offer v2' provides discounts on FTTP rentals and connections where ISPs meet certain targets for FTTP customers in the Openreach Fibre First FTTP Footprint (either as at 31 March 2020 or 31 August 2021). That footprint covers Openreach's commercial FTTP build since July 2018 with the exception of sites covered by the GEA Volume Offer.

2.31 The table below sets out the associated rental discounts from the FFTP Only Offer v2, relative to the standard monthly rate today.

Table 2: FTTP Only Offer v2 monthly rental discounts

Variant (Mbps)	Standard monthly rental (£)	Discounted monthly rental (£)	Discount
80/20	17.28	15.28	12%
115/20	17.28	16.28	6%
160/30	21.14	17.28	18%
220/30	21.28	18.28	19%
330/50	24.28	21.28	12%
550/75	27.28	21.28	22%
1000/115	31.28	24.28	22%

Standard monthly rental prices from Openreach's FTTP price list [LINK]. List prices as at 19 April 2021.

2.32 In order to qualify for discounts, ISPs must commit to achieving a target of FTTP new provides as a percentage of total new provides an ISP wishes to connect to the Openreach network in the relevant footprint. Up to September 2020, the FTTP target is 70%, increasing to 85% from October 2020, and to 90% from December 2020 until the end of the offer.

2.33 The offer also includes a near-miss tolerance of up to ten percentage points from the FTTP target, where ISPs get partial connection discounts and full rental discounts.

2.34 ISPs participating in the FTTP Only Offer v2 based on Openreach's footprint as at 31 August can also use their FTTP volumes to count towards their Ultrafast target in the GEA Volume Offer.

CityFibre's assessment of the FTTP Only Offer v2

2.35 As set out in the 2021 WFTMR Statement, the assessment of geographic offers must focus on the effect of the offer on alternative operators and not simply Openreach's intentions, or whether the offer is targeted. The latter are only relevant insofar as Ofcom is considering whether or not there is an objective justification for the offer.

2.36 This offer primarily delivers rental savings to ISPs and in that regard, there is a question about the impact of those savings on ISP's incentives regarding who they purchase wholesale access from.

2.37 CityFibre note that the offer is available on a relatively widespread basis and therefore the effect of the offer could be across large parts of the UK. In addition, as outlined above, [✂].

2.38 CityFibre notes that in assessing such offers the actual offer close data can often be ambiguous. For instance, it may have been claimed that the FTTP Only Offer v2 runs until 30 September 2022.[28]

[28] Paragraph 3.16 of the 2021 Consultation.

However, the contract states that from 1 October 2022, rental prices will be adjusted by CPI.[29] This means that the offer will continue beyond 30 September 2022. Clearly, the longer that any discount is in place, the greater the effect on alternative networks and it is important that operators, both network operators and ISPs, have certainty as to how the assessment has been conducted and the effect of any consent.

2.3 Local Marketing Offer

Description of the offer

2.39 Under the Local Marketing Offer ('LMO'), ISPs can select up to four conurbations of up to 500k premises in total within the Openreach Fibre First towns and cities where they can benefit from discounts on wholesale FTTP services. To qualify for the offer, ISPs must commit to meeting two criteria:

a) ensure a minimum average revenue per unit ('ARPU') of £16.28 across the offer term; and

b) demonstrate that they are undertaking local marketing of FTTP services in the selected areas.

2.40 We understand that the local marketing commitments include [✂].[30]

2.41 Under the LMO, discounts are available for both rental charges and connection fees (which are waived entirely in some cases).[31] However, given that Ofcom has not included ancillary charges (such as connection fees) within the scope of the regulation, CityFibre focuses its analysis below on rental charges only.

2.42 Table 3 below sets out the rental fee discounts associated with the LMO, relative to Openreach's standard prices today. The discounts are considerable, representing an effective discount of up to 23% available. Furthermore, Openreach has announced price increases for its standard monthly rentals (applicable from 1 July 2021), meaning that the effective LMO discount will increase.[32]

Table 3: LMO monthly rental discounts

FTTP Variant (Mbps)	Standard monthly rental (£)	LMO monthly rental (£)	Discount
40	14.28	14.28	0%
80	17.28	16.28	5%
110	17.28	16.28	6%
160	21.14	16.28	23%
220	21.28	16.28	23%
330	24.28	21.28	12%
550	27.28	21.28	22%
1,000	31.28	24.28	22%

Source: Openreach price list [LINK] and LMO website [Link]. List prices as at 19 April 2021.

2.43 Of great relevance to ISPs considering using the LMO is the fact that any volumes used within the LMO will count towards the volume targets within the GEA Volume Offer, which all major ISPs have

[29] https://www.openreach.co.uk/orpg/home/updates/briefings/ultrafastfibreaccessbriefings/ultrafastfibreaccessbriefingarticles/nga202020.do
[30] LMO contract, Schedule 2, paragraph 2.
[31] Connection charges are reduced to zero (from £97.03) for new to Openreach connections within 12 months of the relevant trigger point or, for migrations on the Openreach network, 6 months.
[32] For example, the effective discount on the 160 Mbps variant will increase to 24%.

signed up to. This inter-connection of offers, ensures that ISPs can take full advantage of the existence of multiple, complementary offers.

2.44 Furthermore, the LMO contract sets out that [✂].

CityFibre's assessment of the Local Marketing Offer

2.45 CityFibre considers that offers such as the LMO can have a material impact on alternative network rollout. Below CityFibre sets out its views on the potential effects of such an offer, as well as the considerations Ofcom should have in mind when considering whether or not to grant consent, given the assessment criteria and process set out in the 2021 WFTMR.

Effect of the LMO

2.46 Although under this offer Openreach cannot determine precisely which conurbations are subject to the discounts, CityFibre considers that there would still be an effect on alternative network build from such an offer. This is because the LMO could target alternative network build by applying only to areas within Openreach's Fibre First footprint. These are areas where Openreach has determined that build is commercial and where alternative network build is also likely due to the concentration of premises.

2.47 Even if Openreach could not determine precisely which areas would be selected by ISPs within the LMO, it would still know with reasonable certainty that at least part of the areas covered by alternative network build will be affected. As Openreach rolls out FTTP, the size of the area covered by its Fibre First Footprint will also increase.

2.48 In particular CityFibre consider that any such offer covering up to 500k premises would be of sufficient scale to affect alternative network operators' build plans. Whilst it may be that 500k is small scale relative to Openreach's network, the same is not true for alternative operators. For example, even large UK cities are unlikely to have more than 200k premises. For instance: Leeds - 125k premises, York - 150k premises, Southampton – 110k premises. Each of these are major UK cities which are likely to be commercially viable for alternative network deployment. A 500k cap would still enable an ISP to make use of the LMO in 3-4 large cities (such as those listed above). Any deployment, even just for one town/city, would have a material impact on a rival network.

2.49 The removal of addressable customers at a lower level than 500k could have a significant effect on build plans, particularly for smaller alternative operators where their builds are concentrated in a conurbation where a major ISP has decided to take advantage of the LMO.

2.50 CityFibre also notes that as part of the LMO Openreach is offering greater discounts on 'new to Openreach network' connections, which specifically target alternative network build. Ofcom set out in the 2021 WFTMR Statement that terms with deter ISPs from switching to new network builders could be a concern.[33] Given this, any commercial offer which includes a 'new to Openreach network' feature should be closely analysed.

Objective justification

2.51 As outlined in the 2021 WFTMR Statement, the onus must be on Openreach to show that any proposed new offer would not adversely affect rival network and/or is objectively justified, based on a fully reasoned submission to which other affected operators can respond. CityFibre would therefore expect Openreach to explain, and Ofcom to consider, whether a discount offered was proportionate to the achievement of the contractual requirements (i.e. ARPU targets and marketing spend in the case of the LMO).

2.52 In doing so, CityFibre considers that only minimal weight should be assigned to Openreach's stated justifications for its conduct, which – even if contained in internal documents – will inevitably have been crafted with a view to subsequent regulatory proceedings.

[33] 2021 WFTMR Statement, Volume 3, para 7.169.

2.53 In regard to the specific ARPU targets within the LMO, ISPs are required to ensure a minimum ARPU of £16.28. However, as can be determined from Table 3 above, this can in fact be achieved quite easily, for instance by migrating all customers onto speeds of just 80Mbits/s or, where some customers remain on the cheaper 40Mbit/s product, by migrating a minority of customers on to speeds of 330Mbit/s or above. In addition, if FTTP customers are more likely to be on faster speeds, ISPs may find the target much less challenging than if it were based on their entire broadband customer base.

2.54 In addition to the ARPU target, the LMO sets out marketing commitments. These however are loosely defined and unlikely to involve significant costs for the ISP. [✂]. It is not clear that the cost of these marketing commitments is justified by the level of discounts offered.

2.55 Given this, CityFibre wish to highlight that any effects analysis must include an assessment of the contractual requirements actually imposed on the ISPs, in order to determine whether or not those obligations are material or not.

2.4 Aggregate effect of the offers

2.56 CityFibre also notes that the 2021 Consultation does not take any account of the aggregate impact of the various offers. Given that ISPs are able to make use of more than one Openreach offer, CityFibre consider that the cumulative impact of them is the most relevant perspective from which to assess the overall effect on rival network build.

2.57 From an ISP's perspective, decisions on which network to use will be based on a view of the networks' coverage and geographic pricing offers in aggregate. Therefore, even if an individual offer would not in isolation materially influence an ISP, the cumulative effect across all offers which it could take advantage of will likely impact an ISP's incentives. Given this, CityFibre considers that an assessment of the aggregate effect of the offers must be undertaken by Ofcom before it can exempt any individual offer.

2.58 Furthermore, CityFibre notes that specific offers could have, as part of their terms, inter-dependencies that allow ISPs to use them in a complementary way, enhancing the aggregate savings for ISPs.[34] For example, qualifying FTTP connections covered by the LMO and FTTP Only offer v2 count towards GEA volume discount targets. In addition, the LMO contract makes clear that [✂].

2.59 By introducing discount schemes which are complementary, and which allow ISPs to sign up without undermining their ability to switch to future offers, Openreach can create stronger incentives for ISPs to stay on the Openreach network than in the counterfactual where these features were not in place.

2.60 If Ofcom does not conduct a cumulative assessment, there is a risk that Openreach may undermine the business case of its rivals by obtaining consent for multiple, complementary offers.

2.5 Signalling effects

2.61 Any statements made by Ofcom, especially as part of a formal stakeholder engagement process will have a material signalling effects on the market. This includes Ofcom's provisional findings on existing geographic offers. The signals can influence Openreach's incentive to introduce other geographic pricing offers, as well as ISPs and network builders' expectations about future offers that Openreach will and will not be allowed to launch.

2.62 CityFibre is specifically concerned that Openreach will attempt to introduce a new LMO with extended scope. Indeed, the existing LMO already envisages that it may be extended and that pricing in these areas may be further reduced.[35] If this were to occur, there is a risk that alternative network build will be deterred in a large part of the country. The nature of that offer is such that

[34] This is distinct from the situation where the various available offers are in no way related.

[35] Ofcom should note the following clauses of the LMO: [✂].

CityFibre cannot know with any certainty where this might occur. CityFibre must therefore factor in this risk in its build plans and its effect may be to reduce the network footprint to which CityFibre is able to commit.

2.63 Similarly, [✂]. This kind of signalling by Openreach, combined with Ofcom's provisional findings (that future geographic pricing offers could be permissible) could have the effect of 'locking-in' ISPs to the Openreach network, thereby undermining incentives for rival network build.

2.64 CityFibre recognises that there are limits as to what Ofcom may set out since each assessment needs to be carried out on a case-by-case basis. However, as Ofcom recognised in the 2021 WFTMR Statement, it is important for alternative network operators to have a degree of certainty as to Ofcom's approach in order for them to develop network build plans and deliver Ofcom's objectives of the rapid rollout of full fibre networks and network competition.