

CityFibre

Dark Fibre Consultation

Consultation on adding dark fibre to the remedies for business connectivity markets

Response submitted by CityFibre Infrastructure Holdings PLC

Non-confidential version

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CityFibre's response to Ofcom's Strategic Review of Digital Communications

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1 Introduction

1.1 About CityFibre

- 1.1.1 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.
- 1.1.2 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.
- 1.1.3 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.
- 1.1.4 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).

- 1.1.5 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.



- 1.1.6 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.

The structure of this response

- (1) Introduction
- (2) Executive Summary
- (3) Context and Background
- (4) The CAT's Judgement
- (5) Ofcom's TC Statement
- (6) Ofcom's DFA Consultation

2 Executive Summary

2.1 Introduction

- 2.1.1 The context of this consultation is the quashing of the 2016 BCMR by the Competition Appeal Tribunal. The CAT found that there were fundamental flaws in the conduct of the BCMR and quashed it in its entirety. Ofcom's decision to issue the Temporary Conditions Statement (TC Statement) and the dark fibre access consultation (DFA Consultation) immediately after the Competition Appeals Tribunal (CAT) issued its Final Order and Ruling in November was therefore an unwelcome surprise to CityFibre and many other communications providers (CPs) in the UK.
- 2.1.2 CityFibre had expected Ofcom to immediately commence the reconsideration of the 2016 BCMR, as directed by the CAT, on receipt of the CAT's summary judgement in July. Indeed, we were concerned that Ofcom had not commenced the collection of up-to-date market data to enable that reconsideration. Ofcom has had plenty of time to collect market data to prepare for a full reconsideration but has chosen not to do so.
- 2.1.3 The DFA Consultation invites comments on the contents of the TC Statement, and this document therefore comments on both these documents. It is important to understand, however, that Ofcom is not consulting on the contents of the TC Statement. The conditions in the TC Statement are already in force, only the DFA remedy is subject to consultation. It is not clear whether this structural approach is designed to evade proper scrutiny of the analytical steps taken on market definition and SMP findings in the TC Statement, but as logically no remedy can be imposed without a firm foundation of market definition and SMP finding, it follows that Ofcom must also expect commentary on these parts of its analysis even if they are not being formally consulted upon.
- 2.1.4 The consultation period allowed in the DFA Consultation, although meeting Ofcom's minimum consultation period requirements, is extremely short. This is because the deadline falls between Christmas and New Year, in the middle of the holiday season when many staff, senior management and board representatives are not available to contribute or approve the responses by CPs. In reality, the consultation period finished around December 21st, when many companies closed their head offices for the holiday period. Given the importance of this consultation, CityFibre considers the consultation period much too short and does not understand why it could not have been extended to the 2nd week of January, offering CPs the opportunity to provide more considered and complete responses. Given the short consultation period and the timing of the deadline in the holiday period, CityFibre reserves the right to submit additional arguments and data during the month of January. In general Ofcom's conduct in rushing out the TC statement and providing an inadequate consultation period on the DFA remedy falls well short of the standards of conduct we would expect from a competent economic regulator.

2.2 The CAT's Judgement and Order

- 2.2.1 The Judgement quashed Ofcom's product and market definitions and the Order quashed the remedies in those markets. The Judgement made extensive criticisms of Ofcom's methods and processes in determining the relevant markets with regards to both product and geographic markets. The CAT did not replace Ofcom's findings with its

own, but remitted the entire 2016 BCMR to Ofcom for reconsideration. There is no doubt that the CAT intended Ofcom to go back and redo the 2016 BCMR.

- 2.2.2 The Judgement also finds that Ofcom did not take utmost account of the European Commission's Article 7 interventions in the BCMR, in which the Commission found that Ofcom should have defined more granular markets and applied differentiated remedies in different SMP markets to reflect the emergence of competition of new competing infrastructures.
- 2.2.3 Rather than reflect the methodological and procedural criticisms from the CAT and take on board the Commission's Article 7 comments, Ofcom's TC Statement relies heavily on the 2016 BCMR analyses and conclusions and makes no effort to reflect the Commission's comments. In CityFibre's view, the TC Statement (and the DFA consultation) reintroduces the vast majority of the 2016 BCMR via the back door. It would seem that Ofcom has no intention of reconsidering the 2016 BCMR.

Ofcom's Temporary Conditions Statement

- 2.2.4 The TC Statement redefines relevant markets susceptible to ex-ante regulation, performs SMP analyses on those markets and applies a set of remedies almost identical to those applied in the 2016 BCMR. The analyses presented in the TC Statement are perfunctory at best, they use old out-of-date market information, and they rely extensively on the analyses and conclusions set out in the now discredited 2016 BCMR.
- 2.2.5 The relevant markets defined in the TC Statement start with the markets defined in the 2016 BCMR and makes incremental changes to remove VHB circuits from the product market and to remove some central business districts from the geographic RoUK market. The CAT clearly intended Ofcom to start the market definition from the re-examination of market data, not simply to adjust the market definitions slightly. Ofcom has chosen to make adjustments that correspond to particularly egregious examples cited by the CAT where Ofcom's process failures in the BCMR had led to manifestly incorrect outcomes on the basis of evidence presented. The conclusion drawn by the CAT was that the processes should be reconducted to an acceptable standard using the correct methodologies: not that minor tweaks should be made to what is substantially the same set of market definitions and resultant remedies.
- 2.2.6 More worryingly, in Ofcom's rush to salvage something from the 2016 BCMR, it now seems intent on departing even from the basic tenets of well conducted market analysis. The SMP analysis in the TC Statement is fundamentally flawed. It relies on tests which are inappropriate and omits other significant tests. That Ofcom relies on the combined market share of the two largest providers in the BCM to determine whether BT has SMP in a specific relevant market is inappropriate and misguided. Further, to omit the examination of changes in market shares over time as part of the SMP assessment is a further flaw in Ofcom's SMP analyses. The resulting SMP markets are not fit for purpose as the basis for the imposition of any remedies, never mind remedies that cause changes to the market structure and harm to investment incentives.
- 2.2.7 Using the SMP markets, defined using discredited relevant market definitions as the basis and applying inappropriate SMP tests, Ofcom proceeds in the TC Statement to apply a near carbon copy of the remedies applied in the 2016 BCMR. Ofcom states that, as the 2016 BCMR remedies were not overturned by the court, they still stand and are appropriate for the newly defined SMP markets.

- 2.2.8 Ofcom thus ignores the CATs critique that remedies should only be determined and imposed once markets are properly defined. This sequence is critical to the proper conduct of regulation under the Common Regulatory Framework: first, markets are defined, then SMP analysis is performed and only then can appropriate and proportionate remedies be defined – therefore remedies applicable to different SMP markets from the 2016 BCMR cannot simply be transferred to the new SMP markets.
- 2.2.9 In applying the old remedies Ofcom also, again, ignores the Commission’s comments that remedies should be more nuanced to reflect the level and nature of competition in different geographies across the UK, even if BT still has SMP in all of those markets. The CAT found that Ofcom had not taken utmost account of the Commission’s comments and it is clear that Ofcom has again chosen to ignore the Commissions’ comments when applying remedies in the TC Statement. The failure to properly re-examine markets means that Ofcom ‘doubles down’ in this consultation on an approach which ignores evidence of growing infrastructure-based competition from the likes of CityFibre.

Ofcom’s use of emergency powers

- 2.2.10 Ofcom claims that, due to the existence of exceptional circumstances and the urgent need for Ofcom to act to safeguard competition and protect the interests of consumers, it has the right to impose the TC Statement under what amounts to emergency powers, without the need to consult with stakeholders in the UK, or with the Commission or BEREC.
- 2.2.11 CityFibre does not recognise that such circumstances exist and it is clear that the arguments presented in the TC Statement, in support of the deployment of these powers, do not demonstrate that the necessary circumstances exist. The quashing of the BCMR is certainly an embarrassment for Ofcom but the overturning on appeal of flawed decisions is a key component of the overall regulatory architecture of the CRF and as such can hardly be construed as an unanticipated ‘emergency’. Because Ofcom fails to define the ‘emergency’ to which it is purportedly responding, it is also not possible to comment on the remarkable period of time that this ‘emergency’ will apparently last – sixteen months - except to note that there is no precedent that we are aware of anywhere of an NRA making use of this emergency power for such an extended period of time under the CRF. On any reasonable analysis, it appears that the cited ‘emergency’ is no more than a convenient administrative device to evade the clear intent of the CAT that Ofcom reconduct the 2016 BCMR to an acceptable standard.
- 2.2.12 In addition to the criteria for the use of emergency powers not being present, Ofcom has not actively considered the available alternatives to the imposition of the TCs. Ofcom could have asked BT for voluntary undertakings, but chose to not do so. Ofcom provides no real justification for not doing so and has in the past relied successfully on such undertakings.
- 2.2.13 The reality is that Ofcom has created the situation where it claims that there is an unavoidable period of 16 months between the CAT’s Order and Ruling and Ofcom being able to complete a new BCMR. Ofcom could have started the preparations for the reconsideration of the 2016 BCMR as soon as it received the CAT’s initial judgement that the relevant market definitions were quashed. It could have started collecting up-to-date market data and liaising with stakeholders to ensure that it would be ready to commence that reconsideration as soon as the full Judgement was issued. Instead Ofcom chose to spend its time to prepare the TC Statement.

- 2.2.14 It is noteworthy also that Ofcom in fact does not intend to reconsider the 2016 BCMR at all. Instead it is simply embarking on the next BCMR (the 2019 BCMR) which was due to be conducted over the next 15 months in any case. Having re-imposed the majority of the 2016 BCMR via the backdoor through the TC Statement, Ofcom has effectively circumvented the Judgement and is continuing business as usual with the 2019 BCMR.

2.3 Ofcom's DFA proposals

- 2.3.1 CityFibre considers Ofcom's proposal to impose the DFA remedy defined for the 2016 BCMR on the newly defined (and flawed) SMP markets to be highly inappropriate. The DFA remedy was designed for a different market, which has now been quashed due to Ofcom not having followed the required methodologies and processes. How can Ofcom conclude that a remedy of that provenance is suitable for the imposition in the temporary framework Ofcom has created resulting from its defeat in a wide-ranging appeal of market definitions and remedies on the 2016 BCMR?
- 2.3.2 Ofcom's benefit calculations appear superficial and Ofcom omits significant costs and risks that would result from the imposition of the DFA remedy for the 12 months from April 2018 till April 2019, when the 2019 BCMR is expected to take effect.
- 2.3.3 Ofcom had devised a usage restriction for the DFA remedy in order to comply with the revised CISBO product market, excluding VHB circuits. The enforcement of that restriction, is however being handed over to BT to effect through contractual provisions with no realistic means for BT to police compliance with such provisions.
- 2.3.4 CityFibre's appeal included an appeal against Ofcom not imposing a duct and pole access (DPA) remedy either instead of or alongside the then proposed DFA remedy. Although that appeal has not been heard, due to the CAT quashing all of the remedies Ofcom had imposed in the markets for which it found that Ofcom had erred in their definition, the CAT found that Ofcom had also erred in not taking utmost account of the Commission's comments which advocated the application of DPA in areas where infrastructure competition was emerging.
- 2.3.5 For Ofcom to re-apply the DFA remedy without concern for its impact on infrastructure investment and to not consider the DPA remedy, nor the compatibility between the DFA and a potential future DPA remedy, effectively creates a situation where the imposition of a DPA remedy in the 2019 would be complicated by the incompatibility of the active-minus pricing of the DFA remedy and the likely cost-based pricing of a DPA remedy.
- 2.3.6 For what is likely to be very minimal benefits, and substantial risks, Ofcom's imposition of the DFA for a 12-months period is disproportionate and goes against the grain of good regulation.

Conclusion

- 2.3.7 In summary we have the remarkable position where Ofcom has put several firms to considerable cost in challenging a patently flawed BCMR: has lost the resultant appeal hands-down: and yet is now seeking, by a series of procedural ruses, to reintroduce most of its flawed analysis and to reimpose a remedy which is patently not fit for purpose. In doing so, it is once again choosing to ignore the advice it has received from the European Commission under the Article 7 procedure in flagrant violation of the findings of the CAT on this point. It is doing so against increasing market evidence that the strategic focus

of the 2016 BCMR was misconceived: more investment into new alternative telecoms infrastructure has been forthcoming since the publication of that statement than in any comparable period since the late 1990s. The direct contribution of investment to expanding competition in the BCMR is being held up solely by Ofcom's determination to continue to pursue a wrong-headed policy based on reuse of BT's legacy assets, not the creation of competitive conditions to spur sustainable infrastructure-based competition.

3 Context and Background

- 3.1.1 Ofcom's DFA consultation was issued on November 23rd 2017, as part of a set of three documents issued that day, all in response to the Order and Judgement issued by the CAT in relation to appeals by BT and CityFibre against Ofcom's 2016 BCMR Final Statement (2016 BCMR). The other two documents were 1) a revocation of certain measures imposed in the business connectivity markets, and 2) a Statement of temporary SMP conditions in relation to business connectivity services (the TC Statement). The DFA consultation invites comments on the TC Statement, although the TCs were effective with near-immediate effect and are in effect at the time of CityFibre writing this response.
- 3.1.2 The 2016 BCMR Statement was issued on April 28th 2016 and appeals were made to the CAT by BT and CityFibre on 26th June 2016. The appeals challenged Ofcom's BCMR decision and its decision making process in accordance with the law and Commission guidelines. The appeals included grounds relating to Ofcom's failure to follow EU and UK law and guidelines and provide the basis for a challenge to Ofcom's process in defining relevant product and geographic markets as well as to the proportionality and appropriate nature of remedies defined and applied. This failure compromised the quality of decision making and led Ofcom to fail to take into account relevant considerations, and to remedies being applied that should not have been applied to the business connectivity market (BCM) through the 2016 BCMR¹. Appeals included against the design of the Leased Lines Charge control (LLCC) in the light of the obligations in the law, and a challenge to the appropriate nature and proportionality of the remedies Ofcom chose to introduce such as the dark fibre access (DFA) remedy, and Ofcom's decision to not apply at duct and pole access (DPA) remedy as well as a particular challenge to Ofcom's further process failure in failing to take Utmost Account of the views of the EU commission when making the BCMR.
- 3.1.3 Due to logistical issues at the CAT², and its interpretation of its jurisdiction, the appeal against the LLCC remedy was heard first, by the CMA. This sequence was in many ways illogical as the suitability of remedies naturally depend on the markets identified and the market failures identified in those markets, and the proportionality or otherwise of remedies fashioned and appropriate to the circumstances. The CMA found that CF had put forward a credible case [36], but that it had the power and discretion to choose among a range of different charge control mechanisms, including the use of CCA FAC. The CMA also caveated its findings by stating that the conclusion was reached in relation to the markets as defined in the 2016 BCMR.
- 3.1.4 The CAT decided to hear the case in two stages, recognising that if it found that Ofcom had failed to comply with the law and failed to adopt the appropriate process in stage one (market definition) that would mean that relevant and appropriate and

¹ See for example City Fibre's Notice of Appeal

² Given at the time as being the CAT's inability to source panel members to work with Judge Snowdon on the appeal.

proportionate remedies could not possibly be maintained and the entire case would have to be remitted. If, on the other hand Ofcom were found to be compliant then a remedies hearing would be needed to examine whether the remedies adopted were appropriate and proportionate. In the event, because Ofcom so comprehensively failed to comply with the law, no remedies hearing was needed.

- 3.1.5 On July 26th 2017 the CAT issued its decision on the Final Statement of the BCMR, finding that Ofcom had erred in its conclusions with respect to market definition, and that its errors were so extensive that the CAT could not issue directions but had to quash Ofcom's decisions. The CAT issued its decision as a short statement, pending the production of a full reasoned judgement, because, among other reasons, its decision needed to be published as soon as possible following the hearing to ensure that the remedy Ofcom had sought to impose was not introduced.
- 3.1.6 The hearing took place in 16 sitting days between 10 April 2017 and 24 May 2017. On 26 July 2017 the Tribunal handed down a short ruling setting out its findings ([2017] CAT 17). On 6 September 2017 Mr Justice Snowden made a reasoned order ([2017] CAT 20) granting permission to CityFibre to amend its Statement of Intervention in BT's Appeal and dismissing an application made by the CP Group interveners for certain costs connected with that amendment.
- 3.1.7 On 10 November 2017 the Tribunal handed down its judgment ([2017] CAT 25 the "Judgement") setting out its reasons for its ruling of 26 July 2017. On that date the Tribunal published a provisional non-confidential version of the Judgment with the contents of Section F(5) redacted. The Tribunal will review the confidentiality of the material referred to in this section in due course.
- 3.1.8 On 20 November 2017 a hearing was held in private and Mr Justice Snowden made an Order giving effect to the Tribunal's ruling of 26 July 2017 and made a ruling refusing to delay the making of that order ([2017] CAT 26). On 23 November 2017 the Tribunal released this ruling for publication.
- 3.1.9 A CMC took place on 4 December 2017 to deal with costs. Judgment on costs is pending.
- 3.1.10 In its Judgment the CAT also found that Ofcom had not taken 'utmost account' of the Article 7 comments provided by the European Commission (the Commission) in April 2016. The Commission's comments went to the entire 2016 BCMR including Ofcom's approach to the process of interpretation and implementation of EU law and the way it addressed the issues of market definitions and remedies.
- 3.1.11 This response should be read in this context. Ofcom's TC Statement and DFA consultation should be considered in the light of the CAT's findings, so this response does not only analyse Ofcom's TC Statement and DFA consultation as stand-alone documents, but in the context of whether they accurately and appropriately implement the CAT's findings, both in letter and in spirit.

4 The CAT's judgement

- 4.1.1 The Judgment, finalised and published dated 10th November 2017 makes numerous findings. Most of these findings are not, as Ofcom asserts, related to market definition alone, but relate to the failure by Ofcom to properly apply the methodology and process called up in law in the correct way. There are three key steps to the approach that the law requires, firstly, gather evidence, secondly identify relevant product and geographic markets and substitutes within them, and finally assess the competition taking place in those relevant markets as a precursor to the identification of appropriate and tailored and proportionate remedies.
- 4.1.2 A fundamental process error is also identified in the Judgement provided below. The Judgement is in the context of the Ofcom failure to follow the sequence and methodology required in the law. Its finding is expressly relevant to whether the 2016 BCMR is properly and legally sound. This process failure is also compounded by the fact that, in addition, Ofcom has to take utmost account of the position of the EU Commission in following the law and EU guidance. The CAT expressly found that Ofcom failed so to do. In the Final Statement, Ofcom simply restated its position and failed to take the Commission position properly into account in it's the context of the sequence, methodology and process required by the law. Ofcom suggests in various places in the decision and statement that it has fulfilled its EU legal requirements. This is very clearly not the case.
- 4.1.3 We deal below with each point in turn.
- 4.1.4 In the section dealing with the scope of the Judgement it specifically referred to City Fibre's appeal and challenge to Ofcom's BCMR in paragraph 14. That challenge was not limited to market definition, neither does the CAT limit its Judgement with reference to City Fibre's challenge to market definition. The Judgement clearly sets out that Ofcom has failed to apply the proper sequence and process from market definition to the definition of appropriate and proportionate remedies. The Judgement also finds that Ofcom had erred in not taking utmost account of the Commission's Article 7 comments, which went to the proportionality of remedies depending on the competitive conditions in individual SMP markets.
- 4.1.5 Ofcom raised with the Tribunal that certain evidence that had been submitted related to the Appeal lodged by City Fibre and following City Fibre's withdrawal from the hearings, the Tribunal had no jurisdiction to address the question of the CBDs as a separate geographic market from the rest of the UK.³ The Tribunal rejected Ofcom's contention and to put the matter beyond doubt allowed BT to amend its pleadings⁴.
- 4.1.6 In remitting and reconsidering the product market, the Tribunal considered that both product market and geographic markets should be reconsidered together⁵. In

³ See para 137 CAT judgement of 10th November 2017

⁴ Para 144 Ibid

⁵ Para 146 Ibid

determining the issues on product and geography the CAT refers to the process of evidence gathering that Ofcom should adopt. The types of evidence that need to be taken into account and the appropriate approach that should be adopted in accordance with the law is set out in the Judgement. The Tribunal then makes findings that Ofcom failed to gather the relevant evidence, misconstrued or misunderstood the relevant evidence ⁶and, because of its methodological failures, failed to comply with its legal obligations.

4.1.7 For example, the Tribunal finds that the purpose of defining markets is to identify the market boundaries for a further analysis of the effective competitive conditions and, if the markets are not found to be effectively competitive, then appropriate and proportionate remedies can be identified and tailored to address the problems identified. The example given in the Judgement was that, within a particular geography the effectiveness or degree of competition could be at a level of intensity that was insufficient but, if so, Ofcom's remedy would need to be more closely tailored to address the particular conditions in particular ways. One or more players may have market power and, a finding of the relevant level of competition, or lack of competition, is required before remedies can be identified and tailored to meet the specific issue at hand. As noted in the Judgement, the forward looking review required by the legislation, involves Ofcom in assessing the forward looking position and that requires that ***"information about future roll out plans from the incumbent operator and its main competitors need to be collected"***. ⁷

4.1.8 The CAT was at pains to emphasise that the assessment of the market was not an end in itself but a means to undertaking an analysis of competitive conditions. The assessment of the competitive conditions is then a further and necessary step, as a precursor to the imposition of remedies (if any). We set out below parts of the Judgement that make the express points about the sequence and methodology below. At para 392 the CAT makes the following observation:

"It is worth recalling the sequence of analysis mandated by section 79 of the 2003 Act (see paragraph 64 above), together with para 55 of the SMP Guidance:

"55. Once the relevant product market is identified, the next step to be undertaken is the definition of the geographical dimension of the market. It is only when the geographical dimension of the product or service market has been defined that a NRA may properly assess the conditions of effective competition therein."

4.1.9 In paragraph 393 of the Judgement the CAT states: *"In short, the relevant legislative framework and guidance makes clear that market definition should precede the analysis of SMP (which should in turn precede the question of remedies)"*

⁶ See for example para 190-191 reviewing evidence and the entire assessment of product markets, see also para 222 where Ofcom was found to have misunderstood the "compelling evidence" from BT. Para 246 refers to the BDRC survey relied on by Ofcom and was criticised for providing scant support for Ofcom's contention relating to switching. At para 336 Ofcom is found to have failed in its methodology on testing links in the chains of substitution.

⁷ See CAT judgement of 10th November sections G "What is the purpose of defining geographic markets?" Para 351 et seq paragraph quoted above is from BEREC Common Position quoted therein (para 133).

- 4.1.10 It then reviewed the evidence put forward by Ms Curry for Ofcom and made the following finding in paragraph 394 (*emphasis added*):

“Instead of rejecting the CBDs as a separate geographical area on the basis of what Ms. Curry suggested was a provisional view as to the likely findings on SMP and remedies, we consider that the correct approach would have been for Ofcom to form its view as to the appropriate geographical areas first and independently of the issues of SMP and remedies, and then to conduct its SMP and remedies assessments in respect of those separate areas.” (emphasis added)

- 4.1.11 In 395 the CAT finds that the problem with the approach Ofcom took is the consequences for its remedy assessment:

“...Instead, by placing the CBDs together in the same geographic market as the RoUK, Ofcom precluded the possibility that a different SMP finding or different remedies might be appropriate in those urban areas.”

- 4.1.12 The CAT reiterated its concerns about mixing up the sequence of assessment with remedies at para 396 of the Judgement:

“The points that we have made concerning Ofcom’s treatment of the CBDs were reflected in the observations of the European Commission in its letter to Ofcom of 22 April 2016 commenting on Ofcom’s draft statement. The Commission’s comments under the heading, “CISBO geographic market definition and remedies” were summarised in the FS as follows:

“4.456.1 In its comments on the draft Statement, the Commission said that it welcomed our decision to deregulate or impose lighter remedies in areas where infrastructure-based competition has developed in recent years. However, it commented that a more granular differentiation of remedies in areas where there was some actual infrastructure-based competition could reduce the likelihood that CPs would reduce investment or even exit the market.

4.456.2 It considered that our approach could be developed further “in order to more accurately reflect the competitive conditions of a given area”. In particular, it considered that we could develop a test, similar in concept to that used to define the boundary of the CLA, but with different parameters, which could then be used to identify other areas where the lighter remedies could be applied. It suggested that, if this were done, it might then show that areas such as the five CBDs were also suitable for lighter remedies.

4.456.3 The Commission therefore asked us to “consider...a lighter set of remedies, not only in the LP area, but also other parts of the UK territory, including the five CBDs, based on a set of clear criteria reflecting all relevant parameters of the state of infrastructure-based competition therein.””

- 4.1.13 At paragraph 397 of the Judgement the CAT states:

“In the FS, Ofcom indicated that it had considered the Commissions comments, but it did not adopt them. Ofcom set out its reasons at FS 4.456.4 to 4.456.15. The crux of Ofcom’s rationale for not adopting a more granular approach and differentiating between the CBDs and the RoUK in its definition of geographic markets was set out in the following two sub-paragraphs:”

[not repeated]

- 4.1.14 At paragraph 398 of the Judgement, in relation to Ofcom’s treatment of the comments received from the Commission from the Article 7 review procedure, the CAT stated: *“These paragraphs amount to no more than a reiteration of Ofcom’s earlier views, and we have already dealt with each of the points that Ofcom made. To repeat, we consider that when considering the similarity of competitive conditions between the CBDs and the RoUK, Ofcom wrongly interpreted its own metrics as regards the presence of infrastructure across the whole of the CISBO product market that it had defined (i.e. including EFM and not limited to VHB), that it often failed to make the correct comparison between the CBDs and the RoUK which it placed into the same geographic market, and that it erred in allowing its decision on the definition of geographic markets as regards the CBDs to be influenced by its provisional assessment of SMP and remedies.”*
- 4.1.15 At paragraph 399 of the Judgement, the CAT states:
- “For those reasons, we consider that Ofcom also erred in adhering to its approach notwithstanding the view expressed by the European Commission that it ought to adopt a more granular approach to reflect more accurately the competitive conditions in other areas of the UK, including in particular the CBDs. In doing so, Ofcom failed to take “utmost account” of the Commission’s views as required by Article 7(5) FD.”*
- 4.1.16 It is important to re-read and appreciate the point that the CAT is making here. The Judgement reviewed the legal framework and Ofcom’s obligations. In summary it found that a central legal failing was Ofcom’s approach to the sequence of things it has to do. It was mistaken in allowing its decision on the determination of geographic markets to be influenced by its provisional assessment of SMP and remedies.
- 4.1.17 As outlined above, the CAT’s finding in its Judgement cannot be artificially construed as merely requiring some minor adjustments to market definition, as asserted by Ofcom in the Decision and Statement in question here. On the contrary, the findings in the CAT Judgement are that Ofcom adopted the wrong sequencing and methodology and put its focus on the remedies before the legal requirements to properly identify markets, assess the conditions of competition within them and then assess remedies. It follows that carrying over remedies which rest on an entirely flawed process for conducting the market review is not an acceptable approach for Ofcom to now adopt.
- 4.1.18 As described above, Ofcom similarly cannot assert that it has fulfilled its EU legal obligations when it has not done so. The CAT ruling makes an express finding that Ofcom did not properly take the Commission’s views into account and has simply re-stated its previous position. In its statement and decision Ofcom seeks to rely on the BCMR in part. However, the calling up of a flawed decision, improperly made, does not provide any legally sound basis for a new decision, and cannot provide any basis for the statement that Ofcom has fulfilled its EU obligations.

4.2 CAT Ruling and Order.

- 4.2.1 In the CAT's rationale for the ruling on the form of the Order⁸, paragraph 13 of its Ruling following legal argument is worth recalling (emphasis added):

*“First, nobody has actually suggested that the draft order which has been produced does not properly give effect to the Tribunal’s decision. There is, I think, logical force behind the point made by Ofcom that if, as the Tribunal has held, Ofcom erred in its determination of the product market definition and the geographic market definition and needs to reconsider those market definitions, **then the edifice of the finding of SMP and the imposition of remedies which has been constructed upon those determinations must logically fall away.** The proposed order is therefore one which it would be appropriate for the Tribunal to make.*

- 4.2.2 The ruling specifically deals with the on-going status of the BCMR. It is described, by Ofcom, and accepted by the Judgement that the ***“edifice of the finding of SMP and the imposition of remedies which has been constructed upon those determinations must logically fall away”***.

- 4.2.3 Where the foundations have been found to have been constructed illegally, as here, the imposition of remedies, constructed on defective foundations, and the edifice on which it was built, have to logically fall away.

- 4.2.4 It was argued by some of the intervenors at the secret hearing before the Order was made that partial validity or some continuing validity of the 2016 BCMR would be a preferable option. In responding to this argument, the Ruling goes on to state in paragraph 14:

“In that regard, I am not attracted by the suggestion which has been made by some of the intervenors that, given a little more time, an alternative and more nuanced or partial quashing of Ofcom’s determinations could be devised, which would, in effect, leave standing some of Ofcom’s determinations and resultant regulations, whilst striking other parts down.”

- 4.2.5 We know from this ruling and the arguments that were put to the Tribunal about the partial validity or continuing validity of part of the BCMR was rejected. As a result it is not open to Ofcom to argue or rely on the continuing validity of parts of the BCMR. However, Ofcom appears to be saying, in a number of places in the Consultation and Statement that the 2016 BCMR has some validity and can be relied upon. This is incorrect. In legal terms the decision was quashed; it is void. If Ofcom seeks to continue to rely upon the 2016 BCMR it is compounding its original error of starting with a remedy that it wants to introduce and working backwards. It is also now by failing to take into account the Judgement and the ruling on the order giving effect to the Judgement.

- 4.2.6 Ofcom appears to be compounding previous errors in relying on parts of the BCMR, a previous flawed decision that has been quashed by the CAT. The CAT expressly quashed Ofcom’s decision on the basis that it adopted the wrong methodology and

⁸ Order of the CAT in case 1260/3/3/16 British Telecommunications vs Ofcom, 20th November 2017

sequence of assessment. It is inherently incorrect for Ofcom to seek to rely on part of the 2016 BCMR as having continuing validity as it does; or to claim as it does that it has fulfilled its EU obligations, where the Judgement expressly found that it did not do so. Such an approach fails to understand the logic of the Judgement or the underlying law. To put the matter beyond question, the CAT was asked whether the Ruling meant that the BCMR has any continuing validity and made an express finding that it did not.

5 Ofcom's TC Statement

5.1.1 Questions 2.1 through 2.4 in the DFA consultation asks CPs whether they agree with the product and geographic market definitions, and SMP findings as set out in the TC Statement. Ofcom does not invite comments on the remedies applied through the TC Statement. In this section, CityFibre presents its analysis of and comments on the contents of the TC Statement, including the remedies applied, in the context of the CAT's findings and Ofcom's powers and duties.

5.2 Ofcom's use of emergency powers

5.2.1 The TC Statement has been implemented by Ofcom through specific provisions. These provisions purport to enable Ofcom to introduce measures without consultation (with stakeholders and the Commission) in cases where Ofcom reasonably considers that there are exceptional circumstances and where there is an urgent need safeguard competition and protect the interests of consumers⁹. It is CityFibre's strong view that Ofcom has not and cannot justify the use of these emergency powers in the current circumstances. Paragraphs 1.19 to 1.38 in the TC Statement set out Ofcom's justification for the use of emergency measures, we make certain points on the use of these powers below, without prejudice to further or other points we may make in due course:

Ofcom's urgent need to act

- 5.2.2 Ofcom argues that the revocation of the CISBO regulations in the 2016 BCMR would create a 'regulatory lacuna' which BT would be able to exploit to the detriment of competition and end consumers.
- 5.2.3 Even if some temporary safeguard measures may be desirable to freeze the status quo pending the re-assessment required by law, Ofcom should recognise that BT has on other occasions been found to be dominant and does in any case remain subject to competition law provisions, and has previously provided undertakings that restrain it from abuse of that dominance. It has an extensive compliance policy in place and collects evidence and information that would enable swift action by Ofcom in the event of any incipient abuse of dominance.
- 5.2.4 If Ofcom had evidence of urgent changes and effects on competition arising in July 2017 it could have provided swifter certainty to the markets in July by freezing the position while reviewing and redoing the BCMR and imposing 'safeguard' remedies to prevent further distortion to the market pending the outcome of the remittal.
- 5.2.5 Ofcom states that it has considered the obvious alternative of seeking voluntary undertakings from BT concerning its conduct (something which Ofcom has relied upon in other regulatory proceedings in the past), but considers that approach inappropriate here, for reasons that are unclear. City Fibre therefore considers Ofcom's Temporary Conditions to be disproportionate to the risks resulting from the temporary absence of ex-ante regulation.

⁹ See Section 80A(2) of the 2003 Communications Act.

5.2.6 Ofcom restates in paragraph 1.23 of the TC Statement concerns identified in the 2016 BCMR, and refers to different types of abuse of market power that BT could engage in. The evidence used as a basis for considering those risks arising is referenced back to Ofcom's findings in the 2016 BCMR, which were challenged. It further states that, as the revised market definitions determined in the TC Statement cover approximately 96% of the circuits originally covered by Ofcom's 2016 BCMR CISBO market, those same concerns remain valid.

"a) concerns that, in the absence of appropriate ex ante regulation, BT would not make access to its networks, services or associated facilities available on terms that would secure efficient investment and innovation, both in the relevant wholesale markets and in the related downstream retail markets;

b) concerns that, in the absence of appropriate ex ante regulation, BT would favour its downstream retail businesses to the detriment of their competitors in the relevant retail markets (including by price or non-price discrimination);

c) concerns that, in the absence of appropriate ex ante regulation, there is a relevant risk of adverse effects arising from BT fixing and maintaining some or all prices at an excessively high level or imposing a price squeeze; and

d) concerns that, in the absence of appropriate ex ante regulation, there is a risk that the poor quality of service offered by BT in the provision and repair of wholesale services will impact detrimentally on all downstream providers of leased lines, including BT's retail businesses, and ultimately to the detriment of consumers"

5.2.7 The basis for Ofcom's concerns are quite questionable. They are theoretical and not evidenced with contemporary data. BT is contractually committed to serve its customers. It has a commercial imperative to obtain new business and can be expected to do so. In the circumstances BT cannot reasonably be expected to either withdraw supply or fail to supply a reasonable customer need. The expression 'access to its networks' needs to be more fully defined perhaps – while it may be relevant and appropriate in other circumstances it does not appear that there is an evidenced basis for this issue in this market context.

5.2.8 Moreover, BT continues to operate under existing undertakings requiring a non-discriminatory supply. Its commercial offerings for services are contracted for on a long term basis by customers. We understand that its systems and processes are difficult to change in the short term. There may be a longer term issue but, given the difficulties in practice, in short terms changes arising, and no evidence of their doing so to date, this does not appear to be a basis for the use of temporary emergency powers.

5.2.9 The risks outlined, do not appear to be matters that can or will arise in the short term and provide no basis for urgent or exceptional measures. The risk that BT may increase prices or impose a price squeeze also needs to be set in the market context for the supply of leased lines.

5.2.10 It is unclear here what, if any, process Ofcom has conducted to identify and address the urgency of the situation in the market for customers generally, given the need at law to do so in the interests of competition and consumers generally. That obligation would suggest a process to at least check that the measures are needed and are in the interests of all concerned.

- 5.2.11 CityFibre notes that it has received no approaches from Ofcom since July seeking further information about the nature and extent of our network, nor of the significance of the July £200m raise which we explicitly stated was intended in part to fund expansion into new cities, should regulatory conditions permit. This is hugely surprising given that the criticisms of the CAT go directly to the question of Ofcom’s inadequate understanding of prevailing market conditions and the extent of infrastructure-based competition.
- 5.2.12 For Ofcom to consult while imposing a series of leased line remedies appears to be doing the work the wrong way around. By contrast with the approach adopted by Ofcom, a more reasonable approach would be to freeze the position pending the full and proper market review demanded by the CAT remittal order. That could have been started in July. In the meantime, Ofcom could have maintained a set of ‘safeguard’ remedies that do not have the market-distorting effects of the remedies proposed challenged and found wanting in the BCMR. These could be achieved under voluntary undertakings.
- 5.2.13 In paragraph 1.25 of the TC Statement, Ofcom states:
- “As a result, Ofcom considers that a period without regulation would carry the risk of significant negative effects on competition and consumers:*
- a) CPs that need to purchase new leased lines or upgrade existing ones, and that are not able to defer purchases until such time as Ofcom is able to put regulation back in place will be unprotected from the competition problems Ofcom has identified;*
 - b) Some CPs may defer purchases that would otherwise have been made during the unregulated period (given they are unprotected from the exploitation of market power during that time). However the impact of this may distort competition and harm users. For example, delaying network upgrades in anticipation of future re-regulation means that in the interim a CP offers a lower quality service to its customers.*
 - c) BT’s existing leased lines customers may be adversely affected insofar as BT has the scope to vary the price they pay (e.g. because their contract comes to an end) or because they are affected by poor standards for the repair of wholesale services.*
 - d) BT could swiftly begin favouring its own downstream businesses.”*
- 5.2.14 The concerns listed above are what Ofcom uses as its justification of having any “urgent need to act in order to safeguard competition and protect the interests of consumers”¹⁰. CityFibre agrees that, in principle, an unregulated company with market power could abuse that market power. However, the relevant question here is: What is the proportionate action required in the context of the products and market and competitive consequences in question to prevent this from happening and can that be done without resorting emergency powers?
- 5.2.15 When reviewing the urgency to act, it is important to look at past behaviour of the (presumed) dominant company:

¹⁰ See TC Statement paragraph 1.27.

- a. Has it a history of attempting to circumvent regulatory restrictions, or
 - b. Does it have a history of cooperation with the regulator in the form of voluntary undertakings?
- 5.2.16 The evidence, although not referred to by Ofcom, is that BT has a good track record.
- 5.2.17 Further, it is important to consider the proportionality of any actions taken to prevent abuse of dominance during the period while Ofcom reconsiders the 2016 BCMR in light of the CAT Judgement:
- a. Should those actions be designed to safeguard against a deterioration of the prevailing circumstances at the time the actions are taken, or
 - b. Should they seek to implement decisions taken in a BCMR that has been found to be flawed?
- 5.2.18 The analyses presented in the TC Statement show that Ofcom has had considerable time since the CAT's Ruling in July 2017 until the publication of the TC Statement on November 23rd knowing that the decision had been quashed.
- 5.2.19 As outlined above the CAT decision was taken in the expectation that remittal would give rise to work being conducted within Ofcom to comply with its legal process and obligations correct the errors made. In the meantime the inappropriate remedies would not be introduced. Once proper and appropriate assessments of competition and the competition problems at issue are identified, then remedies can be defined and applied to solve the problem identified.
- 5.2.20 Instead of asking for up to date information about the current market circumstances, Ofcom appears to have re-examined its data from the 2016 BCMR process and, taking into account what it knew of the Judgement, produced rough and ready 'new' market definitions for the two product markets in question as well as the geographic markets. Ofcom states that it has taken account of information provided through the appeal process. However, the information considered during the CAT appeal was limited to only issues that were specifically raised in the grounds of appeal, so any new information obtained during the appeal in relation to the market, would by definition be limited. It does not replace the need to obtain fresh and up to date evidence on which to base a decision.
- 5.2.21 In accordance with the CAT decision, on remittal Ofcom should have commenced a reassessment in accordance with the correct sequencing and methodology and do its work properly in view of new data taking properly account of the CAT Ruling, so as to be prepared to perform the necessary analyses to determine new markets once it has received and analysed the responses to requests for information and conducted robust market analysis.
- 5.2.22 Obtaining up to date market information is not a very difficult task. As an industry specific regulator Ofcom can be expected to have the information at its fingertips, or at least know where to look when needed. Ofcom has explicit powers under s.135 of the Act to request information from CPs. Had Ofcom looked for information and evidence it would have been in a position to complete its analyses relatively quickly after the receipt of the reasoned Judgement, enabling it to propose revised market definitions, SMP findings and remedies for comments by stakeholders in a transparent manner. Had Ofcom pursued

that approach, then it is clear that there would be a period of time between the CAT's final Order and the completion of the consultation process (of perhaps 4-6 months).¹¹ (There is still time to put this right).

- 5.2.23 Pending the full investigation of the facts in accordance with the CAT remittal, Ofcom could have imposed the non-specific remedies that had existed in the previous period of regulation of the BCM (that is the period of 2013 to 2016), thus ensuring that important provisions such as non-discrimination and regulatory costing and accounting obligations were in place. This option was specifically identified by the Commission in its letter to Tim Cowen dated October 12th 2017.
- 5.2.24 If Ofcom had concerns that BT would exploit the lack of price regulation for that short period, it could have approached BT to seek a voluntary undertaking to not increase prices during the period. It is CityFibre's understanding that BT would have been willing to entertain such a request and, further that BT's current Undertakings impose obligations of non-discrimination and provision of wholesale access on an EoI basis. Whilst the 2016 BCMR included an aggressive Leased Lines Charge Control (LLCC) that was designed to half BT's wholesale leased lines prices during the 3-year period, the lack of price reductions for the short period outlined below, could have been easily compensated for once the new markets and remedies were introduced – should the conclusion be that the aggressive LLCC would still be appropriate and proportionate.
- 5.2.25 As outlined above, it seems entirely possible and rational that Ofcom could have taken a very slightly different course of action, which would have resulted in a much shorter period without specific ex-ante regulation and for which period Ofcom had entirely appropriate options to ensure that BT would not be in a position to take advantage by acting anticompetitively in any manner. And it should be recognised that alongside these short term measures, BT would remain subject to competition law provisions prohibiting it from abusing its dominance in any market.
- 5.2.26 CityFibre therefore considers that Ofcom has itself constructed the situation for which it has chosen to implement emergency measures. Ofcom now says that it cannot undertake the proper review of the BCM quicker than by the end of 2018, at the earliest and therefore has imposed the TCs for a period until the end of March 2019 – coincidentally the exact time the 2016 BCMR was due to be replaced by a revised market review. It is in fact CityFibre's understanding that Ofcom has no intention of re-doing the 2016 BCMR. Ofcom is ignoring the Judgement and is simply starting the new BCMR process as was already scheduled in Ofcom's Annual plan. In a meeting with Ofcom, CityFibre asked Ofcom how it intends to implement the CAT's findings for the 2016 BCMR and Ofcom replied that it would not make sense to redo the 2016 BCMR as it has to do the next BCMR now in any case, so it will simply consider the CAT's findings¹². It is clear therefore that Ofcom is not and will not be undertaking a reconsideration of the 2016 BCMR.
- 5.2.27 CityFibre strongly disagrees with Ofcom's position. Without prejudice to any future submissions that CityFibre may choose to make in this consultation or elsewhere, Ofcom

¹¹ Other bodies such as the CMA and EU Commission and other NRAs conduct market reviews in similar periods.

¹² Ofcom's annual work plan gives no indication that it will be undertaking a reconsideration for the 2016 BCMR.

could clearly have deployed the process outlined above, which would have enabled it to freeze the status quo ante, do its work properly and to take full account of the CAT's findings within a relatively short period. This would have avoided the need for remedies which rest on out of date information and which distort the market and cause harm to competitors such as CityFibre, as acknowledged by the Competition and Markets Authority¹³. CityFibre strongly disagrees that Ofcom has a justified urgent need to act to safeguard competition and protect the interests of consumers in the form it has, and believes that Ofcom's approach amounts to a failure to give due regard to the CAT's findings.

The presence of exceptional circumstances

- 5.2.28 Ofcom claims in paragraphs 1.29 through 1.32, that exceptional circumstances exist, which justify its recourse to the use of emergency powers.
- 5.2.29 As a starting point the exceptional measures proposed are to be put in place for a considerable period of time. However, both the wording of the provision on which Ofcom is relying, and the precedent use of these powers in other jurisdictions makes clear that these powers are meant to be in place for a temporary period only. They are not designed to be used to bridge a gap between a finding of a regulatory failure and the next cycle of market review.
- 5.2.30 By definition the circumstances are not exceptional if the circumstances for the use of the measures are dealing with the usual regulatory cycle of review.
- 5.2.31 CityFibre disagrees that exceptional circumstances exist here. The scheme of the law clearly allows for appeals against market review decisions and for the effect of an appeal to be the quashing of a market review decision. This is not an 'exceptional circumstance' but something quite clearly provided for and anticipated in law.
- 5.2.32 Ofcom further states in the same paragraph that "*the result is that although it was accepted that Lower Bandwidth CISBO services should be regulated in most of the country, that regulation would no longer be in place*". The CAT did not find that Lower Bandwidth CISBO services should be regulated in most of the country. It found that Ofcom was wrong to find that there was no break in the chain of substitution between 1Gbps and 10Gbps services and that Ofcom had erred in determining the geographic markets. Ofcom's claim that this somehow infers that services of 1Gbps and below should be regulated is also not supported by the CAT's findings. Whilst this could be the conclusion from a revised market definition and SMP analysis, Ofcom cannot jump to this conclusion without following the sequence and process, conducting the exercise properly (recognising the fundamental flaws identified by the CAT in the 2016 BCMR approach), and collecting up-to-date data to ensure that the analysis recognises the substantial change in market conditions since information was gathered for the 2016 BCMR.
- 5.2.33 To assume market power as a basis for exceptionality and the use of emergency powers is a non sequitur and seems to flow from a straightforward 'category error' in Ofcom's thinking. The natural condition of the market is not that it is regulated, rather regulation

¹³ See CMA final determination para 3.80

is justified in the 'exceptional circumstance' of there being a finding of Significant Market Power. As the flaws in the conduct of the BCMR were so extensive, it follows that Ofcom cannot rely on any part of its previous examination of market conditions or its findings of SMP. As we outline above, if it is contended that even without a well-founded SMP determination there is a presumption of dominance on BT's part, the correct way to address this would be to seek some form of undertaking from BT as regards its behaviour in the interim combined with a properly conducted but expedited remedial market review.

5.2.34 Further, in paragraph 1.30, Ofcom claims that as the remedies in the 2016 BCMR had been subject to full domestic and EU consultation, interested parties had had their opportunity to comment and Ofcom its opportunity to consider such comments. Here Ofcom ignores three very important factors:

1) several of the remedies were appealed and would have been heard by the CAT, had Ofcom not erred so spectacularly on market definition matters. Market definition ultimately underpins the remedies under challenge and consequently the CAT made it clear that it considers it unnecessary to hear the appeals on remedies as those remedies were also quashed due to the underpinning market analyses having been found faulty and the resulting market definitions quashed;

2) the Commission expressed concerns at Ofcom's 2016 BCMR remedies, recommending more differentiation of remedies where emerging competition was in evidence and a preference for the application of a DPA remedy instead of or alongside Ofcom's preferred DFA remedy. The CAT specifically stated:

"the Commission notes that OFCOM identified boundary test criteria for the identification of competitive areas, without at the same time providing clear characteristics which would qualify other areas in the UK for the imposition of lighter remedies"¹⁴; and

3) Remedies can only be appropriate if resulting from a process of identifying potential market failures and targeting remedies that would overcome such market failures. Having not gone back and assessed the relevant product and geographic markets, or competitive effectiveness within their proper boundaries, and then addressed its mind to appropriate and proportionate remedies, Ofcom is wrong to simply assume that the same problems exist or the same remedies would be relevant, let alone appropriate or proportionate.

5.2.35 For example, having found that some BCDs should no longer be part of the RoUK market, Ofcom also found that some were still not sufficiently competitive to be excluded from the RoUK SMP market, but it is clear that a significant level of competition does exist in those CBDs (and likely in a number of other locations which Ofcom had not identified in its 2016 BCMR analysis) and therefore those markets are clearly prospectively competitive. As advised by the EU Commission, different remedies are likely to be appropriate for markets that are prospectively competitive than for markets without effective competition that are dominated by a single player.

¹⁴ Commission comments pursuant to Article 7(3) Notification dated 22 April 2016

- 5.2.36 Lastly, in respect of Ofcom's justification of the presence of exceptional circumstances, Ofcom states in paragraph 1.31 b) "*BT was found to have SMP in the Lower bandwidth CISBO market, then called the AISBO market, in all parts of the UK except the Hull area, in all previous BCMRs. The only change to the SMP findings for these products in the 2016 BCMR Statement was the finding that no CP had SMP in the CLA*". Here Ofcom again relies on its flawed 2016 BCMR market definitions and SMP analysis to justify why it is a foregone conclusion the Lower Bandwidth CISBO services need to be regulated throughout most of the UK. The circularity of this argument simply does not withstand scrutiny.
- 5.2.37 In conclusion, CityFibre disagrees that Ofcom's unsubstantiated presumption that Lower Bandwidth CISBO services must be regulated across most of the UK gives rise to exceptional circumstances. As set out above in the section discussing Ofcom's claims that it has an urgent need to act, there were perfectly reasonable options available for Ofcom to address the situation arising from its flawed analyses, processes, methodologies and conclusions of market definitions in the 2016 BCMR.

Ofcom's review of alternative approaches

- 5.2.38 Ofcom does, very briefly, consider alternatives it could have chosen to the use of emergency powers. In paragraphs 1.33 through 1.38, Ofcom dismisses:
- 1) the use of a consultation period of less than 1 month; and
 - 2) obtaining voluntary commitments from BT.
- 5.2.39 CityFibre agrees that a very short consultation period would not be appropriate, but does not understand why Ofcom considers that that would be necessary. As outlined earlier in this section of our response, CityFibre considers that Ofcom could have produced a consultation document and consulted appropriately within a timeframe of 4-6 months, a period during which safeguard measures could be deployed without any significant disadvantage to competition or consumers.
- 5.2.40 With regards to voluntary undertakings by BT, perhaps Ofcom considers that such undertakings would not be appropriate for the period of 16 months, for which Ofcom is applying its TCs, but CityFibre does not agree that it is necessary or appropriate that any interim measures should be applied for that period. The law is only available for temporary measures. It seems that Ofcom has manufactured a situation where it is neatly circumventing the CAT's findings and Order that Ofcom should reconsider the 2016 BCMR and is instead imposing unjustified remedies for the period it takes to conduct a full new market review to be applied from April 2019. Obtaining voluntary undertakings from BT for a period of 4-6 months seems entirely appropriate.
- 5.2.41 CityFibre is further puzzled at Ofcom's refusal to rely on voluntary undertakings from BT. After all the creation of Openreach was entirely based on voluntary undertakings by BT, a framework which CityFibre understands has worked well for a period of time. Although the DCR found that a legal separation of BT would improve upon the voluntary undertakings, CityFibre is not aware that Ofcom has considered that they formed an inappropriate basis for the creation and operation of Openreach.
- 5.2.42 In paragraph 3.9 of the TC Statement, Ofcom explains that it considers that voluntary undertakings from BT can supplement ex-ante regulation, but not replace it. That may

be true for standard long-term regulation, although, as set out above, Ofcom appears satisfied that voluntary undertakings provide a sufficiently useful framework for the separation of Openreach from BT to effect the functional separation remedy.

Ofcom is not redoing the 2016 BCMR as mandated by the CAT

- 5.2.43 It appears clear that Ofcom is in fact not reconsidering the 2016 BCMR as directed by the CAT. Instead, Ofcom has done a somewhat superficial review that in no way takes account of the many process and methodology errors highlighted by the CAT and indeed adds some further errors, discussed in Section 5.5 below.
- 5.2.44 Having completed an inadequate and superficial approach, Ofcom has then proceeded to impose a near carbon-copy of the 2016 remedies onto these revised SMP markets, claiming exceptional circumstances and urgency to act to circumvent its duties to consult both nationally and undermine its EU obligations vis-a-vis the Commission.
- 5.2.45 What Ofcom then appears to pass-off as its reconsideration of the 2016 BCMR is in fact the next BCMR process, which Ofcom was due to start now in any case. Whilst Ofcom may take into account some of the heavy criticisms expressed by the CAT of Ofcom's market definition processes and methodologies in the next BCMR, that does not constitute a reconsideration of the 2016 BCMR and therefore does not constitute full compliance with the CAT's Judgement.
- 5.2.46 Further, Ofcom's claim that the 2016 BCMR remedies stand, regardless of the underlying analysis of markets and SMP have fallen away, is astonishing. Not only did the CAT make an express ruling on the issue but also Ofcom's counsel stated in court that Ofcom recognises that "The entire edifice [of the 2016 BCMR] has fallen"¹⁵. That includes the remedies and the justification for those remedies. It shows that there is no basis for stating that Ofcom could have complied with its EU obligations. To properly reconsider the 2016 BCMR, Ofcom needs to start again with an open mind, rather than simply reapply regulation based on multiple process failings that have been thoroughly discredited in the courts.

Conclusion

- 5.2.47 CityFibre strongly disagrees with Ofcom's rationale for the use of emergency measures. The need for a regulator to act in a transparent and accountable manner is paramount to the existence of market conditions where parties are willing to invest hundreds of millions of pounds, and should only be departed from in situations where there is a genuine emergency for which there are no reasonable alternative solutions.
- 5.2.48 Our analysis in this section has demonstrated clearly that Ofcom did and does have alternatives to the imposition of potentially unjustified remedies applying powers that are clearly intended to address very different situations.
- 5.2.49 The above analysis is presented without prejudice to any further submissions CityFibre may choose to advance in this consultation or elsewhere. We believe that Ofcom has used these 'emergency measures' in a way which reflects no 'emergency', without

¹⁵ See transcript of CAT hearing on 20th November, page 21 lines 3 through 10.

regard to more proportionate measures, and with a clear view to evading the findings of the CAT.

5.3 Ofcom's revised product market definitions

- 5.3.1 The simple separation of services >1Gbps into a separate market is not an appropriate short term reflection of the CATs findings in the product market for CISBO services.
- 5.3.2 CityFibre considers that Ofcom could and should have conducted a proper market analysis of the competitive conditions of the relevant product and geographic markets using up-to-date market data for what Ofcom describes as CISBO services >1Gbps. The uncertainty arising from not knowing whether the finding that BT does not have SMP in this product market in any parts of the UK will be revoked in the 2019 BCMR is extremely unhelpful to CPs planning network investments that go long beyond that time horizon.
- 5.3.3 Had Ofcom chosen to consult on a revised set of appropriately evidenced relevant markets and whether BT has SMP in each of those markets, then the uncertainty would only be for a 4-6 months period, not for 16 months. CityFibre considers that Ofcom is itself causing unnecessary uncertainty in the market by omitting that analysis at this time. We address Ofcom's SMP analysis in more detail later in this response.
- 5.3.4 CityFibre has no comments at present with regards to Ofcom's changes to the market for CI Core services.

5.4 Ofcom's revised geographic market definitions

- 5.4.1 CityFibre considers that Ofcom's approach to defining revised relevant geographic market definitions are flawed and superficial. CityFibre does not recognise that Ofcom has taken due account of the CAT's reasoned Judgement, but has instead implemented an over-simplistic set of adjustments that result in the potential for both over- and under-regulation in the BCM. Ofcom's statement on paragraph 2.10 of the TC Statement, that Ofcom has "*considered the Tribunal's findings very carefully*" does not bear scrutiny given the detail of the Judgement is not reflected anywhere.
- 5.4.2 The CAT's critique of Ofcom's geographic market definition process and methodology was very broad, identifying a number of areas where Ofcom's approach was not considered to be in compliance with Ofcom's duties and powers, the EU Framework and/or the UK Communications Act 2003.
- 5.4.3 Whilst the CBDs were held as examples for where Ofcom's erred, the CAT did NOT simply conclude that Ofcom should have reviewed the CBDs individually, but that Ofcom's methodology and approach was fundamentally flawed.
- 5.4.4 In paragraph 2.15, Ofcom states that:

"the tribunal found that Ofcom erred in defining the RoUK as a single geographic market including the five CBDs. In particular, the Tribunal considered that the metrics Ofcom relied upon did not support the conclusion that the competitive conditions are sufficiently homogenous to justify the inclusion of the five CBDs in the same geographic market as the RoUK."

5.4.5 That is not the same as determining that only those five CBDs may have sufficiently different competition conditions to justify their separate analysis and potential separation as a separate market. Had Ofcom chosen to perform separate analyses of ten CBDs in the 2016 BCMR, then it is very possible that all or most of those also demonstrated sufficiently different competition characteristics to set them apart from the RoUK market. Ofcom has failed in particular to engage with firms such as CityFibre about the further development of our competitive footprint since 2015 or indeed the extent to which that footprint would be extended further if a regulatory framework conducive to this were put in place.

5.4.6 As set out very clearly by the CAT, the purpose of the market definition is not to define markets where Ofcom feels certain that there is or is not SMP, but to define markets where the competition conditions differ sufficiently from other markets to set them apart from those other markets. It is very possible that different geographic markets where, despite a finding that BT has SMP in them all, some have sufficiently different competition conditions from the others to give rise to the application of a different set of remedies to address those specific competition conditions. It is therefore very possible that more locations in what Ofcom defined as the RoUK market are more similar to the five CBDs than to the remaining parts of the RoUK market. We simply cannot not know that without gathering evidence.

5.4.7 The importance in identifying all the locations with sufficiently different competition conditions is not simply to determine whether BT has SMP in those markets as well as the RoUK, but also to determine whether (even if BT is found to have SMP in both the RoUK market and a market consisting of all or some of the BCDs) the competitive conditions are such that different remedies are appropriate from those applied in the RoUK market. The CAT clearly highlighted this in paragraph 395 of the Judgement

“Instead, by placing the CBDs together in the same geographic market as the RoUK, Ofcom precluded the possibility that a different SMP finding or different remedies might be appropriate in those urban areas”. (emphasis added)

5.4.8 Ofcom states¹⁶ that the CAT had not found that Ofcom had erred in defining the CLA or the LP. Whilst the CAT did not make a formal finding stating that Ofcom had erred in defining the CLA and the LP, the CAT was very clear that it expected Ofcom to redefine its parameters for determining geographic market definitions. In paragraph 400 of its Judgement the CAT stated:

“In particular, we would envisage that if, as a result of its reconsideration, Ofcom were to define the product market(s) differently, it would likely have to adjust the main criteria that drive the design of the infrastructure presence”.

It is clear, therefore, that the CAT did not envisage Ofcom simply re-applying the very same criteria for determination of geographic markets as those it had widely criticised through the relevant section of the Judgement.

¹⁶ See paragraph 2.17 of the TC Statement.

- 5.4.9 Additionally, BT's appeal included criticism of Ofcom's approach to defining the CLA and LP geographic market boundaries¹⁷ and, whilst not making a specific separate finding in this regard, the CAT expressed concerns that Ofcom's Boundary Test may have been defined to replicate the old CELA market boundary in the CLA market.
- 5.4.10 CityFibre considers that Ofcom has misinterpreted the CAT Judgement in an unduly narrow manner, not taking on-board the broader criticisms clearly made by the CAT. This approach appears self-serving to enable Ofcom to apply temporary conditions without due regard to the damage to competition that could arise from those conditions.
- 5.4.11 This approach was confirmed during a meeting CityFibre attended at Ofcom's offices on December 11th, in which Ofcom stated that it considered that taking account of the CAT's Judgement in the next BCMR (the 2019 BCMR) would constitute compliance with the Judgement, rather than making an effort to adjust the markets, SMP findings and remedies in accordance with the CAT's findings now, so as to ensure that no additional harm would result from the potential application of inappropriate remedies into potentially badly-defined markets.
- 5.4.12 CityFibre believes that it would be feasible for Ofcom to undertake a better review of the appropriate geographic markets for business connectivity services and that simply separating out the five CBDs is not sufficient. CityFibre is confident that, were Ofcom to review the data it has on a number of other towns and cities, it will find that the competitive conditions in several of those locations will differ sufficiently from those in the remainder of the RoUK to justify them either being categorised as a separate market together with the five CBDs already defined, or in another market. As explained above, whilst BT may still have SMP in those locations, the emergence of competition means that other remedies than those applied by Ofcom would be appropriate.
- 5.4.13 CityFibre does not consider that Ofcom's TCs in any way take account of the Commissions' Article 7 comments on the draft BCMR 2016, in which the Commission called for a more granular geographic market analysis and the identification of markets in which lighter remedies would be appropriate.
- 5.4.14 CityFibre considers that it would be feasible for Ofcom to have undertaken a more granular geographic analysis as part of the analyses that underpin the TC Statement. Doing so would help prevent the application of inappropriate remedies [§<]. As a result of the 2016 BCMR remedies, [§<].
- 5.4.15 As an example, Table A10.14 of the 2016 BCMR Statement listed a number of cities in which CityFibre is present or plans to be present. That table shows that in all but two of those cities there is a score above 2 for high network reach within 100m. Whilst that level of competition may not be sufficient to find that BT does not have SMP, it seems clear that there is significant and (due to at the very least CityFibre's rapid network roll-out in its chosen cities and track record of building well in excess of 100m to reach new business sites) growing competition to the extent that Ofcom should actively consider whether the same remedies would be appropriate in those markets as in markets with substantially less presence of competitive infrastructure. Table A10.14 is copied below:

¹⁷ See CAT Judgement paragraphs 128 and 403-405.

Table A10.14 Sensitivity analysis NR values in City HNR postcode sectors, based on CityFibre roll-out

City	100m NR	200m NR	No. of HNR Postcode Sectors	No. of CISBO Circuits	No. of VHB Circuits
Aberdeen	1.99	2.53	17	1548	14
Ayr ¹⁷⁹	-	-	0	0	0
Bath	2.00	2.18	15	610	11
Bournemouth	2.00	2.23	50	1523	119
Coventry	2.02	2.44	48	2211	41
Dewsbury/Batley	2.06	2.50	36	1692	19
Dundee	2.37	2.82	23	460	39
Edinburgh	2.71	3.30	73	3664	40
Exeter	2.37	3.09	21	1226	241
Huddersfield	2.07	2.41	23	1103	8
Hull	1.71	2.23	17	515	0
Leeds/Bradford	2.49	3.18	159	7251	58
Leicester	2.36	2.95	63	2312	16
Milton Keynes	2.01	2.64	32	1632	43
Newcastle	2.22	2.59	89	4488	71
Newport	2.04	2.35	18	614	15
Nottingham	2.26	2.69	91	4201	267
Peterborough	2.11	2.59	27	1299	17
Plymouth	2.23	2.75	31	1195	40
Reading	2.48	3.61	77	4537	101
Sheffield	2.16	2.72	81	2802	36
Slough	2.61	3.64	41	2436	126
York	2.45	3.09	21	507	8

5.4.16 Identifying those locations as separate markets with sufficiently different competition conditions from the remainder of the RoUK market would enable Ofcom to act in accordance with the law, the Commissions' recommendations, and BEREC guidance that Ofcom should undertake more granular market analysis and consider differentiated remedies in markets where competition is emerging.

5.4.17 Where data was not available to make clear conclusions, Ofcom should err on the side of caution, as indeed Ofcom states in a number of places in the TC Statement that it does it does, and classify more locations as separate markets than fewer. This is simply because the harm that results from the application of overly aggressive remedies in prospectively competitive markets cannot be reversed. On the other hand, a short period of under-regulation would be easier to remedy than over-regulation.

5.4.18 Instead, Ofcom dismissed CityFibre's network presence as insignificant:

5.4.19 *"As of June 2017, it [CityFibre] had connected around 8,000 business and public sector sites, many of which could be using CISBO circuits. To put this number in context, this is around 2.5% of the base of CISBO circuits we considered in the 2016 BCMR Statement"*¹⁸

5.4.20 However, this understates the competitive constraint from CityFibre for two reasons:

- 1) it compares CityFibre's customer base to the UK market as a whole, but in those areas where CityFibre is active it can be expected to have a significantly higher share of CISBO circuits; and
- 2) the number of businesses currently connected to CityFibre's network significantly understates its network reach, which is the principal basis on which Ofcom has

¹⁸ See TC Statement, paragraph 2.23(b).

assessed geographic market definition and market power. In this regard, CityFibre's website states that its network addresses 28,000 public sites, 7,800 mobile masts and 280,000 businesses.

5.5 Ofcom's SMP findings

- 5.5.1 Although the CAT did not consider Ofcom's SMP analyses in detail, it is critical that Ofcom's SMP analysis for the new product and geographic markets is conducted in line with the proper process identified by the CAT in accordance with the advice of the Commission in April 2016, of which the CAT found that Ofcom had not taken utmost account.

Ofcom's overall approach to SMP analysis

- 5.5.2 Paragraphs 2.29 through 2.32 of the TC Statement set out Ofcom's approach to the SMP analysis it has undertaken in support of the TCs. CityFibre is deeply concerned that several of these principles appear to be fundamentally flawed, we explain below.

- 5.5.3 In 2.29 Ofcom states that the normal market share threshold for concerns about SMP is 40%, but that, because the 2016 BCMR relies on data from 2014, Ofcom considers that it should pay "particularly close attention to markets where BT's market share is below 50%". This is nonsensical. Forty per cent is below 50% so just using the normal market share threshold will suffice as an initial indicator of whether there might be SMP concerns. We note from Tables 2.1 and 2.3 that Ofcom estimates BT's market share in the Lower Bandwidth CISBO markets in LP and RoUK is above 40% in all segments. We are puzzled therefore as to the need to pay attention to those markets where BT's share is below 50%.

- 5.5.4 If Ofcom has a concern that its market data may be incorrect because it is now so out of date, then rather than rely on those data it could use its powers to collect current data and conduct a proper market analysis.

- 5.5.5 Ofcom further puts forward two additional parameters it uses for determining whether BT has SMP in the markets defined¹⁹, namely:

- 1) The combined market share and its largest competitor Virgin Media, and
- 2) That, if unregulated, BT's market share in the markets defined would likely be higher than measured now in a regulated market.

We address each of these separately below.

The combined market share of BT and Virgin Media

- 5.5.6 Ofcom's claim that the combined market share of BT and its largest competitor is an indicator of whether BT has SMP is startling and represents a departure from all standard economic theory and Ofcom's previous practice. Ofcom has been conducting market reviews since early 2003 and we are not aware of any occasion on which they have used

¹⁹ See paragraph 2.32 of the TC Statement.

the market share of the second largest operator as an indicator of the SMP of the largest operator.

- 5.5.7 There is no reference in standard economic textbooks on assessment of single firm dominance (SMP) on the combined market share of the largest two firms. The European Commission's guidelines on the assessment of SMP list a number of criteria that should be considered²⁰: the market share of the second largest operator is not one of them. We note that Ofcom provides no references to theory or precedent to support this claim.
- 5.5.8 In fact, a similarly sized main competitor could result in either a monopoly or competitive outcome. If the two firms collude (implicitly or explicitly) prices are likely to be at or close to the monopoly level for both firms, whereas if the firms compete intensely, prices could be at the competitive level²¹. The only way to know whether a market with a high concentration level for the top two firms is competitive or not is to examine prices, quantities and quality. Nothing about the dominance or otherwise of the largest firm can be assumed from the market shares of the two largest per se.
- 5.5.9 Footnote 48 refers to the HHI measure of market concentration. The HHI is a measure of concentration in the market and not an indicator of the position of any individual firm. Therefore, whilst it is useful for determining whether a market might be concentrated, it cannot be used to indicate that any individual firm has SMP.

Market shares affected by regulation:

- 5.5.10 In 2.32(b) Ofcom states as follows:

"it is likely that BT would have a higher share of the market in the absence of regulation" and that *"for the purposes of SMP assessment, we must imagine the market ... in the absence of regulation"*. In footnote 49 Ofcom refers to the Modified Greenfield Approach as justification for this statement.

- 5.5.11 We are sure that Ofcom is fully conversant with the Modified Greenfield Approach, but its use of it here suggests otherwise. Under this approach, the position of dominance on the market under investigation is assessed as if there were no regulation in that market but that the upstream market is subject to current regulations²². This is because, whilst the subject market may not be subject to SMP, it might be if there was no obligation on the dominant firm upstream to provide access. Ofcom seems to be getting confused here with the Pure Greenfield Approach in which no regulation exists at either level of the market. Certainly if BT were not under an obligation to provide access at the upstream

²⁰ Paragraph 78

²¹ This is the "Bertrand Paradox" where a duopoly results in the same outcomes as a perfectly competitive market in certain circumstances as each firm competes down to marginal costs for fear of losing all sales to its rival if it tries to hold a price premium.

²² See European Commission *Explanatory Note Accompanying the Recommendation on Relevant Markets* 9th October 2014. Also Antonio Bavasso, Dominic Long; The Application of Competition Law in the Communications and Media Sector: A Survey of Recent Cases, *Journal of European Competition Law & Practice*, Volume 1, Issue 3, 1 June 2010, Pages 232–240

level its market share downstream might increase. However, this is not the case and so Ofcom's claim in 2.32(b) is irrelevant to an assessment of SMP.

- 5.5.12 Ofcom's view that the market share of the SMP operator is an understatement of the position that would occur if it were not subject to regulation is also not supported by any economic theory or practice in the assessment of dominance. There is no mention of such an approach in any standard textbooks nor in the European Commission's SMP guidelines.
- 5.5.13 Based on the analysis above, CityFibre does not recognise the validity of Ofcom's approach to the impact on BT's market share if no regulation was imposed in the relevant market.
- 5.5.14 Lastly, CityFibre is concerned at the conspicuous absence of any analysis of changes to market shares over time. Ofcom's presentation of BT's market shares in Tables 2.1 and 2.3 is static, simply showing its market share at a given point in time (now three years ago). These tables do not show whether BT's market share is static, increasing, decreasing or whether it fluctuates over time. It is well established in economic theory and practice that market shares must be examined dynamically in an assessment of dominance. The European Commission's SMP guidelines state: *"The fact that an undertaking with a significant position on the market is gradually losing market share may well indicate that the market is becoming more competitive, but it does not preclude a finding of significant market power. On the other hand, fluctuating market shares over time may be indicative of a lack of market power in the relevant market."*²³
- 5.5.15 Given the market developments over recent years, in particular the entry of firms such as CityFibre and the expansion of Virgin Media, it is quite possible that BT's market share has been declining, in particular in the period since 2014.

Conclusion

- 5.5.16 For the reasons set out above, CityFibre has serious concerns as to the validity of Ofcom's SMP analysis. It would seem that Ofcom is applying economic principles that are not recognised in any standard approach to determining dominance (or in accordance with the law) as well as leaving out other (and more significant) and relevant factors that should be taken into account in its analysis.
- 5.5.17 Given these serious concerns, CityFibre considers it entirely inappropriate that very aggressive remedies (including the LLCC and the proposed DFA), are to be applied on the basis of these analyses. Below we set out specific comments on Ofcom's analysis in the individual markets.

Ofcom's approach to analysing infrastructure presence

- 5.5.1 Ofcom proposes to apply the same methodology in the review of infrastructure presence as that deployed in the 2016 BCMR, namely the number of OCPs within 100m of business premises.

²³ See paragraph 75 of the Commission's SMP Guidelines.

- 5.5.2 In our view, this approach is based on an out-dated assumption that providers of business connectivity already have trunk networks and build out from their points of presence in a given city or other area. This approach is, therefore, flawed for two reasons.
- 5.5.3 First, CityFibre (and other new network operators), in fact, base their business development on entering entirely new towns and markets so serve new customers such as business and local authorities including schools, libraries and hospitals where they have not previously had a market presence. As was explained at length during the 2016 BCMR process, CityFibre builds networks in a new city targeting public sector buildings and business districts across the city as a whole. It does not simply place a network node in a city and then serve customers within an arbitrarily defined circumference from that point. The business plan works on serving the whole city with market entry at the city level and not within postcode sectors surrounding exists nodes. In considering the constraints that rivals place on BT, Ofcom should consider the reality of how firms enter markets and compete and not apply an outmoded methodology that does not reflect reality.
- 5.5.4 Secondly, Ofcom bases its 100m distance on average and median dig distances they have seen operators are prepared to dig²⁴. To the extent that operators do extend their network reach from existing nodes, the average or median distance is the wrong measure as it understates how far CPs are prepared to extend their networks. In our view, a better measure would be some form of frontier. Perhaps not the furthest an operator would be prepared to dig, but to the distance that represents the 9th decile of distance by number of lines. This would provide a better indication of competitive constraint a CP places on BT as it gives a better indication of how far a CP would normally be prepared to dig to win business.
- 5.5.5 Ofcom's approach to determining the effect of competitive infrastructure presence is overly conservative, misses out the impact of existing and prospective competition, fails to assess forward looking demand and to take into account timely likely and sufficient entry and appears to be designed to determine that BT has SMP in as much of the UK as possible.
- 5.5.6 Perhaps Ofcom's approach would have been suitable if Ofcom had followed the legal requirements it should have considered and taken into account BEREC's views and the Commission's recommendations and assessed effective competition. Only then should Ofcom have identified and defined appropriate and proportionate remedies. Where relevant to any problems identified, Ofcom should have introduced more nuanced and differentiated remedies in different markets, especially recognising the importance of emerging competition.
- 5.5.7 If Ofcom had applied a duct and pole remedy as suggested by the European Commission this would have reduced the cost burden on competitive CPs and allowed them to compete for connections further from their networks. This would have allowed Ofcom

²⁴ 2016 BCMR Statement Para 4.369

to amend its high network reach and boundary tests to include premises to an average of say 300 – 500m and a 9th decile even further than that.

- 5.5.8 The points made in relation to Ofcom’s overall approach to SMP analysis are applicable throughout the section where Ofcom applies that approach to the individual geographic markets it has defined. The fact that CityFibre does not comment in detail on each of those geographic markets should not be interpreted as agreement to the analyses performed.
- 5.5.9 In particular, in all the geographic markets where Ofcom finds that BT has SMP, Ofcom includes a statement as set out below:

*“Our view that BT has SMP in at least [name of the relevant market] would not be altered if the relevant market were all CISBO services. In the 2016 BCMR Statement, we found that BT had SMP in all CISBO services in the [name of the relevant market]”.*²⁵

CityFibre finds this statement extraordinary and suggests that this is a strong sign of Ofcom having a closed mind to the impact of the CAT’s findings and Judgement on Ofcom’s misguided approach and process to market definitions (and the consequences for SMP findings).

Ofcom’s analysis of Lower bandwidth CISBO services in the five CBDs

- 5.5.10 Below is CityFibre’s review of Ofcom’s analysis of the Lower Bandwidth CISBO services (LB services) in the five CBDs. As stated above, much of our commentary is equally applicable to the analysis performed by Ofcom in other markets, but as this is a key market that has been defined, purportedly as a consequence of the CAT’s Judgement, we have decided to focus particularly on that.

BT’s market shares

- 5.5.11 As stated in paragraph 2.29 of the TC Statement the data used is from 2014. CityFibre is surprised and disappointed that Ofcom did not request more recent data for this analysis especially given developments in the market since then. Ofcom knew from late July that it would need to reconsider the competition conditions in the CBDs, but decided to limit its reconsideration to the use of now very old data. CityFibre considers that Ofcom’s conclusion based only on market shares (given the age of the data and the evidence of significant infrastructure investment since 2014) results in a conclusion of SMP that would not be reached if it had used current data, used the proper tests for SMP and examined the increasing competitive constraints on BT.
- 5.5.12 As mentioned above, CityFibre finds the lack of analysis of changes to market shares over time to be a significant weakness in Ofcom’s review of effective competition in a given market. A market in which a party holds 70% share today, but held 90% a short time ago shows strong signs of growing competition. It is possible that an SMP finding would still be appropriate, in order to protect the emerging competition, but the emergence of

²⁵ See for example paragraph 2.52 of the TC Statement.

competition would strongly suggest that the remedies applied should be with a view to further encourage that competition, rather than to drive improved efficiency in BT.

- 5.5.13 Ofcom has persistently maintained its one size fits all approach to applying aggressive remedies to BT with the consequence that its approach is untailored and inevitably ill-suited to the needs of the different markets, despite the range of different remedies that are clearly available to Ofcom to encourage emerging competition.

The combined market shares of BT and Virgin Media

- 5.5.14 As stated above, CityFibre considers Ofcom's focus on the combined market share of BT and Virgin Media is erroneous. The existence of a strong competitor would be equally as likely put more competitive pressure on BT as the existence of a larger number of smaller competitors as it would result in non-competitive outcomes. This market structure cannot be used per se to determine the SMP position of BT without a proper examination of competitive intensity and the past behaviour of the firms.

- 5.5.15 CityFibre considers that this part of Ofcom's SMP analysis, for all the relevant markets, should be disregarded.

Ofcom's analysis of control of infrastructure not easily duplicated

- 5.5.16 To review the impact of control of infrastructure not easily duplicated, Ofcom deploys its network reach analysis for the five CBDs. From the data presented in table 2.6 of the TC Statement, it is clear that there is substantial competitive activity in all the five CBDs with more than 49% of businesses in all five CBDs having 3 or more OCPs within 100 meters. There can be no doubt that, whilst they may not yet be fully competitive, they all have emerging competition. In the circumstances a proper assessment of effective competition and the dynamics actually operating on the ground is essential; and particularly so if proportionate and tailored remedies designed to secure competition are to be imposed.

Ofcom's analysis of prospective competition

- 5.5.17 Ofcom states in paragraph 2.89 of the TC Statement that there are limited prospects of further entry and competition, primarily due to the limited size and business density in the CBDs. The level of new entry and network expansion by existing OCPs will however depend on the incremental costs of building the additional network infrastructure.

- 5.5.18 If the business case for adding new customers is sufficiently profitable, then it is likely that most of those providers will bid for new connections most of the time. Recognising that competitive provision is preferable to complete reliance on access to regulated assets, it would therefore follow that any regulation applied should encourage further network roll-out by the existing infrastructure providers.

- 5.5.19 If, following a proper assessment of effective competition on a more granular basis, a remedy were to be required, then appropriately tailored regulation could then take the form of mandated duct and pole access, that would improve the business case for competitive providers to bid for more new connections, at a longer distance from their current network flexibility points than if the new connections needed to be funded as full self-build.

- 5.5.20 In markets where competitive activity is clearly apparent, with nearly half of all businesses having at least BT and three other OCPs within 100 meters, BT may still enjoy a position of market power, but that situation could be remedied and more effective competition enhanced relatively quickly if measures were introduced to lower entry barriers and increase timely likely and sufficient entry enabling OCPs to compete with BT, by using BT's duct and pole infrastructure.
- 5.5.21 Even if Ofcom refuses to contemplate a DPA remedy in the BCM (a position we urge it to reconsider), it should nonetheless take into account the effects of a less restricted DPA remedy being introduced in the WLAM with some consequent positive spill-over in the form of reduced entry barriers in the BCM, given that this appears to be Ofcom's intention.
- 5.5.22 Further, as mentioned above, network competition is growing across a much larger number of towns and cities than the five CBDs analysed by Ofcom in the 2016 BCMR. This is evidenced by the level of network reach in the cities where CityFibre is present. Although those markets may not yet be fully competitive, BT's market share is reducing and the remedies appropriate for locations like that, are those which will accelerate OCP network deployment so that regulation at the active layer can be removed from BT in the forthcoming market reviews.
- 5.5.23 The European Union is currently revising the Common Regulatory Framework and a draft European Electronic Communications Code has been published. We recognise that this draft is still subject to negotiation between the Commission, Parliament and Council, however, in the context of this response we would like to draw Ofcom's attention to Recital 175, which states²⁶:

"In geographic areas where two or more access networks can be expected on a forward-looking basis, end-users are more likely to benefit from improvements in network quality, by virtue of infrastructure-based competition, than in areas where only one network persists. The adequacy of competition on other parameters, such as price and choice, is likely to depend on the national and local competitive circumstances. In assessing the adequacy of competition and the need for regulatory intervention, national regulatory authorities should take into account whether at least one of the network operators offers wholesale access to any interested undertaking on reasonable commercial terms permitting sustainable competition competitive outcomes for end-users on the retail market".

- 5.5.24 Despite this clear suggestion from the EU, albeit in draft form, that the presence of two competing operators may be sufficient to indicate adequate competition, Ofcom dismisses the presence of CityFibre and Virgin Media alongside BT as "unlikely to have a material impact". The potential on a forward looking basis for effective competition is therefore ignored by Ofcom to the potential detriment of future investment. As CityFibre operates a wholesale-only business (focusing on provision of dark fibre, but also

²⁶ This reflects what we understand to be the most recent Council draft text and is a watered down version of the Commission's proposed text which envisages three operators as being potentially sufficient for effective competition.

providing active services) and Virgin Media also offers wholesale leased lines, the proposed EECC text would be very relevant to the UK BCM.

Ofcom's analysis of barriers to entry and competition

- 5.5.25 Ofcom uses the example of how investment in infrastructure has developed over time in the LP market as an example of how it expects only limited incremental investment in the CBDs, primarily due to the lower business density outside the inner CBDs where the highest presence of rival infrastructure outside the CLA have been identified.
- 5.5.26 This is an unevidenced assumption, and as such is contrary the evidence based approach called for in the legislation. The assumption ignores relevant facts such as that both CityFibre and Virgin Media (alongside others²⁷) are actively rolling out new fibre-based networks to whole towns and cities with the intention to serve both the mass-market broadband market and the BCM market, reaching business premises substantial distances from those Ofcom is now defining as the inner CBDs.
- 5.5.27 Ofcom's approach in this regard is symptomatic of its flawed approach in the BCMR and what appears to be an overall conviction that competition exists in very few parts of the BCM and that Ofcom does not consider that there is sufficient emerging competition in other parts of the country to justify a differentiated approach to defining appropriate and proportionate remedies. That position is clearly at odds with the Commission's formal comments on the draft 2016 BCMR, of which the CAT found that Ofcom had not taken utmost account.
- 5.5.28 Indeed it is conspicuous that in its reconsideration of the 2016 BCMR, Ofcom persists in not taking utmost account of the Commission's views and comments. Ofcom has suggested that it will consider the Commission's comments in the 2019 BCMR, but by not doing so now, an opportunity for the UK risks being missed and Ofcom's actions could instead cause the green shoots and emergence of competition to recede, due to the overly aggressive and disproportionate remedies applied by Ofcom in a way that is based on a demonstrably flawed process and which fails to take account of relevant considerations and takes into account irrelevant considerations.

The timeframe for Ofcom's analyses

- 5.5.29 Throughout the TC Statement, Ofcom refers to its expectation of market developments between November 2017 and April 2019. Not surprisingly, not much new infrastructure will be planned, built and used to deliver services to consumers in this period particularly if Ofcom persists in its approach that increases confusion, and risk in the mind of the customer and reduces the opportunity for others given the price controls. That does not mean, however, that nothing is happening. The reality is that a lot of investment is taking place, despite the manifest uncertainty driven by regulatory intervention, but the impact of that investment, for example on market shares, will inevitably manifest itself over a longer period. Leased lines are typically sold on long term contracts, often spanning 3 –

²⁷ See for example Hutchison 3 G's announced plans to provide the third UK wide network using both high frequency services over 5G technology and fibre together.

7 years, so there is a lag between the network coming into place and it being deployed widely to consumers.

- 5.5.30 CityFibre considers Ofcom's very short term outlook to be misguided and misaligned with the market context. Further, it is not in line with its objectives to encourage competition at the deepest level possible. Ofcom should, in relation to market definition, SMP determination and design of appropriate and proportionate remedies, consider the likely impacts of its action on the viability of long term sustainable infrastructure competition, in particular given the general pro infrastructure based competition approach in Ofcom's strategy and the tenor of the new EECC. Were Ofcom to do that, its conclusion on the prospects of competition in large parts of what is currently still categorised as the RoUK market would be very different.

Ofcom's silo-approach

- 5.5.31 In this review, as in the 2016 BCMR and the current WLAMR, Ofcom steadfastly refuses to recognise the facts and fails to acknowledge that these two markets are very interdependent and that investment to serve customers and consumers may overlap on the supply side with considerable expenditure saved if both demands can be met over infrastructure used for multiple purposes.
- 5.5.32 CityFibre has in the past produced evidence of significant cost savings and synergies between the demands of different customer groups and the existence economies of scope. It is therefore important that Ofcom recognises that, whilst some of CityFibre's investment plans focus on the broadband market that investment will also increase reach to serve business connectivity customers.
- 5.5.33 Therefore, when Ofcom says that the five towns in which the CBDs are located do not have sufficient business density to justify investment to serve sites located outside the CBDs themselves, that is incorrect. CityFibre plans to roll out broadband fibre infrastructure to up to 50 cities and 5 million premises (business and residential) in the UK in the next seven years. Those fibre networks will also service business connectivity customers, increasing the reach much further than the CBDs. Ofcom is wrong to presume that CityFibre's investment in broadband infrastructure will not increase its network reach in the BCM. As we have previously communicated to Ofcom, our business model envisages further expansion beyond the 50 towns and cities to between 100 and 120 towns and cities, giving CityFibre a total addressable footprint of nearly 40% of UK homes and businesses. This build programme could be completed by the end of the next decade were the necessary regulation in place to support it.

5.6 Remedies

- 5.6.1 Ofcom is effectively proposing to re-impose the same set of remedies as it imposed in the 2016 BCMR. Some minor changes have been made but in essence the remedies pack is identical to that imposed in the 2016 BCMR; with a few areas of the UK filleted from their application.
- 5.6.2 CityFibre does not agree with Ofcom's manner of imposing those remedies. As set out earlier in this response, CityFibre considers Ofcom's resort to emergency powers is inappropriate, disproportionate and unnecessary.

- 5.6.3 CityFibre further considers that Ofcom should simply freeze the status quo pending its completion of the remittal ordered by the CAT. Remedies that maintain the status quo would be reasonable while Ofcom completes the tasks it is required to complete, but remedies that cause changes to competition and market conditions should not be imposed in a situation where no comprehensive market analyses and assessments of effective competition have been undertaken to ensure that those remedies are appropriate and proportionate to the market failures identified in SMP markets defined through a complete and transparent process.

General remedies

- 5.6.4 CityFibre does not think it is necessary to use emergency powers to impose the general remedies, given the circumstances.
- 5.6.5 CityFibre also disagrees with the period for which the general remedies should be applied. It should be entirely possible for Ofcom to complete its reconsideration of the 2016 BCMR within four-six months, and the period since July could have been more effectively used to gather up to collect up-to-date data for that purpose.

Specific access remedies

- 5.6.6 CityFibre considers it neither necessary nor appropriate for Ofcom to rely on emergency powers to for the imposition of these remedies, nor that the remedies are either appropriate or relevant to market power assessments that have not been made or are based on flawed assumptions under a BCMR that has been found to be based on the wrong process and t have reached the wrong conclusions. As they are a continuation of existing remedies, also based on flawed processes and assessments they should be urgently reconsidered. In the meantime it is entirely possible and quite likely that BT would undertake to continue to comply with its existing non-discrimination obligations and agree to freeze the status quo.
- 5.6.7 CityFibre also disagrees with the period for which the specific access remedies should be applied. It should be entirely possible for Ofcom to complete its reconsideration of the 2016 BCMR within four-six months from now.

Charge control

- 5.6.8 Ofcom expresses concern that the absence of ex-ante regulation of BT's wholesale leased lines charges could result in BT *"setting and maintaining some or all charges for Ethernet services with bandwidths of 1Gbit/s and below at an excessively high level"*²⁸. As a consequence of that concern, Ofcom has decided to impose the same charge control on the newly defined SMP markets as was applied in the 2016 BCMR.
- 5.6.9 Ofcom justifies the application of the same charge control by stating that the differences in the SMP markets defined in the TC Statement and those in the 2016 BCMR *"are*

²⁸ See paragraph 5.2 of the TC Statement.

limited, and it would therefore be appropriate to impose the same form of Ethernet charge control (subject to the modifications set out further below”²⁹.

5.6.10 Ofcom further justifies the application of the same charge control by stating that it was upheld on appeal³⁰.

5.6.11 Whilst CityFibre agrees that a player with SMP may have the incentives to set its prices higher than the price level that would prevail in a perfectly competitive market, we consider that Ofcom’s approach to setting the charge control for the period in question is seriously flawed. The main reasons for that positions are:

- 1) Ofcom’s approach to determining the new SMP markets is characterised by a number of flaws, which make those decisions weak and potentially wrong (see above);
- 2) That, whilst Ofcom has found that BT has SMP in most of the markets in which the 2016 BCMR found BT to have SMP, Ofcom is ignoring the CAT’s position that some markets where BT may still have SMP may however differ sufficiently from other SMP markets to justify a different and more nuanced set of remedies³¹;
- 3) The Commission specifically requested that Ofcom take a more careful and detailed approach toward assessment of markets, competition within markets and differentiate remedies to ensure that geographic areas in which competition is developing are subject to remedies that will promote the further development of that competition, not remedies that have the overriding objective to drive efficiency improvements in the dominant provider³².

5.6.12 The 2016 BCMR LLCC was set to reduce BT’s prices to a level reflecting BT’s costs, including its substantial economies of scope and scale. This was explained by Ofcom during the CMA appeal process³³, in which Ofcom also explained that it had not set the LLCC with a view to encourage infrastructure investment in the BCM market, considering that the existing monopoly infrastructure of BT was sufficient to serve the needs of business and other users of business connectivity services in the UK.

5.6.13 In its decision, which found that Ofcom’s decision to design the LLCC as it had was within Ofcom’s powers and discretion, [X]³⁴.

5.6.14 The CMA’s conclusion that City Fibre [X], combined with the Commission’s recommendations that Ofcom undertake more granular market definitions (with a

²⁹ See paragraph 5.17 of the TC Statement.

³⁰ See paragraph 5.17 (4th bullet) of the TC Statement.

³¹ See CAT Judgement paragraph 399.

³² *ibid.*

³³ CityFibre’s appeal of the LLCC to the CAT was referred to the CMA.

³⁴ [X]

particular focus on applying differentiated remedies in areas where competition is emerging), and the CAT findings on Ofcom's flawed process and methodology, when taken together provide a powerful set of reasons against Ofcom continuing with its current approach and simply imposing the same LLCC.

- 5.6.15 CityFibre considers that, for the reasons set out in its original appeal against the BCMR that continue to be relevant, and now, taken together with the reasoning and findings of the CAT toward the BCMR, and the process failings exposed in Ofcom's approach as determined by the CAT, as well as the fact that Ofcom has been found to have failed to have taken utmost account of the Commission's views, among other reasons, that Ofcom has erred by adopting the LLCC in the current time. Also, as set out earlier in this response, CityFibre considers that a period of 4-6 months is sufficient for Ofcom to undertake a proper and robust reconsideration of the 2016 BCMR³⁵.

5.7 Conclusions of CityFibre's review of the TC Statement

- 5.7.1 CityFibre was extremely surprised to see the contents of the TC Statement. Ofcom reliance on emergency powers appears to be entirely unnecessary and unjustified. Ofcom could have used the period from July 2017 till the publication of the full reasoned Judgement and the CAT's Order and Ruling to prepare a consultation document, requesting new market data where required, and the reconsideration of the 2016 BCMR could certainly have been completed by end of March 2018. This would have created a limited time period of only four months, during which Ofcom would have been able to conduct the necessary work and could have been addressed by extension to BT's existing voluntary undertakings. That would be been appropriate practical and proportionate.
- 5.7.2 Ofcom's market analyses and SMP analyses are characterised by a number of flaws, which render their conclusions unreliable. For Ofcom to use those conclusions as the justification to impose remedies that not just safeguard the competition conditions, but will cause significant changes to the market and competition conditions is unjustifiable.

³⁵ This is because Ofcom has already performed part of the necessary analysis. It could therefore reconsider parts of its analysis based on responses to the consultation process and issue a consultation document in the early spring of 2018.

6 Ofcom's DFA consultation

- 6.1.1 The consultation document to which this response is written, is Ofcom's Dark Fibre Consultation (DF Consultation). The earlier sections in this response are responding to Questions 2.1 through to 2.4 in the DF Consultation and relate to the separate TC Statement which defines relevant product and geographic markets, determining where BT has SMP and imposing a series of remedies very similar to those imposed in the 2016 BCMR.
- 6.1.2 The remainder of this response is to the contents of the DF Consultation document, in which Ofcom proposes to impose a dark fibre access (DFA) remedy in the SMP markets defined in the TC Statement.

6.2 Background and context for the DFA remedy

- 6.2.1 Ofcom first proposed to introduce the DFA remedy in the BCM in the 2016 BCMR. The remedy was defined to encourage innovation by CPs who do not operate their own networks as it would enable them to use their own electronics when providing active leased lines to retail customers (or to provide wholesale active lines services).
- 6.2.2 Whilst there was support for the DFA remedy amongst those CPs that currently use BT's active leased lines services, the imposition of the remedy was challenged by BT and forms part of BT's appeal of the 2016 BCMR.
- 6.2.3 Other CPs also opposed the DFA remedy, but primarily the pricing principle Ofcom used to set the DFA price, and the resulting DFA price level. Those opposing the pricing of the DFA remedy include the members of the Infrastructure Investors Group (the IIG), namely: CityFibre, Virgin Media, euNetworks and Zayo.
- 6.2.4 These four CPs have all invested heavily in the building of new competitive fibre infrastructures to provide users of leased lines-based services with high quality and innovative services that could not be provided if they had chosen to rely on wholesale access to BT's services.
- 6.2.5 CityFibre, appealed parts of the 2016 BCMR alongside BT, whilst another IIG member, Virgin Media, intervened in the appeal. The CityFibre 2016 BCMR appeal overlapped to some extent with that of BT in relation to calling out the fact that Ofcom had failed to properly follow the legally required process in a number of ways in the areas of product and geographic and on remedies and the requirements to take utmost account of the Commission's views. City Fibre also challenged Ofcom's lack of appropriate and proportionate remedies through the imposition of the leased lines charge control (LLCC) and the fact that Ofcom did not impose a duct and pole access (DPA) remedy either instead of or alongside the DFA remedy.
- 6.2.6 The CAT's quashing Ofcom's BCMR following the hearings on its approach to market definition (the cornerstone of any market review and assessment of market power), the appeal on remedies was not heard by the CAT³⁶. However, as set out above, the CAT's judgement clearly calls into question the approach Ofcom took toward its legal

³⁶ With the exception of CityFibre's appeal of the LLCC, which was heard by the CMA before the CAT heard

obligations and reflects the CAT's expectation that the remedies Ofcom had included in the 2016 BCMR and which were challenged by BT and/or CityFibre should be carefully reconsidered following a proper reconsideration of evidence on relevant markets and market power, as is required by the law, and would have occurred if Ofcom followed CAT's Ruling and Order remitting the entire 2016 BCMR.

6.2.7 Whilst CityFibre voiced its concerns that the review of the LLCC by the CMA was to be heard before the appeal of the BCMR and the hearing on Ofcom's approach to market definitions or remedies, this was the sequence that was imposed by the CAT, for logistical reasons, and created by Ofcom's need to have a decision before the introduction of its proposed Dark Fibre Remedy in October 2016.

6.2.8 CityFibre's LLCC appeal included claims that [§]. The CMA found that it agreed with that position. In particular one element of the 2016 BCMR DFA remedy was its pricing on an 'active-minus' basis, using BT's 1Gbps active wholesale leased lines prices as the anchor price. The continued application of that approach will be likely to exacerbate the harmful effects of the flawed BCMR decision on infrastructure competition, because Ofcom is continuing with the same approach and same resulting price level will apply. This consideration is highly relevant and a necessary factor for Ofcom to take into account and entirely absent from Ofcom's considerations.

6.3 Ofcom's DFA remedy proposal

Having failed to properly define a revised set of relevant markets, or properly assess effective competition therein, but nevertheless finding BT to have SMP in a majority of those markets³⁷, Ofcom is now proposing that, in addition to the remedies already imposed through the TC Statement, a DFA remedy should also be imposed.

6.3.1 It is unclear what the competition concern is, for which dark fibre provides a remedy. Firstly, the introduction of dark fibre is highly unlikely to constrain BT's incentive or ability to raise prices. Evidence that the introduction of dark fibre from BT leading to prices being constrained is not found in Ofcom's consultation or the BCMR. Nor is dark fibre from BT in fact likely to lead to any sudden increase in customers switching from ethernet services within the remainder of the period. It is CityFibre's understanding (from public and industry sources) that the vast majority of business customers will be unlikely to switch from their existing systems and suppliers for their telecommunications services, particularly given the parallel price capping of leased lines.

6.3.2 Thirdly, the proposed dark fibre remedy is only (as a result of the SMP Decision) going to be implemented for bandwidths of 1gb or below. As Ofcom has itself acknowledged, and found in the Judgement based on evidence submitted, bandwidth requirements are likely to increase over time. One of the main benefits of dark fibre is that once a fibre is installed, there is no real constraint on bandwidth (other than dictated by the equipment

³⁷ Ofcom found that BT has SMP in all the same markets as in the 2016 BCMR, except in the market for services >1Gbps and the geographic locations of the Glasgow, Leeds and Birmingham central business districts.

used to light it). The principal benefit of dark fibre is therefore limited and its utility to customers reduced if there is any limitation on its use. The below 1gb requirement for dark fibre is also, in practical terms, likely to be either unenforceable by BT (or very costly for BT to monitor and then enforce). If BT were to impose contractual usage restrictions on the DFA remedy, that would defeat the value to the customer of the dark fibre as envisaged by Ofcom to enhance competition in the downstream markets. Any sort of practical enforcement would involve BT in undertaking site visits, checking others CP's equipment and, where necessary, pursue operators for breach of contractual terms.

6.3.3 One of the rationales for DFA in the 2016 BCMR (which appears to have been adopted as an on-going consideration by Ofcom), was that Ofcom considered that DFA would encourage a layer of competition at the access level, as CPs would be able to choose the equipment they use to 'light' the fibre. We make three points to this issue in relation to Ofcom's current proposals:

1) the proposed remedy fails to provide any encouragement or incentive for new infrastructure investment - by far a better generator of competition at all levels of the supply chain than the stimulation of the sale of equipment to light fibres;

2) customers would be prevented in their business context in contract with BT from lighting the fibre in ways that work for them. They would only have a choice of the supplier of equipment they attach to the dark fibre. BT's contracts would need to cap DFA usage at 1Gbps usage, and customers might be required to use equipment that is pre-approved by BT as not exceeding 1Gbps or that can be monitored directly by BT in some way to limit usage to 1gb or below; and

3) breach of any contractual restriction on usage would mean that BT is put in a position where it could accept higher usage and compensation for breach of contract. This would remove any possible benefit of the remedy in constraining BT's prices.

6.3.4 Ofcom proposes that the DFA remedy should be the same product as specified in the 2016 BCMR, with pricing and technical specifications remaining unchanged. Importantly, however, the DFA remedy would only be mandated for the provision of active services of up to 1Gbps.

6.3.5 It is important to note that the market definitions, SMP findings, and remedies imposed in the TC Statement have been imposed without complying with the proper process of data collection assessment and public consultation, and is applicable only until April 2019, when Ofcom expects to have concluded the next full BCMR process. The imposition of a DFA remedy would therefore be applied in circumstances to markets which have not been defined properly in accordance with the law and in a robust and transparent process.

6.3.6 It is also important to acknowledge that the imposition of a DFA remedy constitutes a major step in how the UK BCM has hitherto been regulated. The DFA remedy would be the first time that a passive remedy has been imposed.

6.3.7 The use of the DFA remedy would require investments by the CPs that will consume it, including staffing up to operate and maintain the electronics on the dark fibre circuits and investing in network operations monitoring equipment and capabilities. It is irresponsible for Ofcom to impose a DFA remedy at this time (based on flawed processes and market definitions and SMP findings that have not based evidence gathering and

testing and the scrutiny that consultation with stakeholders would ordinarily apply). Ofcom has simply continued in error in failing to take a responsible approach toward international obligations and has failed to address the Commission's existing advice. Its failure to consult in the current process either with the Commission or other EU NRAs through BEREC risks creating a remedy that distorts both the market in the UK and pan EU markets that the Commission and BEREC consultation process was designed to avoid.

- 6.3.8 Ofcom proposes that the DFA remedy is introduced in April 2018, meaning that it will have been in the market for one year by the time the 2019 BCMR is due to come into effect. Should the 2019 BCMR find that a DFA remedy is not an appropriate and proportionate way in which to address the potential market failures identified (if any), then the CPs would have wasted expenditure and wasted investments in the use of DFA. Those CPs would be faced with either having to convert their DFA circuits to active leased lines, or they would have to maintain the relatively small stock of DFA circuits they would be able to install in that year, whilst future purchases would be active leased lines or perhaps DPA which would enable the CP to build their own networks.

Ofcom's justification for imposing the DFA remedy

- 6.3.9 Ofcom considers that the same competition concerns are present in the new SMP markets as in those defined in the 2016 BCMR and that the analysis Ofcom performed in the 2016 BCMR remains valid despite the findings of the CAT and the market dynamics and likely changes to the SMP markets, and that, for example, the DFA remedy would now only be for the market of leased lines up to and including 1Gbps, rather than all speeds as in the 2016 BCMR.
- 6.3.10 Ofcom lists the same benefits for the DFA remedy as in the 2016 BCMR³⁸ and state that it has reason to believe that cost savings from using the DFA remedy may be greater than Ofcom had first believed. The benefits listed are, cost savings, greater scope for innovation, and potential for reduction in downstream regulation. Below we evaluate each of those benefits both in their own right and in respect of the changes to those benefits resulting from the changed SMP markets.

Cost savings

- 6.3.11 Ofcom states in the DF Consultation that there are potentially significant cost savings in relation to equipment costs, as '*in many cases*'³⁹ CPs duplicate BT's equipment in order to obtain better monitoring or to provide additional downstream services. Ofcom estimates that cost savings of using DFA instead of an active 1Gbps service would vary between 4% and 14%⁴⁰.

³⁸ See DF consultation paragraph 3.9.

³⁹ See DF Consultation paragraph 4.4.

⁴⁰ See DF Consultation paragraph 4.25.

- 6.3.12 Ofcom further discusses potential cost savings in the area of fault frequency, detection and repair⁴¹, assuming that CPs would be able to perform those functions such that the overall costs will be reduced.
- 6.3.13 CityFibre is not able to provide any insights into the prevalence of duplication of electronics by CPs currently using BT's active wholesale leased lines, but we are very surprised to see Ofcom's assumption that DFA will result in a reduction in costs associated with faults. While there may be a reduction in faults resulting from the reduction in equipment duplication (fewer equipment components to fail), Ofcom appears to ignore the fact that many CPs do not today have complex network operation centres, they do not employ people to attend faults, or do they have the expertise in either of those areas.
- 6.3.14 When considering that Ofcom expects that DFA circuits will primarily be used for new connections, and that the DFA circuits will likely be split between several CPs, it is very conspicuous that Ofcom has omitted the obvious increase in costs that will in future be incurred by the CPs to perform those activities, as well as the lack of economies of scale each individual CPs will have compared to BT in the provision of those activities.
- 6.3.15 CityFibre considers that Ofcom's cost savings analysis is superficial and omits significant components which, if included, would have likely balanced out any savings to an individual CP in the year in which the DFA remedy will be available⁴². Therefore, as the remedy would only be known to be available for one year with any certainty before the completion of the 2019 BCMR (which may not find that DFA is the appropriate and proportionate remedy for any market failures identified), CityFibre considers that Ofcom cannot rely on its cost savings analyses to justify the introduction of the DFA remedy during the period where Ofcom proposes that its temporary conditions are in place⁴³. Any investments made by CPs during that period to use the DFA remedy will be wasted costs and would likely leave the CPs in a deficit.

The costs of introducing the DFA remedy

- 6.3.16 Ofcom also states that, as BT has now already incurred the costs of developing the DFA remedy, the incremental costs of implementing DFA alongside the TCs are limited⁴⁴.
- 6.3.17 CityFibre is very concerned at this approach. The fact that a remedy has already been developed should now be used as a justification for the introduction of that remedy. BT appealed the DFA remedy and CityFibre appealed the rationale and basis for Ofcom's

⁴¹ See DF Consultation paragraphs 4.30 through 4.43.

⁴² Especially as the DFA remedy now proposed cannot be used to provide active services of higher speed than 1Gbps.

⁴³ Please note that CityFibre does not accept that Ofcom's Temporary Conditions should be in place for more than maximum six months from the issuance of the CAT's Judgement and Order.

⁴⁴ See paragraphs 4.79 to 4.80 of the DF Consultation.

approach and its proportionality and the process has now been shown to be flawed in the Judgement.

- 6.3.18 The CMA found that the LLCC, and the pricing of the DFA, was, if anything, [§<]. The Commission opined that Ofcom should define more granular markets and differentiate the remedies it imposed in these, even if BT was found to have SMP in them all. The CAT quashed the basis and process adopted by Ofcom toward its assessment of underlying market definitions (and therefore all the remedies based on those market definitions) and Ruled that the BCMR has no continuing validity⁴⁵.
- 6.3.19 These findings cast such significant doubt on the legal basis for and utility of the DFA remedy in the market circumstances.

Greater scope for innovation

- 6.3.20 In the 2016 BCMR, Ofcom focused extensively on the greater scope for innovation by CPs that it considered would result for the DFA remedy. In the DF Consultation, Ofcom states that its analyses in the 2016 BCMR still applies⁴⁶, and states that “A contractual restriction applied by BT to prevent usage of dark fibre above 1Gbit/s would not fundamentally change the fact that dark fibre would provide an environment more conducive to innovation”, further stating that CPs could innovate in three areas:

- 1) Innovation in services, features and packages;
- 2) Innovation in the method of delivery of services; and
- 3) Innovation in the speed of innovation.

Scope for future deregulation at the active level

- 6.3.21 Ofcom states in paragraphs 3.9 and 4.58 through 4.60 that the introduction of the DFA remedy is likely to pave the way for reduction or abolishment of regulation of active wholesale leased lines, including the SoR process for leased lines services.
- 6.3.22 CityFibre considers that, if Ofcom wanted to prepare for de-regulation at the active level it should have mandated DPA either instead of or alongside a DFA remedy. DPA provides proper freedom for the CPs to design and operate their own fibre networks. Such fibre networks can be almost entirely made up from using BT’s ducts and poles or the DPA remedy can be used to complement self-build, as would be the case for CityFibre if it were able to use DPA in the BCM.
- 6.3.23 CPs using DPA will then be able to compete with BT in the wholesale market for active leased lines and for dark fibre circuits. This development is for example seen in France.
- 6.3.24 Further, the pricing of the proposed DFA remedy (as was the case in the 2016) would be on an active-minus basis, linked to BT’s prices for its 1Gbps services. [§<], very importantly, would be incompatible with cost-based pricing for a DPA remedy.

⁴⁵ CAT Judgment para 393 and para 13 of the Ruling

⁴⁶ See DFA Consultation 4.40 onwards.

- 6.3.25 Ofcom states that its proposed relaxation of the DPA usage rules in the currently ongoing WLAMR process would allow dual use and therefore enable some providers in the BCM to use DPA and that this overcomes the absence of DPA in the BCM. CityFibre disagrees with this position. Ofcom's current proposals for the usage restrictions for the new DPA remedy leave a substantial level of uncertainty, with BT being the arbiter of whether a CP's proposed use of DPA is in compliance with the revised usage restrictions. CPs like CityFibre that typically build infrastructure to serve the BCM before starting to roll out fibre to serve the broadband market cannot know whether they can deploy the DPA remedy for the initial BCM infrastructure. That uncertainty makes it much less likely that such CPs will seek to use DPA.
- 6.3.26 Ofcom need to understand that the planning and design of a network is a lengthy and costly activity. If a CP designs the network to use DPA, but subsequently finds that BT objects to the use of DPA for that specific network, then the CP needs to re-design the network, losing substantial time and incurring substantial additional costs. Ofcom's current proposals for DPA usage restrictions in the WLAMR do not effectively provide for use of the DPA remedy in the BCM.
- 6.3.27 Whilst DFA provides some flexibility for CPs to use their own equipment to create active leased lines, there is still a reliance on BT and the DFA lines would not become an integral part of the CPs owned and operated network. [redacted] CityFibre refers Ofcom to [relevant sections] if its response to the 2016 BCMR consultation for the full justification for why DPA is more appropriate and proportionate as the first passive remedy in the BCM. CityFibre further refers Ofcom to the Commissions' comments on the draft 2016 BCMR (of which the CAT recently found that Ofcom had not taken utmost account) which express a clear preference for the DPA remedy.
- 6.3.28 Lastly, the proposed DFA remedy is only applicable to circuits <= 1Gbps. Therefore, for CPs reliant on BT's regulated access services, there will remain a need for active wholesale leased lines services. Again here, it seems that Ofcom has already decided that it will be able to justify the extension of the DFA remedy to cover VHB circuits in the 2019 BCMR. This exactly is the same process failure which caused the CAT to quash Ofcom's process approach to market analyses in the BCMR 2016 appeal. Ofcom's statements throughout the TC Statement that it considers that its SMP findings for circuits <= 1Gbps would also apply to circuits > 1Gbps is another example of this flawed and prejudiced approach.
- 6.3.29 [redacted].
- 6.3.30 For the reasons set out above, CityFibre strongly disagrees with Ofcom's assertion that the introduction of the proposed DFA remedy, including the way it is priced, would pave the way for reduction in regulation active of active remedies in the BCM. The DFA remedy simply does not provide the ability for CPs to build their own independent networks and, at the same time, the DFA remedy is subject to conditions and costs and priced in a manner that provides a disincentive for CPs to invest in competitive end-to-end fibre networks to compete with BT.

Risks and costs of the DFA remedy

- 6.3.31 Ofcom states in paragraphs 4.63 through 4.65 of the DF Consultation that many of the risks associated with the introduction of the DFA remedy as identified in the BCMR 2016, are no longer applicable due to the limitation of the DFA remedy to circuits <= 1Gbps.

This is because those risks related to the use of DFA for circuits > 1Gbps, such that the pricing gradient that currently applies to BT's active leased lines portfolio could be disrupted, potentially forcing BT increase prices for lower speed circuits in order to recover the loss of contributions to common costs from reduced sales of VHB services.

- 6.3.32 Ofcom also states in paragraphs 4.74 through 4.78, that it considers that any negative impact in investment incentives for rival infrastructures that might have arisen from the 2016 BCMR DFA remedy is now substantially reduced due to the new DFA remedy being limited to circuits <= 1Gbps.

Ofcom's reliance on compliance with the usage restrictions for the DFA remedy

- 6.3.33 All of Ofcom's arguments in relation to the presumption of reduced risks of the currently proposed DFA remedy either relies on the compliance by CPs of the usage restrictions (i.e. that DFA must not be used to provide active services of a speed greater than 1Gbps, or recognition that the proposed DFA is subject to unwelcome conditions that can be imposed by BT, will incur additional costs and is unworkable in practice.
- 6.3.34 CityFibre does not understand Ofcom's faith in the compliance with this restriction. In our view, CPs are likely to attempt to find ways to deliver > 1Gbps services through the DFA circuits, and there is a risk that BT would be able to effectively monitor and police compliance with the usage restriction.
- 6.3.35 If failure of compliance were to prove to be the case, Ofcom would be basing its regulatory decision making on an assumption of non-compliance or failure of compliance. This would be a strange and unattractive position for a public authority to be relying on, and moreover, an unreasonable basis for decision making
- 6.3.36 CityFibre is also concerned that it appears that Ofcom has already made up its mind with regards to the outcome of the 2019 BCMR, in as far as Ofcom states repeatedly in the TC Statement that it would find that BT has SMP in the VHB market as well in all the geographic markets where it has currently found that BT has SMP in the market for wholesale leased lines <= 1Gbps.
- 6.3.37 As a consequence of that presumption, it seems that Ofcom is continuing with its remedy defined process and intent on ignoring the law and CAT Judgement with a view to lifting the usage restriction on the DFA remedy no later than April 2019, one year after the introduction of the remedy with the usage restriction.

The risks of impact on rival investment and the proportionate calibration of remedies

- 6.3.38 Ofcom states in paragraphs 4.74 through 4.78 of the DF Consultation that it considers the impact on rival investment to be lessened by the usage restriction of the DFA remedy. As set out above, either the usage restriction will be ineffective and Ofcom will have put in place an ineffective remedy, which makes its decision highly questionable, or Ofcom's assessment of the impact on rival investment of the DFA remedy risks being unduly optimistic. Either way, the risk to infrastructure investment has not been appropriately and proportionately calibrated in accordance with the law.

- 6.3.39 As set out in CityFibre’s comments on the TC Statement above[§<]47.
- 6.3.40 Notwithstanding the difficulties identified above, the signal sent to investors from Ofcom’s result oriented position indicates that it is uninterested in operating in accordance with the law, and uninspired by gathering facts and making evidence based assessments of relevant markets and effective competition. This is indicative of a regulator who is closed minded. Taken together with its actions overall, the facts indicate a determination in Ofcom to impose dark fibre supply obligations on price capped terms without proper regard to the competition issue to be remedied, the relevant facts or consequences.
- 6.3.41 In these circumstances, investors are concerned about Ofcom’s motives and CityFibre believes that the introduction of the DFA remedy is certain to have significant detrimental impact on the reputation of the UK as a place that operates on a predictable rule of law governed basis and welcomes opportunities for investment.
- 6.3.42 CityFibre has recently secured financing to roll out fibre networks to provide broadband services to at least 1m premises and has partnered with Vodafone UK as an anchor tenant for that investment. [§<]48. [§<]

47 [§<]

48 [§<].