



Consultation on adding dark fibre to the remedies for business connectivity markets: Virgin Media Response

29 December 2017

1. Executive Summary

The regulation of Business Connectivity Markets is an important exercise by Ofcom to ensure that the existence of dominance in a relevant market is controlled, while ensuring that appropriate incentives to invest for fibre build are maintained. The focus on network build by BT and alternative Communications Providers (“CPs”) is greater than ever and supported in public comments made by Government and Ofcom.

The proposal to require BT to provide Dark Fibre Access (“DFA”) as part of a package of temporary remedies runs counter to these positive pro-investment sentiments.

Ofcom has proposed that BT supplies DFA for circuits of 1Gb¹ and less. Virgin Media considers that the proposal is flawed for a number of reasons:

- Ofcom has failed to undertake a proper analysis of the underlying market
- It is inappropriate to impose DFA regulation where Ofcom has relied upon emergency powers to carry out its market analysis
- Ofcom’s analysis does not justify the imposition of DFA based on the evidence relied upon
- Ofcom has failed to engage adequately with industry to conduct a meaningful review and has ignored relevant aspects of the Competition Appeal Tribunal’s (the “CAT”) judgment (the “Judgment”)
- Ofcom has failed to allow industry to respond fully to the proposal by limiting unnecessarily the consultation response window to, effectively, three weeks.

The risk of proceeding with the remedy in light of those concerns is clear. Ofcom will impose inappropriate regulation that cannot easily be undone. It will undermine investment incentives, send inappropriate messages to investors and create further confusion in a market that has been the subject of appeal for the last 18 months. To continue with such an approach will risk further challenge and uncertainty beyond the point at which Ofcom considers that the temporary measure will be withdrawn.

¹ We use “Gb” as an abbreviated term for Gigabit per second throughout this response.

It is vital that Ofcom properly considers this issue, and to that end we have set out our concerns as fully as possible within the time allowed. We will, however, continue to consider the issues raised and, given the limited time allowed for a response, we reserve the ability to supplement this response.

2. Introduction

Ofcom sets out that it is consulting on two issues: “*whether to add a requirement on BT to provide dark fibre in addition to other remedies imposed in the BCMR Temporary Conditions statement*” (the “Statement”), and also “*on the market definition and SMP assessment set out in [that statement]*”². Virgin Media tackles both issues in this response. We identify fundamental concerns with Ofcom’s approach to both its market analysis and its proposal to impose a DFA remedy in the identified 1Gb and below CISBO market.

We discuss Ofcom’s market analysis in section 3 below and consider Ofcom’s proposal to impose DFA in section 4.

3. Ofcom’s Approach to market definition in the Statement

Ofcom has decided a market definition, imposed a finding of SMP and decided upon remedies in relation to certain Business Connectivity Markets following a decision made on 23 November 2017; only 2 weeks after the CAT overturned Ofcom's 2016 statement.

These decisions have been taken under the “exceptional circumstance” powers contained with the Communications Act 2003 (as amended) (“the Act”), which allow Ofcom to impose temporary regulations when:

- There are exceptional circumstances; and
- There is an urgent need to safeguard competition and protect the interests of consumers.

Ofcom argues that these conditions exist in order to justify the highly unusual step of imposing SMP regulation without following the normal process of local consultation and notification to, and consultation with, the European Commission.

Virgin Media disagrees with Ofcom and considers that it has not met the high threshold set under the Act to justify the use of exceptional powers.

In this regard, it is first important to consider the legislative backdrop to sections 80A(2), 80(1A), 48A(2) and 49A(2) of the Communications Act 2003 (“CA03”) (together, the “emergency powers”). Each of the emergency powers is derived from provisions of the Framework Directive, which forms parts of the European Electronic Communications Framework (“Common Regulatory Framework” or “CRF”).

² Statement paragraph 1.7

Article 7(9) of the Framework Directive, is the original legal basis for the emergency conditions. Where Article 7(9) is satisfied, a national regulatory authority is not obligated to comply with Article 6 or Articles 7(3) and (4) of the Framework Directive:

- Article 6 requires Ofcom to provide interested parties with an opportunity to comment on draft measures within a reasonable period where they will have a significant impact on the relevant market.
- Article 7(3) requires Ofcom to notify a measure falling within the Framework Directive or Access Directive (e.g. imposition of an SMP condition) to the Commission, BEREC, and the national regulatory authorities in other Member States. It must then provide these bodies with a one-month period to provide comments.
- Article 7(4) provides that where the Commission has objections to a draft measure notified under Article 7(3) it may require Ofcom to not adopt the measure for a two-month period.

Article 7(9) operates as an exception to these three provisions, and the broader market review framework that underpins the CRF:

9. In exceptional circumstances, where a national regulatory authority considers that there is an urgent need to act, in order to safeguard competition and protect the interests of users, by way of derogation from the procedure set out in paragraphs 3 and 4, it may immediately adopt proportionate and provisional measures. It shall, without delay, communicate those measures, with full reasons, to the Commission and, the other national regulatory authorities and BEREC. A decision by the national regulatory authority to render such measures permanent or extend the time for which they are applicable shall be subject to the provisions of paragraphs 3 and 4.

Against that backdrop it is important to recognise the very limited scope of the emergency powers. Those powers are limited to exempting a national regulatory authority from carrying out, in advance, the full consultation exercise that would normally be necessary before implementing provisional measures. Those powers do not, however, exempt the national regulatory authority (Ofcom) from carrying out the market analysis that is necessary before any relevant measure is imposed.

3.1 Exceptional Circumstances are not met

Ofcom must establish an urgent need to safeguard competition in order to rely on these provisions. Ofcom suggests that the finding that BT has SMP in a market and a lack of regulation in that market gives rise to an obvious risk of competition problems arising. For the reasons set out in section 3.4, Virgin Media does not consider that the requirement for exceptional circumstances has been met.

3.2 Exceptional Circumstances do not permit sub-standard review

As noted above, the exceptional circumstance powers in the Act allow Ofcom to avoid the need to consult as part of the process involved in undertaking a market analysis procedure, establishing SMP and deciding upon remedies. It is not, however, open for Ofcom to use the emergency powers to avoid undertaking the underlying analysis required under the Act. The underlying analysis cannot, therefore, be cut short or be of a sub-standard nature. Ofcom is still required to undertake a full market review and in this context, and has not done so in this case.

BT had SMP in the AISBO market in 2013 when the market review considered circuits of 1Gb and below. The 2016 statement, which has been overturned by the CAT, found BT had SMP in a wider, all bandwidth, CISBO market, based on information provided by Communication Providers (CPs) from 2014. Ofcom has now imposed a new market definition based on minimal new analysis, relying on the information gathered for the 2016 statement, stating that it has also taken account of information provided through the appeal process.

The information considered during the CAT appeal is necessarily limited to those issues that were specifically raised in the grounds of appeal. The CAT had no jurisdiction to consider issues that were not pleaded, and so any information obtained during the appeal in relation to Ofcom's market analysis as set out in the Statement, will by definition only be limited. Evidence provided during the appeal process cannot therefore replace the need to obtain fresh and up to date evidence on which to base a decision. There are a number of areas, in particular relating to geographic market definition, where Ofcom does not appear to have grappled with up to date information.

Ofcom accepts that its approach is unconventional, and acknowledges that a fresh analysis has not been undertaken. That analysis is continuing in parallel with a full review now being undertaken as a "priority"³. Ofcom has thereby expressly acknowledged that it has not conducted the full underlying analysis that is required before putting in place new regulation.

Ofcom obtained the evidence used for the 2016 review nearly four years ago. The reason for the requirement in the CRF and the Act to conduct three-year market reviews is to ensure that regulation is appropriate for the market in question. Ofcom notes in many of its publications and statements that technology and the behaviours of customers are changing; its Connected Nations report is updated every year to reflect this. Ofcom's decision to rely on information from 2014 as the basis for the new decisions in the Statement is therefore inappropriate.

This is not an abstract or theoretical criticism; changes within the leased lines market have been significant since the evidence was obtained for the 2016 review. Ofcom has ignored these changes (most notably CityFibre's investment and Virgin Media's Project Lightning) without proper analysis of their impact. Ofcom notes, in dismissing Virgin Media's Project Lightning, that it is focused on residential rather than business supply. This misses the point: as network build increases the reach of Virgin Media's network, more businesses can be supplied with leased lines. It was clearly in evidence before the CAT that Virgin Media is able to expand its reach from any point in its fibre network, and therefore network expansion is relevant irrespective of the primary purpose of the build.

Further, Ofcom does not even engage with other market trends that may affect the supply of leased lines. Asymmetric Broadband designed for businesses continues to evolve with significant increases in bandwidth (both up and down) and quality of service to justify reconsideration of competition in the lower bound of the relevant market⁴.

3.3 Ofcom's approach does not appropriately address the CAT Judgment

³ Statement paragraph 1.16

⁴ Virgin Media supplies Business Broadband (#Voom Fibre) based on upload speed, rather than download providing the highest available download speed on the network on all packages (at up to 350Mb) – see <https://www.virginmediabusiness.co.uk/connectivity/internet-access/business-broadband/>

Ofcom's unusual approach of not updating the information that underpins its market analysis is justified by imposing regulation only where its *"conclusions would not be affected by the Tribunal's findings"*, and therefore Ofcom claims that it is adopting *"a cautious approach"*⁵.

This approach, Ofcom suggests, allows it to leave certain conclusions from the 2016 statement intact, with a need only to address the direct criticisms made by the CAT as to the process. Aside from the requirement to undertake a full review, addressed in section 3.1 above, Ofcom appears not to have followed its own rule. Virgin Media considers that there are a number of areas where Ofcom has failed to address the Judgment.

3.3.1 Geographic Market Definition

Ofcom's approach to geographic market definition was one of the grounds of appeal considered by the Tribunal. In particular, the Tribunal considered the extent to which different areas of the country are sufficiently similar to be part of the same geographic market.

Ultimately, the Tribunal found that *"Ofcom erred in its definition of the geographic market for CISBO services in that, on its own metrics, Ofcom was wrong to find that the RoUK comprises a single geographic market including the CBDs"*.⁶

In light of the Tribunal's Judgment, in the Temporary Conditions statement Ofcom has defined eight distinct geographic markets: (a) the CLA; (b) the LP; (c) each of the Five CBDs (Birmingham, Bristol, Glasgow, Leeds and Manchester); and (d) the RoUK excluding the Five CBDs. However, Ofcom has given no further consideration as to whether there are other areas in the RoUK that could also be identified as separate geographic markets.

Such a narrow consideration of the Tribunal's Judgment is clearly insufficient. Although the Judgment focused on the differences between the CBDs and the RoUK, its remittal clearly extends to a wider re-examination of geographic market definition. The Tribunal make this clear in paragraph 400 of the Judgment:

"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 its infrastructure presence tests."

As Ofcom has defined the product market differently, it is vital that it gives proper consideration to the geographic market definition and in particular the analysis of the RoUK. The Tribunal also made comments about the dangers of grouping together large areas in a single geographic market:

"there are obvious dangers in the use of very large areas for geographic markets analysis. In particular, although Ofcom was plainly entitled to use the Network Reach Test to select broad areas consisting of many postcode sectors for further investigation, it does not follow that the candidate areas are set in stone so that the further investigation of

⁵ Statement paragraph 1.8

⁶ CAT Judgment, paragraph 433.

competitive conditions cannot or should not take place on a more granular level within those areas"⁷

The above point is not a theoretical one. There are a large number of other cities that Ofcom needs to examine in significantly more detail to determine whether they exhibit conditions consistent with effective competition before contemplating the imposition of DFA in the whole of the RoUK excluding only the five CBDs.

CityFibre has expanded significantly since the 2016 BCMR statement and has a geographic presence in 42 cities. Ofcom's own analysis in the BCMR 2016 Statement reveals that a number of the cities in which CityFibre was planning to expand in 2016 already have at least two other CPs (including BT) present. For example, Table A10.14 in the 2016 BCMR statement shows that when CityFibre's expansion plans are taken into account:

- (a) 20 out of the 23 cities considered by Ofcom have an average network reach of two or more OCPs (i.e. three CPs including BT) at a distance of 100m;
- (b) six out of the 23 cities considered by Ofcom have an average network reach of three or more OCPs (i.e. four CPs including BT) at a distance of 200m; and
- (c) eight out of the 23 cities considered by Ofcom have more than 50 high network reach post code sectors.⁸

Since Ofcom conducted this analysis, CityFibre has expanded its geographic presence further than originally forecast by Ofcom and it now has a fibre footprint in 42 cities across the UK.

Ofcom has sought to dismiss CityFibre's expansion on the basis that CityFibre has connected a relatively small number of businesses:

"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"⁹

However, this understates the competitive constraint from CityFibre:

- (a) 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
- (b) the number of businesses currently connected to CityFibre's network understates significantly its network reach - which is the principal basis on which Ofcom has assessed geographic market definition and market power. CityFibre's website states that its network addresses 28,000 public sites, 7,800 mobile masts and 280,000 businesses.

In light of the Tribunal's findings that Ofcom erred in its geographic market definition it is vital that Ofcom undertakes a proper and detailed assessment of conditions of competition in urban areas in

⁷ CAT Judgment, paragraph 431.

⁸ Defined as a postcode sector which has a 200m network reach greater than or equal to two.

⁹ Temporary SMP Conditions Statement, paragraph 2.23(b).

the UK. This is true in respect of the remedies imposed in the Statement, but is even more acutely required in respect of Ofcom's proposal to introduce the novel, highly interventionist requirement to provide dark fibre. Without such an analysis, Ofcom will be unable to assess with any degree of accuracy the geographic areas in which BT may be expected to have SMP. This is particularly important as it is in these smaller cities where DFA is likely to have the greatest adverse impact.

It is also significant that Ofcom has maintained its approach to geographic market definition in light of the Commission's comments made in relation to the 2016 statement. The Commission 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"*¹⁰

Ofcom did not change its approach in the 2016 statement and the CAT found that Ofcom had not taken utmost account of the comments. This substantiates the need for Ofcom to undertake a comprehensive review of its approach to geographic market definition.

In summary, Ofcom has not even begun to carry out the geographic market analysis that the Tribunal indicated was necessary or which would be required before introducing any SMP condition - particularly a novel and interventionist SMP remedy.

3.3.2 SMP Analysis

Ofcom justifies using the analysis conducted for the 2016 statement¹¹ for its SMP finding on the basis that its assessment was forward-looking until March 2019. However, this disregards the fact that the analysis was based on a market definition that has now been overturned by the CAT. Ofcom concedes that some of the evidence relied upon is old and states that it will only make an SMP determination where it can be "sure" that BT holds SMP in a market¹². This is a high threshold to meet, and not one that Ofcom achieves.

In line with the approach in the 2016 statement, Ofcom places heavy reliance on the presence of alternative operator infrastructure. However, its methodology does not appear to have taken account of issues raised in the CAT process.

For example, Ofcom maintains an approach to "competition" that is defined by the number of operators who bid for a contract, rather than the potential number of bidders. The evidence before the CAT contended that a bidder will assume that all other competitors would be commercial rivals in a tender, irrespective of whether they bid or not.

Ofcom states that evidence on the presence of competing infrastructures is mixed, with a substantial number of users having several nearby operators (as well as the option of EFM¹³), and a significant minority with "a more limited choice".¹⁴ Ofcom concludes that a good choice of provider for a majority is not relevant to an SMP determination which is based on a concern over the significant minority of operators, who still have a choice, albeit a more limited one. This approach is certainly

¹⁰ Commission comments pursuant to Article 7(3) Notification dated 22 April 2016

¹¹ Statement paragraph 2.20

¹² Statement paragraph 2.20

¹³ Ethernet Final Mile which was found by the CAT to be relevant to market analysis

¹⁴ Statement paragraph

not consistent with one that requires SMP to be imposed only in cases where Ofcom is sure of BT's dominance based upon a lack of alternative network infrastructure.

Similarly, Ofcom suggests that its "sure" approach to SMP requires that it adopts a more cautious approach to service shares that would give rise to a presumption of dominance. Ofcom sets out the Guidance from the Commission that a 40% would usually give rise to a presumption of dominance, but in this case it considers market shares of 50%. When Ofcom analyses the market, it is significant that in the LP Ofcom determines that BT has a share of more than 50% only in relation to CISBO Medium bandwidths.¹⁵ Similarly, in the CBDs determined to be uncompetitive, BT's market share is below 50% in both CISBO Low and High bandwidths in Birmingham, and below 50% in CISBO Low for Bristol. Again this analysis does not suggest that Ofcom can be sure of an SMP finding in these markets, aside from any concerns over the age of the data that is relied upon.

3.4 Exceptional Circumstances: no urgent need to act to safeguard competition and protect consumer interests.

Virgin Media considers that Ofcom has failed to establish that there is an urgent need to act. We consider that there are three significant areas in which Ofcom has fallen short in its assessment:

- a. Failing to evidence risk to competition
- b. Failing to consider adequately whether a voluntary agreement would have been sufficient
- c. Failing to take account of other regulation, including the Undertakings

3.4.1 Lack of evidence of risk to competition

In order to rely on section 80A of the Act, Ofcom has to justify an urgent need to safeguard competition. Ofcom states that the industry relies heavily on active leased line remedies, and "*in the absence of regulation there are therefore significant risks for competition and consumers*".¹⁶ This is a non sequitur, in that, provided the supply of active leased lines is maintained, and there is confidence in that supply, there will be no risk. It is therefore incumbent on Ofcom to evidence that the supply of leased lines, in the period before substantive regulation can be consulted on and implemented, is likely to be withdrawn or compromised (e.g., by pricing increases etc).

Ofcom has not provided any evidence that this is the case. At paragraph 1.25 Ofcom sets out four grounds as to why there is an urgent risk:

- a. Purchasing CPs will be unprotected from competition problems
- b. CPs that defer purchase may distort competition
- c. Customers may be affected by BT varying pricing or quality of service
- d. BT could favour its own downstream business.

These scenarios are not supported by evidence of any likelihood that BT (or CPs) would act in the assumed manner. Indeed, the evidence to date is to the contrary. The CAT Judgment, in June 2017, effectively rendered Ofcom's SMP conditions unenforceable from that point, as they were based on an illegitimate market definition. According to Ofcom, BT and other CPs should have begun to act in a manner consistent with the four concerns above. This has not happened: the market for leased

¹⁵ Statement Table 2.1

¹⁶ Statement paragraph 1.21

lines has remained stable throughout the five month period since the Judgment, with no discernible drop in demand or any variation of conditions of supply. Ofcom states: “*there is no case for the period of uncertainty to be prolonged any further*”¹⁷, yet there is no evidence that there has been a period of uncertainty that has adversely affected the market for 1Gb circuits and below.

In contrast, there are objective reasons why BT and CPs would not behave in the manner described above.

3.4.2 Voluntary commitment insufficiently considered

Ofcom has faced periods where there is an absence of regulation in markets where BT has been found to have SMP. This is a not uncommon occurrence in relation to charge controls that expire before the subsequent market review completes. In these circumstances BT and Ofcom agree a voluntary commitment to bridge the gap between review periods (which can be substantial¹⁸). This is an approach that has been shown to work by providing sufficient confidence to industry that BT will act appropriately in the absence of formal regulation.

Ofcom states that it is not appropriate to address concerns through a voluntary commitment and that it has not received an offer of a voluntary arrangement from BT.¹⁹ Ofcom does not adequately explain why seeking an agreement with BT to cover the period prior to the conclusions of its current “*prioritised*” review would not be an appropriate route, or why this option has not been explored with industry. It is rather bizarre that Ofcom says that BT has not approached Ofcom to instigate a voluntary arrangement; it is clearly for the regulator to lead in any such arrangement. In this case, Ofcom published its statement without prior discussions with industry.

3.4.3 Undertakings not sufficiently taken into account

BT remains subject to the Undertakings in relation to supply of active leased line circuits. Ofcom suggests that the Undertakings would not be suitable regulation to rely upon on the basis that they complement SMP regulation rather than substitute for it.²⁰

We agree that the Undertakings are a different form of regulation, designed to ensure that Openreach can operate as a functionally separate business from the rest of BT, rather than seeking to address dominance in a single market. However, it is short sighted to dismiss the Undertakings as not relevant. It is necessary to look behind the rationale of the Undertakings and understand their effect.

The Undertakings require Openreach to offer wholesale services on non-discriminatory terms to its customers, including BT’s downstream divisions. This supply is on an Equivalence of Inputs (EOI) basis, which ensures, in respect of leased lines, that a 1Gb EAD circuit has to be offered on the same basis to BT as to any other CP. BT is of course a major consumer of leased lines (Ofcom acknowledges this in its SMP analysis), and it would not be practical or viable for Openreach to

¹⁷ Statement Paragraph 1.26

¹⁸ Narrowband Charge Controls expired in Sep 2016, and Ofcom accepted a voluntary arrangement to bridge the lacuna created until publication of its final Narrowband statement in November 2017, a period of 14 months.

¹⁹ Statement Paragraph 1.28

²⁰ Statement Paragraph 3.9

withhold supply from other parts of BT. That being the case, and given that the Undertakings operate to ensure that the rest of industry would be able to purchase leased lines on an EOI basis, it is difficult to see how Ofcom's concerns are substantiated.

Although BT could seek to maintain equivalence but increase the price of leased lines, this could be dealt with, as it has in the past, through a voluntary agreement. Additionally, BT would be subject to ex post competition law in any market that they were dominant in, providing an additional constraint on their incentive or ability to act in a manner that was detrimental to the market.

3.5 *Ofcom contradicts its own approach to application of exceptional circumstances*

Ofcom justifies its use of exceptional circumstances by applying regulation only to an "uncontroversial" part of the market. The up to 1Gb bandwidth is to be regulated, but the more contentious Very High Bandwidth (VHB) market is not the subject of "exceptional" regulation.

The requirement to limit "exceptional circumstance" regulation to uncontroversial topics is not a criteria contained within the Act. As set out above, exceptional circumstances only allow an NRA to avoid consultation obligations, and do not permit the underlying analysis to be truncated, which Ofcom appears to have done in its market analysis.

Furthermore, Ofcom has not followed its own desire to proceed "cautiously":

- Ofcom has regulated three CBDs that it has found to be uncompetitive, yet the concept of whether the CBDs are an appropriate starting point for a geographic market definition is controversial, for the reasons we set out in section 3.5 above.
- Ofcom has also set a charge control as a remedy and used inputs based on the DFA remedy remaining in place. This seems bizarre given that the DFA remedy imposed in the 2016 Statement was imposed on the now defunct all bandwidth CISBO market, and the Statement itself does not impose any DFA remedy.

4. **Ofcom's Proposal to impose Dark Fibre Access**

4.1 In addition to making determinations on the grounds of exceptional circumstances, Ofcom seeks to implement a DFA remedy and consults on a proposal.

Virgin Media strongly disagrees with Ofcom's approach for a number of reasons:

- a. It is a misuse of Ofcom's power to impose a dark fibre remedy where the enabling market analysis has been carried out under exceptional circumstances and using emergency powers
- b. Ofcom has not identified any competition concerns that the DFA product will address
- c. Ofcom has not established that the remedy meets the tests under section 47 of the Act, notably that it is objectively justifiable, proportionate and transparent.

We address these in turn below.

4.2 *Ofcom does not have the power to impose DFA in these circumstances*

Ofcom relies upon its exceptional circumstance powers to define a market, make a determination of market power and impose SMP conditions on BT. Ofcom's rationale is that short-term regulation is required to fill a regulatory lacuna²¹ because there is an urgent need to safeguard competition and to protect consumers.²²

Ofcom accepts that it can only make an SMP finding where it establishes an urgent need to act; it must therefore follow that any SMP condition imposed under that finding must also be limited to circumstances where there is an urgent need to act.

It is clear that Ofcom has not proposed the new DFA condition on the basis of establishing an urgent need to safeguard competition and protect consumers. Rather, Ofcom has considered the standard legal tests in the Act for setting SMP conditions,²³ and its rationale for imposing DFA is that it will "*promote efficiency and better sustain effective competition*"²⁴.

Virgin Media considers that failing to take account of the basis on which the underlying SMP finding has been made cannot be appropriate when setting SMP conditions. Ofcom accepts that its market analysis is one that is "*pragmatic for present purposes*"²⁵, acknowledging the temporary nature and limitations under which the decision is made. In particular, Ofcom's approach on this occasion is to ensure that it only imposes regulation taking "*a conservative approach*"²⁶, and that conclusions are "*specific to the particular circumstances of these temporary measures*". Ofcom is clear that in exercising its exceptional circumstance powers it is only appropriate to act in areas where there is (in its view) no controversy or issue in relation to the decision made. This approach is also extended to the imposition of SMP conditions where Ofcom explains why there is an urgent need to act in order to safeguard competition and to protect the interests of consumers in accordance with section 48A of the Act²⁷. In this regard, Ofcom concedes that certain remedies do not meet this high bar, for example, it does not impose obligations in relation to new network access that were previously set under the 2016 decision.

Ofcom explicitly states that although an obligation for new network access, through a standardised Statement of Requirements process, would be appropriate for the promotion of competition in downstream markets, "*it does not meet the statutory urgency requirement for the purposes of this [decision]*"²⁸.

On this approach there is no basis on which Ofcom can impose DFA. The requirement on BT to offer dark fibre is a highly controversial remedy. It was the subject of specific grounds of appeal by BT and CityFibre, with arguments made in pleadings on why the remedy was not appropriate under the SMP findings made by Ofcom in its 2016 statement. Ofcom suggests that the underlying "*exceptional circumstance*" market analysis was only made using reasoning "*that the Tribunal's Judgment did not*

²¹ Statement paragraph 1.19

²² Statement paragraph 1.27

²³ Including section 87, 88 and 47 of the Act

²⁴ Consultation paragraphs 1.8 and 4.84

²⁵ Statement paragraph 2.11(a)

²⁶ Statement paragraph 2.5

²⁷ Statement paragraph 3.6

²⁸ Statement paragraph 3.16

overturn”,²⁹ however, Ofcom does not address why this allows it to propose a remedy that was highly contentious and the subject of specific legal challenge. That the Tribunal was not required to make a determination on these grounds of appeal reflects only that Ofcom’s underlying market analysis was flawed, and therefore a view on the remedies was not necessary. Ofcom cannot conclude from the fact that the BCMR Statement was quashed before even getting to a consideration of the challenges to the dark fibre remedy that its analysis of that remedy is not impugned. The analysis that formed the foundation for proposing the dark fibre remedy was found to be in error.³⁰

To acknowledge that, on the one hand, it is inappropriate to impose a less controversial obligation in the form of a new network access condition because there is no urgent need to do so, and then to seek to impose the highly controversial DFA obligation based only on a standard test in the Act is not only inconsistent, but unfair and irrational.

4.3 *Ofcom has not identified the underlying competition concern*

SMP remedies are required to address a specific competition concern identified in the market analysis. In this case, Ofcom has not identified the underlying competition concern that must be addressed through the imposition of DFA in the up to 1Gb market. This point was made in our response to the 2016 consultation and it has not been adequately addressed in any subsequent analysis. Similarly the issue was live in the Appeal to the CAT, and raised by Virgin Media in its intervention in support of BT’s Appeal.³¹

4.4 *Ofcom has incorrectly identified benefits of its proposed remedy*

Ofcom suggests that the benefits of the proposed remedy are three fold: it improves productive efficiencies through lower equipment costs; it enhances dynamic efficiency by offering scope to innovate; and it offers future opportunities to simplify regulation.³²

These claimed benefits do not reflect the SMP analysis undertaken by Ofcom. Instead, they rely on the analysis conducted under the 2016 review, which was for an entirely differently defined market that included all bandwidths. Consequently, the remedy implemented under the 2016 statement, an uncapped dark fibre product, was also different to the remedy now being consulted upon. Ofcom refers explicitly to its 2016 analysis as support for its approach.³³ The same analysis cannot be applied without more consideration of whether this changes the costs and benefits Ofcom previously associated with uncapped DFA.

The latter two benefits identified by Ofcom are forward looking, yet the underlying market and SMP analysis is explicitly temporary. Ofcom is clear that its market analysis is not a substitute for a full review (which is being undertaken concurrently)³⁴, and that it is time limited to April 2019, and potentially will be withdrawn earlier if the substantive analysis is completed prior to that date. It is

²⁹ Consultation paragraph 2.6

³⁰ BCMR Hearing, 20 November 2017

³¹ See Section D of Virgin Media’s Statement of Intervention

³² Consultation paragraph 1.8

³³ Consultation footnote 6 “2016 BCMR Statement reviews in detail the benefits of dark fibre access”

³⁴ Statement paragraph 1.16

therefore inappropriate to plead any specific forward looking, medium term benefits, to justify the imposition of the remedy.

Ofcom contends that the remedy allows CPs to innovate. However, the remedy is time-limited for a market that may well be subject to redefinition as part of a substantive review. It cannot be said that a temporary SMP condition of this nature can give any certainty that CPs could meaningfully rely on to develop programmes of work that require investment in innovation.

Ofcom argues that it is appropriate to take account of future opportunities to deregulate, as a passive remedy may, in the longer term, be able to replace active remedies. To claim that an SMP remedy imposed under a temporary market analysis finding that has a maximum duration of less than one year can have a specific long term benefit concerning how future regulation may be structured is without credibility.

4.5 *Ofcom has overstated cost efficiency benefits*

The remaining benefit identified by Ofcom is that the proposed remedy will improve productive efficiencies through lower equipment costs. Leaving aside the issue of whether those cost efficiencies are real (we deal with that issue separately below at 4.6.2(b)), it is important to view the proposed remedy in the context of the market on which it is to be imposed.

The market is made up of various bandwidth products up to and including 1Gb circuits. The vast majority of the market is made up of “*CISBO low or CISBO medium*”³⁵ bandwidth circuits, where there will be no cost advantage to purchasers, as a DFA circuit is based on the higher priced 1Gb EAD product³⁶. [§<]. This illustrates that DFA is only relevant to a minority of the relevant market.

If there is no cost advantage to [§<] of purchasers there can be no productive efficiency gain. Therefore, Ofcom’s argument rests solely on 1Gb circuits, which it says can be provided more cheaply than the equivalent active circuit.

While the notion of a productive efficiency gain (if Ofcom’s assertions on cost are correct) is something that can be used to assess what regulation may be required in a particular circumstance, no consideration has been given by Ofcom as to the context in which the regulation is imposed. The SMP finding is temporary, meaning that the proposed DFA remedy is likely to be around for less than one year. The decision to purchase DFA would need to be made on grounds other than cost; and the lack of certainty³⁷ over the longevity of a remedy would certainly be a relevant consideration.

4.6 *Dark Fibre Access does not meet legal tests within the Act*

Ofcom seeks to justify the imposition of DFA under the statutory tests set down in section 47 of the Act. Any proposed remedy has to be shown to be:

- Objectively justifiable;

³⁵ Using Ofcom’s definitions from its Statement explained at footnote 26

³⁶ EAD rental pricing is £1800pa for 100Mb; £3150pa for 1Gb, compared with a reference rental price of BT’s previous DFA product of £2680pa

³⁷ It would be inappropriate to regulate on the basis of regulation that may or may not be imposed in future market reviews

- Non-discriminatory;
- Proportionate; and
- Transparent;

Ofcom assesses whether its proposed DFA condition meets these tests at paragraph 4.103 of the consultation. The assessment is at best cursory, and Virgin Media considers that Ofcom has failed to establish that the proposed remedy meets the required thresholds.

4.6.1 *Dark Fibre Access is not objectively justifiable*

The DFA remedy is said to be objectively justifiable as it facilitates and encourages access to BT's network and therefore promotes competition to the benefit of consumers.³⁸ For the reasons stated above, all of the three benefits identified by Ofcom are not substantiated. Additionally, we do not accept that the cost savings that Ofcom sets out as being available to purchasers are valid, a point we discuss in the following section.

4.6.2 *Dark Fibre Access is not proportionate*

Ofcom has also failed to establish that the imposition of DFA would be a proportionate approach to addressing concerns within the defined market. Ofcom states that the remedy is proportionate as it is only "*targeted at addressing the market power that we propose BT holds in these markets and do not require it to provide access if it is not technically feasible or reasonable*".³⁹ This suggests that the remedy is proportionate as it is only imposed to address BT's SMP. We do not consider that this is a sufficient reason to show that the remedy is a proportionate one. Proportionality should be considered on the basis whether a remedy is the least intrusive way in which an identified competition concern can be addressed.

There are a number of reasons why DFA is not a proportionate remedy in this market. We consider that Ofcom's imposition of active access remedies adequately addresses BT's SMP by providing regulated access to its network. We set out below eight reasons why we consider DFA to be disproportionate:

a. Imposition of new to market regulation that cannot be easily undone should be approached cautiously

The DFA remedy itself is highly controversial and represents a fundamental shift in the manner in which leased line regulation has been imposed to date. It is also, by its nature, a remedy that cannot easily be reversed. A price control can be adjusted to reflect circumstances, whereas the dark fibre remedy requires circuits to be supplied in a particular physical configuration and once installed cannot readily be removed. For this reason, the bar to establishing DFA as a proportionate remedy, as the least intrusive manner to address a market concern, should be high.

b. The economic benefits associated with DFA are overstated by Ofcom

Ofcom places reliance on its previous analysis conducted under the flawed 2016 review. That review considered the imposition of DFA across all bandwidths; a substantially different remedy to that

³⁸ Consultation paragraph 4.103(a)

³⁹ Consultation paragraph 4.103(c)

proposed now. DFA pricing is on a cost equivalent basis to a 1Gb EAD or EADLA circuit. This pricing equivalence was a key part of the reasoning that DFA (under the 2016 review) should not significantly adversely affect investment incentives: too low a price and there would be no incentive to build network, yet too high a price would inhibit any take-up. Ofcom's choice of price point reflected that the majority of DFA purchases would be to address needs in the VHB market.

The 2016 statement suggested that a purchaser of 1Gb circuit could obtain an EAD circuit or a DFA circuit for a similar cost of ownership. A buyer who had no expectation of future bandwidth demand over 1Gb would have little incentive to purchase DFA on cost grounds although there could be an (alleged) innovation benefit.

Ofcom now suggests that in addition to that niche of purchasers, CPs who require a 1Gb circuit will be more likely to take a DFA circuit as there will be the opportunity for substantial cost savings in relation to the electronic equipment associated with using that circuit. This is a new argument and one that is vitally important to Ofcom in order that it can show that DFA is a proportionate remedy.

Ofcom sets out, in Annex 5, its analysis of the cost savings available to a DFA purchaser, concluding that a CP can save up to 18% in equipment spend compared to the equivalent 1Gb EAD circuit.

Ofcom's analysis is unsophisticated, although we recognise that it has been undertaken in limited time, and without the usual inputs sought from industry. Indeed, it is notable that no information has been sought from industry to support Ofcom's proposals; this is normally the primary source of evidence used by Ofcom to justify its decisions. Ofcom's approach has been to focus too heavily on the cost of CP/ End User equipment without considering very relevant additional costs that would also be associated with using dark fibre.

In particular, Ofcom's cost comparison does not appear to take into account the following costs that would be relevant in running and managing a network of dark fibre circuits based on an Openreach DFA product:

- Cablelink costs (and time / costs associated with managing BT delivery)
- Hosting charges
- Project delivery costs
- Solution design costs

It is also true to say that a CP that does not have the scale or experience to manage a dark fibre network would struggle to carry out these activities at a cost comparable with BT's.

CPs other than Openreach are also like to face significantly higher resource costs in relation to repair. [X]. Whilst the likelihood of a fibre fault is low, when it does occur providers will have to undertake their own investigation to diagnose that a fibre break is the root cause of the fault before calling in a specialist, likely third party, repair team.

In simple terms, it would cost considerably more for a customer of Openreach to purchase and use a dark fibre circuit than to continue to purchase active EAD circuits. Therefore, save for large CPs, experienced in running and maintaining their own networks, it is unlikely that 1Gb capped DFA would be economically attractive to a potential purchaser.

Ofcom has, in its cost analysis assumed a “one size fits all” product that can be bought by small CPs and large operators alike. At a minimum, Ofcom needs to undertake a proper analysis of cost savings available to potential purchasers of DFA, balancing equipment savings with the additional costs associated with dark fibre management. Ofcom should also consider the different ability of CPs of different size and scale to manage dark fibre circuits.

c. *No consideration on the impact on the market and investment incentives*

Ofcom has dismissed any risk to rival investment incentives for VHB circuits on the basis that the revised dark fibre remedy does not compete with VHB circuits. However, this fails to take account of the uncertainty as to whether dark fibre supplied pursuant to Ofcom's proposed remedy will, nevertheless, be used for higher bandwidth services. In particular, there are two sources of uncertainty:

- the risk that Ofcom will allow dark fibre to be used for higher bandwidths in future reviews; and
- the risk that BT will not have the ability or incentive to monitor whether customers use dark fibre for services above 1Gb.

Investing in fibre deployment is a long-term decision with payback periods often in excess of seven years. Ofcom is well aware that uncertainty in the market can deter investments. In particular, there is a significant risk that the dark fibre remedy will deter Virgin Media and other CPs from investing in VHB services because prices may be undercut in the future.

For the reasons set out above, we do not expect there to be significant demand for dark fibre for 1Gb and below circuits. If, however, we are proved wrong, then the DFA remedy will have a significant impact on investment incentives for 1Gb circuits. Ofcom rejects this risk on the basis that any benefits of using dark fibre over and above active products are *"important in their own right, but we doubt that they are of sufficient magnitude to have a material impact on rival investment"*.⁴⁰ This runs contrary to the importance Ofcom places on the cost savings and innovation benefits of dark fibre identified elsewhere in the consultation. For example, in relation to cost savings Ofcom notes that *"where dark fibre is likely to be taken up, the scope for savings is significant"*.⁴¹

It is also inconsistent with the proposed cannibalisation assumptions Ofcom has used to forecast take-up of dark fibre. In Table 5.2 Ofcom predicts that 73% of new 1Gb circuits will switch to dark fibre in 2017/18. Virgin Media has no plans to offer a dark fibre product that is capped at 1Gb due to the difficulty of monitoring bandwidth. Therefore, if Ofcom's assumption is correct, up to 73% of new 1Gb circuits could be dark fibre from BT rather than an active product from Virgin Media. This will clearly have a significant impact on Virgin Media's revenues and accordingly its investment incentives. Ofcom has not however considered this potential impact in the Consultation. Given the focus during the appeal of the 2016 Statement on the adverse impact on investment incentives of a dark fibre remedy, it is puzzling that Ofcom has ignored this issue in its consultation. This is a clear failure to have regard to clearly relevant considerations.

⁴⁰ Dark Fibre Consultation, paragraph 4.76.

⁴¹ Dark Fibre Consultation, paragraph 4.25.

Ofcom has also failed to consider the potential impact on 1Gb WDM circuits. Ofcom's proposed remedy allows BT to use contractual limitations to prevent dark fibre being used for bandwidths above 1Gb. However, this does not prevent customers from using dark fibre to provide 1Gb WDM circuits, potentially at a significant discount to BT's and Virgin Media's current pricing.

As 1Gb WDM circuits are part of the VHB market, the proposed remedy will potentially have an impact on a market in which Ofcom has not identified SMP. Due to the ease of upgrading bandwidth on a HCS circuit, there is also a significant risk that if customers install WDM equipment on a dark fibre circuit they will have a greater incentive to use higher bandwidths.

Whilst the number of customers taking 1Gb WDM circuits is relatively small, this is an impact to which Ofcom has entirely failed to have regard. It is a further illustration of the rushed and inadequate nature of Ofcom's analysis in the Consultation. As indicated above, the dark fibre remedy proposed by Ofcom is a novel, untested and intrusive remedy. It is incumbent on Ofcom to carry out a thorough impact assessment before contemplating the introduction of that remedy. Assertion and speculation on the part of Ofcom is insufficient.

d. Competing products not duly considered

Ofcom refers in passing to BT's own OSA Filter Connect product, but dismisses its relevance as it is designed to operate primarily in the VHB market. This is missing the point. There are now a number of dark fibre products available in the market. These include BT's OSA Filter Connect [3<]. One of the benefits of dark fibre to CPs is the cost-effective bandwidth scalability it provides.

[3<].

While Ofcom is correct to say that products like OSA Filter Connect cater for the VHB market, the point is not that there is a gap in the market below VHB bandwidth that needs to be filled by regulation, but that there is little demand for such products. Ofcom has not established that there is a meaningful need for a 1Gb and below dark fibre offering. Relying on the demand analysis from the 2016 review cannot be appropriate as this was based on an entirely different market definition that included VHB circuits.

Given the above, a dark fibre remedy that caps bandwidth at 1Gb is flawed due to a very limited demand. It is likely that demand for such a product would rely on an expectation from the buyer that the bandwidth cap would be removed in the future; this would predetermine future regulation, and cannot be a sound basis on which Ofcom should rely to impose this remedy.

e. Policing by BT is not duly considered

Ofcom acknowledges that it is only appropriate to introduce a remedy for the market that it has identified. It also acknowledges that dark fibre can, by its nature, be used to provide a circuit of any bandwidth. There is a consequent need to ensure that the proposed remedy is only used within the defined market for which the remedy is intended.

Although this issue is acknowledged by Ofcom,⁴² it simply states that out of market use could be controlled by BT “*if it so chooses*”, and that such restrictions would not be unduly burdensome for it to administer or monitor.

Virgin Media considers that this reasoning is flawed.

Even if BT did seek to ensure that DFA was effectively policed, Ofcom has underestimated the likely impact of doing so. The fact that the proposal requires a limitation on the use of the DFA service (the capping of bandwidth to 1Gb) means that BT will have to have some ability to monitor the circuit, and in that sense, it cannot be described as a “pure” dark fibre offering which would inherently not allow for monitoring or tracking capability by the supplier.

If BT chose to monitor actively the circuits, installation of Openreach equipment would be required. Therefore, whilst the DFA remedy might remove the need for Openreach terminating equipment, it will create the need for Openreach monitoring equipment of some form, thereby requiring a reconsideration of the Active Differential⁴³ by Ofcom and eroding at least some of Ofcom’s assumed cost savings.

Ofcom’s argument that active monitoring is not required and that a contractual restriction would be sufficient on the basis of “*reputational and relationship damage*” is weak and not sufficient to underpin regulation. To suggest that BT could monitor simply by inspecting circuit ends when on routine maintenance visits, or that suspicions would be aroused by a CP switching to 1Gb DFA from a 10Gb product is naïve. Routine maintenance visits would be known in advance to the purchaser, and therefore would not be likely to reveal the usage of the circuit. Even if equipment installed had a bandwidth capability of handling in excess of 1Gb, it would not necessarily mean that the capability was being used; indeed throttling of capacity was the subject of much discussion within the CAT hearing. In many cases it would not be unusual for the connection to be installed in a different rack/room to the customer equipment and the only visibility that the BT engineer would have of the onward connection is a patch cord. Consequently the engineer would have no visibility of the device connected even if they could determine bandwidth usage.

f. Application of the remedy to all markets

Ofcom has proposed to apply DFA to all of the markets in which it has found that BT holds SMP: the LP, RoUK and the two CBDs of Manchester and Bristol. As we have set out above, Ofcom’s decision to reuse the CBD markets from its 2016 decision is, in itself, questionable as it does not adequately consider the competitive conditions within the country as a whole. However, even accepting Ofcom’s geographic market definitions, there is no consideration of the relative competitiveness of these geographic markets to determine if DFA is a proportionate remedy within that market. The Commission noted in its response⁴⁴ to the Article 7 notification of its 2016 decision that Ofcom should consider whether DFA was an appropriate remedy to apply in all markets.

⁴² Consultation paragraph 1.11, 3.18 and 3.19

⁴³ The Active Differential is defined by Ofcom as comprised on an adjustment to reflect the long run incremental costs avoided by BT in providing DFA ; an adjustment in relation to non-domestic rates (“NDRs”); and the long run incremental costs of any objectively justifiable differences between DFA and EAD.

⁴⁴ Commission comments pursuant to Article 7(3) Notification dated 22 April 2016

In particular the Commission stated:

“there may be grounds to conclude that in areas with a significant degree of infrastructure based competition, by alternative operators access to BT's physical (duct) infrastructure may be sufficient to ensure an adequate level of additional competitive access and pressure at the infrastructure level, and a dark fibre remedy may not be necessary or proportionate. It would therefore appear appropriate for OFCOM to establish criteria also addressing this dimension of infrastructure competition and its relevance for the type of remedies imposed. Therefore, the Commission asks OFCOM to consider in their final draft measure the imposition of 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.”

It is clear that the Commission was concerned about the proportionality of DFA when applied to the wider CISBO market. The need to ensure that the proposed remedy is proportionate in relation to a 1Gb and below CISBO market is clear, and Ofcom has failed to undertake any assessment on whether this is appropriate in relation to the different geographic markets identified in its Statement.

The Commission also referred to the availability of pole and duct access. It is significant that pole and duct access as a remedy under the Wholesale Local Access market review is significantly wider now than it was at the time of the 2016 statement. This remedy can now be used to supply Business Connectivity services subject to a primary use condition within the WLA market. Again, this is something that has not been considered by Ofcom.

g. Timing

The timetable set out by Ofcom in its consultation appears to be optimistic and based on the fact that there is an existing developed product that BT can take ‘off the shelf’ and supply. Although BT’s DFA product did proceed to Reference Offer (RO), no consideration has been given to how the revised product would be policed or monitored. The time taken by BT to negotiate and agree a RO with industry reflected considerable work to achieve a consensus. Engagement with industry to resolve the issue of how 1Gb usage is monitored by BT would need considerably more time than Ofcom appears to allow with its aspirational launch date of April 2018. In order to meet that date, Ofcom would have to publish a draft final statement, notify the commission, take utmost account of any comments made, and draft a final statement to implement the remedy. It is highly unlikely that this statement would be ready to publish before March, which would give BT no time to seek to implement changes to allow effective policing of DFA use.

The consultation process is also significantly shorter than one would expect. The period of one month, a month that includes the Christmas period, gives industry no time to reflect properly on the proposal. Ofcom already acknowledges that, in the context of its market analysis, a short consultation period would render parties unable to engage meaningfully with the process, and comments that a short consultation would be likely to be unsatisfactory for all parties - yet this is the approach that Ofcom has adopted for the dark fibre remedy. Ofcom’s consultation principles⁴⁵ state

⁴⁵ Consultation Principles at <https://www.ofcom.org.uk/consultations-and-statements/how-will-ofcom-consult>

that there are seven principles that it follows for every public written consultation including airing issues prior to a consultation or, if there is insufficient time, holding an open meeting to explain proposals; and consulting for up to ten weeks depending on impact. Virgin Media considers that this consultation was entirely unexpected; no engagement has been offered since its publication and the one-month period (including Christmas week) is woefully inadequate given the potential impact of DFA.

While this has compromised the ability of individual organisation to prepare appropriate responses, it has disproportionately affected representative bodies that have to consult members. In particular, the IIG feels unable to consult its members adequately in the time available, and will not be in a position to submit a full response.

There is, however, a more fundamental concern with the timing of this remedy. Virgin Media considers that it cannot be proportionate to set a highly intrusive remedy when Ofcom has committed to removing the regulation as soon as possible,⁴⁶ once the substantive review is complete. At most this will be a remedy with less than a year to run. The lack of proportionality is emphasised in this case when the remedy is both highly controversial and not easily removed once it has been imposed.

For all of the reasons above, we consider that the proposed approach to DFA is simply not appropriate given the tests set out in section 47 of the Act, and Ofcom has failed, in particular, to justify the remedy as being objectively justifiable, proportionate or transparent.

h. Innovation evidence limited

Ofcom relies on innovation as an important motive to purchase dark fibre. However, Ofcom is still not able to explain the nature of the innovation that would be enabled by the introduction of DFA, relying on the examples of potential DFA use submitted in response to the 2015 consultation. These examples were provided on the basis that DFA would not be bandwidth capped and no analysis has been undertaken to validate whether these examples are still relevant to the proposed capped DFA remedy. We appreciate that the details of all innovation are not going to be known in advance, but it is reasonable to expect to have some awareness of where DFA could enable innovation, otherwise the justification is empty. Virgin Media has considered the broad types of innovation that may be relevant. Providers buying passive fibre and adding the electronics have complete control and are not constrained by Openreach's network configuration and systems; this could facilitate Software Defined Networks (SDN). However, this could also be achieved with Layer 2 Ethernet services currently.

4.6.3 Dark Fibre Access is not transparent

The lack of detail on how BT would be expected to police the remedy and ensure that DFA is used appropriately shows a lack of transparency on how this remedy is supposed to work. Ofcom states that the conditions are "*clear in their intention*"⁴⁷. This is simply not the case in terms of how this remedy can operate in a confined bandwidth market.

⁴⁶ Statement paragraph 2.5

⁴⁷ Consultation paragraph 4.103(d)

5. Conclusion

In setting regulation under exceptional circumstance provisions, Ofcom has failed to undertake a thorough market analysis, and by not taking sufficient account of relevant issues addressed by the CAT has ended up with inappropriate market definitions, creating a flawed basis for the imposition of SMP conditions.

To set “*uncontroversial*” regulation as a stop gap is perhaps an understandable aim, however to attempt to set highly intrusive and controversial regulation is several steps too far, even if the regulation could be justified following a conventional full market analysis

It is in this temporary market analysis that Ofcom proposes DFA for a 1Gb and below market covering four geographic areas. However, Ofcom’s proposal is flawed on many levels; from the basis upon which the regulation is imposed to the underlying analysis on whether the remedy is appropriate in all the circumstances.

The risk of setting DFA as a remedy was clearly articulated to Ofcom in the course of the CAT appeal pleadings, and there is significant evidence that the imposition of this remedy would have seriously undermined investment incentives of infrastructure building CPs. Ofcom has singularly failed to engage with these arguments in the context of this consultation, yet the threat remains. The risk that the market will be destabilised by Ofcom’s continuing intent to make regulated dark fibre a reality come what may sends out a negative message, at a time when Ofcom should be encouraging fibre investment by providers.

Virgin Media
29 December 2017