

DCMS Statement of Strategic Priorities CityFibre response to Consultation

Executive summary

- CityFibre strongly supports the Government's nationwide full fibre rollout ambitions, but warns that unless the infrastructure competition model that has been prescribed – and which sits at the heart of the FTIR's strategy – takes place on a level playing field, so that there is fair competition between Openreach and its competitors, these vital targets will be missed.
- The Statement of Strategic of Priorities (the SSP) has taken welcome steps to address the absence of such a level playing field in today's market, as well as to set out the priorities for a switchover from copper to full fibre that supports consumers and competition.
- These priorities must now be translated into a proactive and coherent regulatory strategy. However, we do not yet have full confidence that Ofcom is giving sufficient weight to the promotion and protection of competition either in its overarching strategy or its day to day operations.
- We therefore make 10 recommendations that aim to strengthen the SSP, so as to ensure that the principles it outlines are fully embedded in Ofcom's future strategy:
 1. To support the principle of prioritization of investment over further reductions to consumer prices, Ofcom should be encouraged to develop guidance on price floors to prevent predation.
 2. To deliver DCMS' priority of "fair and effective competition", **Ofcom must give much greater strategic and operational importance to the monitoring of Openreach for anti-competitive behaviour**, potentially by expanding or adapting the role of the Openreach Monitoring Unit.
 3. To ensure that this "fair and effective competition" is sustainable over the decade or more it will take to achieve nationwide rollout, **Government and Ofcom should commit to not deregulate Openreach before sustainable competition is firmly established and meets a pre-agreed set of KPIs**.
 4. To support the investment case for alternative network deployment, and to encourage not just Openreach but others to make "large and risky investments", the SSP should be clarified to make clear that the **"fair bet" principle applies to all investors**.
 5. So that alternative investors can plan their network rollout with confidence, and irrespective of Openreach's voluntary transparency, Government and Ofcom must work towards a **regulated transparency mechanism**, in line with the EECC requirements.
 6. **In addition to facilitating co-investment arrangements between players, Ofcom must actively monitor co-investment discussions**, some of which are already underway and could be market-shaping, to guard against anti-competitive outcomes.
 7. Government should urge Ofcom to **commence and conclude the proposed review of consumers' access to information in a timely fashion** so that the millions of consumers who will soon have access to full fibre can make informed choices.
 8. Ofcom should take a **leading, rather than a supporting role in establishing cross-platform switching processes**, given that self-regulatory routes are unlikely to succeed because of inherent conflicts

between key participants.

9. Government and Ofcom must **urgently set out principles for copper switchoff that support competition and consumers, and monitor commercial dialogue closely**, given that discussions regarding the switch off of Openreach's network are now underway.
 10. Ofcom must **increase its strategic focus on securing workable, scalable Duct and Pole Access**, given that current product is not yet fit for purpose, and cannot therefore reduce the cost of or speed up competitors deployments.
- We remain fully committed to playing a pivotal role in delivering the digital infrastructure that the UK's economy needs to thrive, and to providing choice for ISPs, MNOs, businesses, consumers and the public sector.
 - Building on the ambitions of the FTIR, we now need a regulatory strategy, guided by the SSP, that is centered on promoting and protecting the competition required to deliver our shared full fibre vision. We are happy to discuss any of the points we raise in this response in more detail.

Introduction

- CityFibre has strongly welcomed the UK Government and Ofcom's strategic shifts to full fibre in recent years, which have helped to build the momentum and investor confidence that is now driving rollout in the UK.
- We also supported the ambition of the DCMS's Future Telecoms Infrastructure Review, which is based on two central conclusions:
 - the UK needs full fibre across the whole of the country as soon as possible, with targets of 15m premises having access to full fibre by 2025 and nationwide full fibre by 2033;
 - competitors to Openreach are needed to meet the targets and deliver good outcomes for our communities, for consumers, for the market.
- Effective and sustained competition to Openreach will be pivotal to the success of the FTIR and to full fibre rollout in the UK, in this initial rollout phase and for the duration of the 15-20 years it will take to reach national coverage.
- As we communicated to DCMS both before and directly after the FTIR publication, we disagree with the FTIR's view that head-to-head infrastructure competition is the best model to meet these targets. In our feedback to DCMS – including in our letter to Jeremy Wright on 7 September 2018 – we suggested that if head-to-head infrastructure competition was to succeed then it must take place on a level-playing field between Openreach and its competitors.
- Given that a level playing field does not currently exist – with Openreach remaining the dominant player, and therefore retaining the motive and means to undermine competition – our post-FTIR discussions with DCMS have focused on ways in which FTIR can be strengthened in order to promote and protect this level playing field by:
 - Preventing anti-competitive behaviour;
 - Creating the conditions for consumers to switch easily to full fibre from copper, and between providers;
 - Removing barriers that undermine competitor rollout.
- We are therefore supportive of the draft SSP, which has taken steps to address all three of these issues. Our response to this consultation principally provides our feedback on sections 1.2 (access to passive infrastructure); 1.3 (stable and long-term regulation), 1.5 (switchover) and Section 2 (furthering the interests of telecoms consumers).
- In each case we indicate where we welcome text that looks to support competition, propose text where further clarification is still required, and suggest additional text aimed at ensuring that Ofcom carries out its regulatory duties in a proactive, timely and joined-up manner.
- This last point is vital. The Strategic Policy Statement that Ofcom published alongside FTIR echoed the conclusions of its DCR, by supporting a shift to full fibre through network competition. We have also received assurances from Sharon White that Ofcom is "absolutely committed" to supporting "fair and open competition", that they are "vigilant" to predatory behaviour by Openreach, that the OMU is taking a "proactive monitoring role" and that they are interested to understand more about switching.
- Despite this, we do not yet have full confidence that Ofcom is giving sufficient weight to the promotion and protection of competition either in its overarching strategy or its day to day operations:
 - Key aspects of a strategy to support competitive full fibre investment – including monitoring of anti-competitive behaviour and work to ensure the right consumer conditions for take-up – remain vague in

Ofcom's Annual Plan 2019/20, despite us having submitted a detailed input into the Annual Plan's consultation highlighting these absences.

- We receive mixed messages in our day-to-day to work with officials about the priority and urgency that is given to full fibre competition and consumer issues.
- We also remain concerned that Ofcom is already looking to discuss the circumstances of de-regulation in the full fibre market long before the building blocks of sustainable competition are in place.
- We support the majority of the principles laid out in the SSP, but if these principles are not baked into Ofcom's regulatory activity, then the goal of nationwide full fibre driven by competition will be at risk.
- We therefore propose that DCMS uses the SSP and its ongoing discussions with Ofcom to push for Ofcom to take a more proactive, timely and joined-up approach to the promotion and protection of fair and effective competition over the long-term (including an expanded role for the Openreach Monitoring Unit) and to commit not to deregulate Openreach prematurely.
- Finally, we would welcome clarity about whether Ofcom will re-issue their Annual Plan for 2019/20 (published this week, ahead of the final SSP) after SPP is published to reflect how it intends to give regard to the SSP. It would be inappropriate, at a crucial point in the emergence of the full fibre market, for investors to wait until Spring 2020 for Ofcom to clarify how it will address the Government's strategic priorities.

1. Promoting and protecting a level playing field

- This section addresses the SSP's proposals in section 1.3: "Stable and long-term regulation that encourages network investment".

a) Prioritising investment over reducing retail pricing

- We fully support the Government's view that "*promoting investment should be prioritized over interventions to further reduce retail prices in the near term*".
- It is critically important to new entrant fibre providers that regulated pricing leaves economic head-room for new entrants who at the outset do not have the economies of scale of the incumbent. Ofcom should be encouraged to set regulated prices that will allow a Reasonably Efficient Operator (REO) to compete with the incumbent.
- It is also important where Ofcom grants a degree of pricing freedom to the incumbent, this does not give Openreach the latitude to engage in predatory pricing behaviour. Ofcom should be encouraged to develop guidance on price floors that prevent predation.

b) Fair and effective competition

- We welcome the inclusion of new text that cements the importance of promoting and protecting a level competitive playing field between Openreach and its competitors: "*It is essential that competition is fair and effective between existing network operators and new entrants, and we expect Ofcom to be vigilant and use its full range of powers to address any anti-competitive behaviour.*"
- If Government and Ofcom remain committed to network competition to drive rollout, despite the concerns we have previously expressed about the effectiveness of that model, then "fair and effective" competition between Openreach and its competitors is essential and should not in any way be watered down in the final SSP.

- However, we remain concerned about how this principle will be translated into regulatory activity. In a letter to us, Sharon White has said that Ofcom are *“taking a proactive monitoring role in this area [predatory actions by Openreach] and are ready to investigate any anti-competitive behaviour or breach of existing regulatory requirements. We also monitor Openreach’s behaviour through our Openreach Monitoring Unit (OMU) with a specific focus on compliance with the commitments and governance processes.”*
- While we welcome these assurances, we have not yet seen concrete evidence of a shift in approach consistent with this sentiment:
 - We see mounting evidence of anti-competitive behaviour by Openreach, but it has proven difficult to persuade Ofcom to look at these issues in the round, and to consider whether they amount to a concerted pattern of conduct. The cumulative materiality of the different activities being undertaken by Openreach needs to be considered in the round. If each case is judged on its own merits, rather than as connected examples of a joined up strategy by Openreach to exert its position to undermine competition, this approach risks “death to competition by a thousand cuts”. This is not a new phenomenon: the cumulative materiality of discriminatory or anti-competitive practices at the point where the market was first transitioning from dial-up internet to broadband was precisely what led to Ofcom introducing, in 2005, strict ex ante rules on BT’s behaviour and led to the creation of Openreach.
 - We are concerned that because Ofcom’s preference is to use its competition law powers to enforce competition issues, that the process for resolving those issues will take too long. As we have stressed before, the next 12-24 months are critical in determining whether competition to Openreach can scale or not, and become sustainable. Swift resolution of issues is key. Ofcom is plentifully equipped with powers to create ex ante competition constraints, but seems reluctant to use them.
 - Finally, despite Sharon White’s assurances above, and the fact that Ofcom’s Annual Plan says that “monitoring of compliance in this area [to enable access to fast reliable broadband through the development of competing networks] is a key priority for the year ahead”, plans to monitor remain vague and missing from the list of work programmes for 2019/20. It is not currently the OMU’s explicit responsibility to monitor Openreach for this purpose and it is not clear whether there is sufficient resource or strategic focus for monitoring of anti-competitive Openreach behaviour directed at fibre competitors within Ofcom, given the continued narrow focus of the OMU on behaviours directed towards the downstream wholesale and retail markets.
- In order to fully embed the principle of “fair and effective competition” in Ofcom’s full fibre strategy, we would welcome the formalisation of Ofcom’s role in monitoring Openreach for anti-competitive behaviour directed toward the full fibre market, perhaps through the adaption or expansion of the OMU’s Terms of Reference. This would provide a clear framework for this monitoring work, over and above the work done regarding Openreach’s governance, as well as a clear reporting and review framework, and secure dedicated resource and expertise.
- Inter alia, we note that the boundaries between access and downstream markets embodied by the legal separation of Openreach align poorly with the problem of discriminatory treatment of alternative fibre providers who are both customers of Openreach (as users of duct and pole access) and its principal competitor. One obvious avenue that Ofcom should be exploring is whether its new policy focus on infrastructure competition powered by duct and pole access necessitates a further (at least) functional separation of a ‘duct and pole co’.

- We fully appreciate that it is not DCMS or the SSP's role to propose to Ofcom how to carry out its duties, but DCMS could consider adapting text used elsewhere in SSP to a similar end. The phrase in question is from paragraph 62 of the SSP, which aims to encourage Ofcom to adopt an "engaged, proactive regulatory approach to the security of communications networks and services": "Ofcom has the powers at its disposal – including information gathering, audit enforcement and penalty powers – to ensure providers comply with their statutory duties to manage security risks. We welcome the strengthening of Ofcom's capability, skills and resources to allow it to perform an enhanced cyber role".
- We would welcome SSP text that encouraged Ofcom to adopt a more "engaged, proactive approach to monitoring Openreach for anti-competitive behaviour"; that proposed that Ofcom use the "powers at its disposal - including information gathering, audit enforcement and penalty powers – to perform this enhanced role" and that Government "would welcome the strengthening of Ofcom's capability, skills and resources" to allow it to do so.
- We would also welcome a specific injunction to Ofcom to consider whether further protections are needed to safeguard the interests of alternative fibre providers who are both customers of and competitors to Openreach through the introduction of further separation measures.

c) Market review periods

- We welcome the proposal of five year market review periods, and the introduction of an All Access Review. Longer market review periods will all other things being equal confer greater market certainty for investors and avoid the problem of the current three-year market review cycle, whereby regulatory decisions are in constant flux as a result of the pre-consultation, consultation, and timeline of any resultant legal appeals taking as long or longer than the three year cycle. Having said this, some flexibility needs to remain in the regulatory system to adjust regulation within five year review cycles if major new market or technology developments arise. This will be particularly important in Ofcom's proposed 2021-2026 All Access Review cycle, as major market developments in both full fibre deployment and 5G rollout can be anticipated in this period.

d) Deregulation of Openreach

- We are very concerned that language in the SSP will lead to premature deregulation of markets. The SSP states that regulation is required "only and to the extent necessary to address competition concerns" and that Ofcom should consider regulatory forbearance in areas where there is "actual or prospective competition".
- In fact, the quid pro quo of a policy focused on infrastructure competition is that, at least in the short to medium term, regulation may need to be strengthened rather than removed if a competitive market is to develop. Investment in new infrastructure is by its nature both a lengthier route to market entry than service competition, and one much more exposed to risk, in that successful anti-competitive behaviour can destabilise new entrants' ability to continue to raise capital. Even though there is now prospective competition from firms such as CityFibre, Openreach remains the dominant player in the telecoms infrastructure market and can use this dominance to undermine competition in the emerging full fibre market.
- Added to this, we are already concerned that there is insufficient regulatory oversight to ensure that Openreach cannot exploit this dominance to create an unlevel competitive playing field.
- Removing regulation of Openreach prematurely, before genuine and sustainable competition is fully established and is being adequately monitored and enforced, would tilt the playing field yet further in Openreach's favour and could fatally undermine the emergence of the competitors that the FTIR has said are required.

- To avoid damaging investment incentives, we propose that a much clearer shared understanding of the conditions under which deregulation would take place is established. In a joint letter that CityFibre sent to the DCMS Secretary of State with other leading altnet network providers, we proposed that Government, working with Ofcom, publicly sets out the “KPIs” of a healthy competitive market as well as a series of monitoring or measuring mechanisms to establish whether or not they are being met. This would help to identify the right time and place to deregulate, as well as perform a vital role in monitoring, deterring and addressing anti-competitive behaviour (as above). These KPIs would need to cover issues such as predatory overbuild and/or pricing structures, access to supply chain and demand and barriers to consumer migration.
- We would welcome reference to these kinds of checks and balances in the SSP.
- We do support Ofcom’s emerging approach of applying differentiated regulation to geographic markets with different characteristics, in particular as regards their suitability for competitive infrastructure deployment. As noted below regarding dark fibre, we urge caution in prematurely deeming geographic areas to be unsuitable for competitive fibre deployment and by doing so applying regulatory remedies that have the effect of foreclosing the market for competitive infrastructure deployment.

e) Fair-bet

- We welcome text in the SSP relating to a fair-bet regime, which appears to apply to all investors not just Openreach: *“The Government’s view is that an effective ‘fair bet’ regime would be one that allows firms making large and risky investments to have confidence that any regulation will reflect a fair return on investment, commensurate to the level of risk incurred at the time of making the investment decision.”*
- Sustained competition will require £billions of investment from both the incumbent and competitors, with all investors making “large and risky investments” needing certainty about how their networks will be regulated in the future. Debates about a regulatory ‘fair bet’ have been unduly focused on the incumbent and its claims of alleged unfair treatment by Ofcom in relation to previous cycles of investment. In the interests of a level playing field, it is important that it is not only the incumbent who is given this certainty. If this is indeed the intention of the SSP text, it would be helpful to make this more explicit. This is important, as Ofcom’s Strategic Policy Statement is clear that it sees “fair bet” as applying to only Openreach: *“We recognise that Openreach needs the opportunity to make higher returns when a risky investment is successful in order to compensate it for the chance a risky investment may fail (the ‘fair bet’ principle).”*
- We therefore propose that the SSP text is clarified to make clear that the fair-bet principle should apply to both incumbent and challenger firms.

f) Transparency

- We have argued that greater transparency of Openreach’s build plans would help to prevent anti-competitive overbuild by Openreach and enable efficient investment of competitor networks.
- We wrote to the Secretary of State in January 2019 to express concerns that the then-impending voluntary publication by Openreach of their build plans could have unintended consequences – worsening rather than resolving the “hold-up” problem it was designed to solve.

- In the event, the published plans largely revealed rollouts that were already in the public domain. However, our concerns about voluntary transparency remain. We still argue that thorough independent oversight is required to:
 - scrutinise and validate Openreach plans to ensure they have sufficient detail in regard to precise locations, accurate timetable for deployment and sufficient evidence of funding;
 - ensure that the full data is published in a transparent manner so that other full fibre investors can assess impacts quickly;
 - monitor Openreach's plans for anti-competitive intent and intervene to prevent predatory overbuild;
 - ensure that Openreach does not deviate from amending or extending its plans to respond to competitor rollout
 - hold Openreach to their rollout, especially if other operators have withdrawn investment from those areas or chosen not to enter a market that they may have otherwise done.
- The voluntary transparency mechanism by Openreach and overseen by Openreach is not able to meet these criteria. We understand that the transparency mechanism being developed in response to Article 22 of the EECC is closer in line to the criteria we have set out.
- Irrespective of the voluntary transparency offered by Openreach, we would therefore urge Ofcom and Government to work toward establishing a transparency mechanism overseen by Ofcom and in line with the requirements set out in the EECC. It would be helpful for this end goal to be made clear in the SSP.
- It is important to note that as the EECC transparency mechanism is designed, that due care is taken to ensure that commercially sensitive material is not shared publicly.

g) Risk-sharing and co-investment arrangements

- In our original submission to the FTIR, we argued that Government and Ofcom could play an important role in facilitating co-investment arrangements between players, both vertically (i.e. between network builders and ISPs) and horizontally (i.e. between fibre providers themselves). Ofcom, which previously has been either dismissive of, or actually hostile to such arrangements, needs to be encouraged to play a more positive role in facilitating such arrangements. We are therefore very pleased to see text to this effect in the SSP.
- Vertical arrangements are starting to emerge. In addition to our existing agreement with Vodafone, another major ISP has now opened discussions with leading full fibre networks, which could have a very significant impact on how the market develops in the coming months and years.
- We also believe that 'reciprocal build' arrangements between competing non-dominant full fibre providers will start to emerge as the full scale of the challenge of building a national full fibre infrastructure becomes clear, and as the negative impact of multiple fibre builds in the same locations begins to be felt by local communities and their leaders (as we recently saw when 20 cities from the Northern Powerhouse wrote to the Chancellor expressing their concerns about the impact of network duplication on their communities).
- As those commercial discussions take place in the coming months, we would urge Ofcom to be vigilant to the potential for the incumbent to leverage its dominant position in the market and any upstream arrangements it may have (for e.g. sports rights) to secure a favourable outcome relating to network rollout.
- At the same time it is vital that Ofcom takes an open-minded and pragmatic approach to the commercial and deployment agreements that may emerge, driven by market forces, and be ready to adapt its own strategy accordingly. Commercial scenarios that could emerge include:

- Horizontal agreements between Openreach and a competitor network
 - Vertical agreements between BT Retail and a non-Openreach network
 - Mutualisation of fibre networks from the distribution point to the home, as is being encouraged in France.
 - Reciprocal build arrangements between non-Openreach networks providers, or between all providers.
- Language in the SSP that both urges Ofcom to actively monitor commercial deals for potential anti-competitive behaviour, and to be pragmatic in the application of its own strategy as the market itself evolves in line with commercially-driven arrangements, would be welcome.

2. Creating the conditions for consumers to migrate to full fibre and benefit from competition

- CityFibre has consistently argued that policy makers, regulators and industry must start work now to smooth the path for consumer migration from copper to full fibre networks, to ensure that maximum value is derived from the investments now being made. Driving as much voluntary migration as possible, through smooth and hassle-free switching, will also be key to determining how and when the switch off of the copper network takes place.
- We therefore welcome the greater focus that demand-side issues have been given in the SSP, in sections 1.5 and 2. Aside from the more specific points we make below, we would add that it is important to frame the policy objective not just as the smooth migration of consumers onto full fibre, but as an opportunity for competition to thrive, and for consumers to move away from the incumbent's network.

a) Consumer information

- Consumers need to have access to clear and accurate information about the broadband products available to them in order for them to make informed choices, and for new products on the market – including full fibre – to be able to compete with existing products. Current advertising rules, and wider sources of information, do not in our view currently enable consumers to make those informed choices and are therefore not fit for purpose just at the point when a raft of new full-fibre enabled products are being launched onto the market.
- We therefore welcome the SSP text, which builds on FTIR's switchover principles to include a specific call for Ofcom to take the lead on consumer information: *"In the context of the strategic objective to secure the roll-out of full fibre broadband, Government would ask Ofcom to consider whether the information available to consumers about the characteristics of different types of broadband services, is helping consumers make informed choices."*
- Ofcom, with its responsibilities for supporting consumers and competition, and with a strategic objective to encourage full fibre investment, is the right body to take this forward. We also agree that a review of the status quo – an assessment of the potential challenges – as suggested in paragraph 55, is the right first step. We would, however, add that such a review needs to commence and conclude in a timely manner. The number of consumers who have access to full fibre in the UK is rising rapidly. If a review does find that measures are required to improve the consumer information, Ofcom, working with Government and industry, need to work to identify those measures as soon as possible.
- Any such Ofcom review also needs to take into account external developments, including the expected ruling of CityFibre's Judicial Review of the ASA's decision on fibre advertising, and the recent news that the ASAI (ASA in Ireland) has issued a draft guidance note concluding that only full fibre products can use the term fibre without prominent qualification.

- We welcome the fact that Ofcom's Annual Plan states that "we want to ensure that consumers have the right information to make informed decisions about the products and services that best suit their needs", but no concrete work plans or timetables are outlined for 2019/20, which raises concerns about the perceived importance of this work, and the need for timeliness.
 - Any guidance that Government can give in the SSP regarding the importance and urgency of work on this issue would be helpful.
- b) Cross-platform switching
- Similarly, a lack of agreed cross-platform switching processes could damage the consumer experience of switching to full fibre and the prospects of competition.
 - We therefore support the SSP's reference to cross-platform switching and the guiding principles for successful switching processes: "*Ofcom will need to protect the interests of consumers (see section 2 below), promote competition between networks, and ensure that switching processes are easy, reliable, and transparent, including where consumers switch between ISPs on different fibre networks (i.e. 'cross-platform' switching).*"
 - However, we would prefer Government to propose that Ofcom takes a leading role here, rather than performing an "important oversight role in ensuring industry readiness for switchover". We are participants of the BSG's FTIR Forum, which has been tasked with exploring this issue and identifying ways forward. The forum is a useful place to air views and discuss options but is not the right forum to lead this activity.
 - A workable solution must mandate the same seamless Gaining Provider Led (GPL) switching solution for cross-platform switches as for switches taking place between ISPs on the Openreach network. Otherwise a substantial competitive advantage will accrue to Openreach as ISPs will find it much more difficult to effect switches away from Openreach than switches from Openreach copper products to fibre products. GPL switching is also the mechanism which offers the greatest guarantee that consumer harm is avoided through badly executed or poorly co-ordinated switches.
 - Cross-platform switching – in particular in the form of a GPL solution, which several companies have already said they oppose – is fundamentally not an area where cross-industry interests will align. Incumbents are incentivised to restrict switching to protect their market share; new entrants necessarily require switching to take place as seamlessly as possible so as to gain market share. In this context, it is important to recognise that a voluntary industry solution is unlikely to emerge; direction will be required by Ofcom. While the BSG FTIR Forum should therefore continue to discuss this issue, it should not be allowed to distract or delay work that Ofcom should undertake.
 - The European Electronic Communications Code (which the Government has said it plans to implement), mandates GPL switching. Ofcom's Annual Plans says that it will consult in Q3 2019 on how it intends to implement the EECC's GPL requirements. This is welcome, but we are concerned that if work does not commence on this until the EECC has been fully transposed into law, a workable solution may not be in place until 2021. As we have noted, consumers wishing to switch onto our network in areas where our consumer product is now live, such as Milton Keynes, are already vulnerable to a sub-optimal switching process. As with consumer information, prompt commencement and conclusion of this work is critical. Acknowledgement of the urgency of this issue, and the importance of Ofcom leading rather than overseeing would be welcome in the SSP.

- Cross-platform switching is the most immediately important element of creating a suitably pro-competitive switching environment. However, Ofcom also needs to be vigilant in relation to other artificial barriers to switching which the incumbents may seek to introduce to weaken the competitive threat to their business. Examples would include long-contract terms, penalties for early termination of contracts, targeted save activities, bundling of different service elements with differing contract lengths and termination processes, and pricing incentives to ISPs which reduce their willingness to transfer customers from one network to another.

c) Copper switchoff

- The SSP briefly refers to ISPs “eventually retiring the legacy copper networks” in the “switchover” section, but says nothing more about the policy and regulatory considerations regarding copper “switchoff”.
- However, there are a growing number of reasons why Government and Ofcom need to be more proactively engaged in the policy and regulation of “switchoff” now, in addition to “switchover”:
 - Openreach has very recently issued a consultation on the switchoff of its copper network. The outcome of that consultation, and how it is conducted, will have a huge knock-on impact on how Openreach rolls out its Fibre First project and the business model that supports it; the commercial agreements that ISPs reach with Openreach and competitor networks; and on consumers.
 - Indeed, as the rollout of full fibre networks gathers pace, an increasing number of locations in the UK will have access to village-, town-, or city-wide full fibre networks from either incumbent or challenger in the near future. This brings the prospect of switchoff closer than has been assumed even 12 months ago.
- It is therefore a mistake to believe that switchoff is something that stakeholders need to consider at some point in the distant future, or that this is merely an issue that the owner(s) of those networks should be concerned with.
- We therefore need strong policy guidance, regulatory oversight, and wider industry engagement to ensure that the switchoff of Openreach’s copper network supports the UK’s wider full fibre rollout objectives and competition, and not just Openreach’s business case.
- Government should therefore urge Ofcom, via the SSP, to set out the principles for copper switchoff that support consumers and competition and closely monitor the development of Openreach’s switchoff plans to ensure that customer migration processes are competitive, neutral and non-discriminatory.

3. Effective Access to Passive Infrastructure

- This section addresses the SSP’s section 1.2

a) *Duct and Pole Access*

- We welcome Government’s support for Ofcom’s strategy to enable unrestricted access to Openreach’s ducts and poles, under the principle of “no undue discrimination”. A workable, equivalent DPA/PIA product that can be used at scale would be an important enabler – alongside a level regulatory playing field – for competitive networks.

- However, we are still some way from having a product that can either reduce cost or speed up deployment, as intended. The current product – the one we expect to be published on 1 April – has not been designed for competitors like CityFibre that are planning and rolling out city-wide deployments at scale. As a tool it is fragmented, restrictive and inefficient.
- We remain committed to working with Ofcom and Openreach to improve DPA – and we therefore support the SSP text that urges Ofcom to use “vigorous and close monitoring” to ensure compliance, putting “all options” if this cannot be achieved. However, it is important to recognise that fundamentally DPA remains a product operated by an incumbent who can exploit this tool to frustrate its competitors.
- Until BT Openreach is obliged to reserve access for its own fibre roll-outs through the same product and follow the same processes as its competitors, DPA will remain a fundamentally non-equivalent proposition and its full potential to accelerate competitive rollouts unrealised.
- We also wish to flag that at in one critical aspect, DPA is likely to prove fundamentally unworkable without changes that may ultimately require legislation. Openreach has inherited wayleaves (many of which were originally entered into by the GPO pre-privatization that permit it to cross private land, install apparatus and gain access to repair and maintain its apparatus). Whilst DPA permits us to reuse these assets it does not require Openreach to share this wayleave, and indeed Openreach is categorically refusing to do so. This has very substantial real-world ramifications. For example, in many Scottish cities, telegraph poles that we might seek to use to deploy new full fibre connections are situated on private land in the gardens to the rear of properties. Without a clear right to reuse the existing wayleave this renders DPA unusable.

b) Dark Fibre Access

- We note that DCMS is advocating that where DPA is not available, other options including Dark Fibre Access should be made available. We do not think this is quite correct or at least it has the potential to be misconstrued by Ofcom and other market participants.
- The first and most obvious alternative to using DPA in dense, urban areas is self-build. It remains the case that in our city-wide deployments we see the majority of homes passed as being pure self-build rather than DPA-enabled.
- The extent to which dark fibre is needed, either in certain geographies or at all, as a ‘second best’ remedy cannot be determined until there is greater real-world experience of the extent to which PIA can be used in a range of different geo-types. No premature decisions should be taken on dark fibre until it is clear what the extent of competitive roll-out of full fibre will be. We think this approach is the correct one and is in line with the FTIR’s principles.
- We would therefore urge the Government to tighten the language on this specific point in the SSP.

Conclusion

- CityFibre remains fully committed to playing a pivotal role in delivering the digital infrastructure that the UK’s economy needs to thrive, and to providing choice for ISPs, MNOs, businesses, consumers and the public sector.

- Building on the ambitions of the FTIR, we now need a regulatory strategy, guided by the SSP, that is centered on promoting and protecting the competition required to deliver our shared full fibre vision. We are happy to discuss any of the points we raise in this response more detail.