

Written evidence submitted by Octopus

1. About Octopus

- 1.1. Octopus has over £11bn of funds under management, and invests in companies which provide critical UK infrastructure, including renewable energy, real estate, healthcare and fibre broadband. Octopus has currently over £1bn of funds under management committed to full-fibre network builders such as Jurassic Fibre, Swish Fibre, Giganet and Vorboss. This makes Octopus one of the most significant fibre broadband investors in the UK.
- 1.2. Despite our optimism for the future of the UK broadband industry, there are several areas where regulation and Government subsidy schemes are limiting commercial rollout of fibre infrastructure, particularly by the new players ('altnets') operating in the sector. This uncertain environment is damaging investor confidence and will ultimately slow down progress towards the Government's gigabit broadband targets. Three issues are of particular concern in this regard:
 - The Government and BDUK's Gigabit programme risks wasting public funds by subsidising providers to build in areas where altnets have already built, or have plans to build, without subsidy.
 - Ofcom consistently favours the incumbent, BT Openreach, at the expense of other market players, and there is no adequate mechanism to challenge its decisions.
 - The lack of DCMS action via its Barrier Busting Task Force in recent months, and its delayed response in driving forward a number of critical reforms.
- 1.3. If the Government hopes to ensure that project Gigabit is successful in connecting underserved areas, the allocation of public subsidy must be better targeted. With the most recent tranche of subsidy announced just last week, this is a priority issue which must be resolved swiftly.

2. F20 – Building Digital UK Planning for Gigabit Delivery

- 2.1. We welcome the Government's commitment of £5bn to help speed up broadband rollout across the hardest to reach 20% of the UK. This area is known as the F20 and includes roughly 6 million premises.
- 2.2. However, Octopus has concerns that the commercial build plans of our businesses, which are credible, funded, and - in many cases - already underway, are not being fully accounted for in BDUK's Open Market Review (OMR) and Public Review process. This process is designed to ensure that the Government does not target commercially viable areas and 'crowd out' private investment. Unfortunately, the way that BDUK and its consultants, Farrpoint, are running the process means that areas judged to be commercially viable by private businesses are being included in procurement lots for public subsidy. Public subsidy in these areas is wholly

unnecessary and will reduce the funding available for areas genuinely in need of Government investment.

- 2.3. We are aware that the OMR/Public Review process is ongoing, and we will continue to engage with BDUK in the coming months. However, initial interactions have raised serious concerns that it is wilfully ignoring our commercial build plans, by prioritising numbers of premises passed rather than a genuinely 'Outside-In' approach of targeting those areas most in need of public subsidy and least likely to get gigabit broadband commercially.
- 2.4. This is not simply an issue for businesses invested into by Octopus. Many altnets have experienced a reluctance from BDUK to accept their commercial build plans. This is damaging, as rural areas with very poor connectivity are not being prioritised, whilst more commercial areas, in some cases those which are already served by altnets, are being tendered. This approach risks undermining the build plans of challenger companies, and thereby damaging the confidence of investors like Octopus.
- 2.5. Even in ordinary times, operator build plans change regularly. However, the current extraordinary level of activity in this sector is leading to even more frequent changes. The growth of challenger companies means that more areas are being connected on a commercial basis than was ever considered likely by the Government in its Future Telecoms Infrastructure Review, or by Ofcom in its Wholesale Fixed Telecoms Market Review. Nimble descoping of premises from Government contracts in light of altnet activity would allow companies to move more quickly, rolling out broadband as it becomes commercially viable. This would also remove a concern that many commercial operators, including those we are backing, currently have, whereby they start to build an area commercially and then suddenly find themselves overbuilt by a competitor using taxpayer money. Commercial operators will slow down or stop their plans if this threat is not removed via a transparent descoping process that enables an operator to remove a location from any subsidy programme when it has a credible build plan.
- 2.6. Commercial investment starts 'Inside-Out'. This approach means that, whilst initial build plans for a town may not include the surrounding small villages, this does not mean that they are not commercially viable. **Consequently, if the Government does not change the way it operates its Outside-In programme, this may accidentally result in the unnecessary subsidisation of commercially viable areas, reducing the attractiveness of the UK for commercial investors like Octopus, and reducing the subsidy available for the areas most in need.**
- 2.7. From our experience, we have seen how small clusters of premises become commercial as other areas nearby are developed. Outside-In must not accidentally destroy this trend, which is already pushing commercial build deep into areas which were previously considered unviable on the basis of the historic analysis conducted by DCMS and Ofcom.
- 2.8. **Recommendation:** We believe a better approach is for companies to receive subsidy for connecting hard-to-reach premises via a voucher scheme. Our companies are intending to complete their current build plans without subsidy. But vouchers would allow them to quickly go deeper into rural areas that surround their commercial build areas. We believe that a suitably sized voucher programme would allow our companies to build a network to 99% of the properties in these areas.

3. Ofcom's regulation and bias towards Openreach

- 3.1. A further major barrier for challenger broadband companies is that Ofcom frequently acts in a way which either hinders smaller companies or overtly favours BT Openreach. Ofcom is often at odds

with Government's approach to telecoms policy yet is largely politically unaccountable. Over the past five years, Ofcom has started consulting on policy proposals in a different way to other regulators. It no longer follows a fair process, and the quality of its interventions suffers as a result.

- 3.2. Ofcom's consultation process often presents challenges for smaller companies. It often accepts evidence from some stakeholders but not others, without explanation. It sometimes publishes stakeholder responses late when it is concerned that these responses make contentious points. Consultations are becoming shorter, and are often held over holiday periods, making it difficult for smaller operators to respond.
- 3.3. Take the Wholesale Fixed Telecoms Market Review ('WFTMR'), which was published in March 2021. This review was of critical importance to the telecoms industry. It set the conditions of competition for the next five years, which in turn determined how investors deploy capital to support fibre network build, as the UK seeks to play catch-up with Europe on gigabit connectivity.
- 3.4. In the WFTMR, Ofcom was presented with evidence from multiple alternative network operators, including companies that Octopus invests in, which showed their commercial plans to lay extensive fibre networks to many of the 9.2m non-urban premises (which Ofcom calls 'Area 3'). The quality of this evidence was clear. It included board resolutions, investor commitments, and technical due diligence reports. However, Ofcom concluded that no networks other than Openreach would lay fibre in Area 3 at a 'material scale'. It therefore designed regulatory interventions with the stated primary aim of encouraging Openreach, rather than its commercial competitors, to invest in this area.
- 3.5. Ofcom set out reasons why, in general, it did not believe what altnets had told it about their fibre investment plans. It is our position that none of these reasons can be reasonably said to apply to the companies we invest in, nor to many of our fellow altnets. Ofcom did not set out reasons why it chose to believe the fibre investment plans of Openreach, a massively indebted company, over those of altnets. Ofcom should be required to formally explain in detail the reasons why it selects some evidence over others, and operators should be allowed to challenge this.
- 3.6. However, the Digital Economy Act 2017 made it *more* difficult to challenge the substance of Ofcom's decisions legally. Industry needs a revised appeal regime which offers a mechanism for merit-based challenges in the most serious cases. Without such a mechanism, the competitive playing field is tilted in favour of incumbent operators like BT Openreach, and it is almost impossible for disadvantaged companies to mount effective legal actions against decisions made by Ofcom. This is now having a direct and negative impact on the quality of Ofcom's consultation processes and regulatory decisions.
- 3.7. The WFTMR decision is not an isolated incident, but part of a pattern of misjudgements. Ofcom also recently held a consultation on a wholesale pricing offer from BT Openreach, called 'Equinox'. It became apparent during this process that Ofcom had been discussing Equinox with BT Openreach for many months prior to this consultation. This forms part of a consistent pattern over the past few years of Ofcom meeting with BT and its Openreach subsidiary significantly more frequently than with other operators. Ofcom should be required to publish lists of stakeholder meetings, in the same way that politicians are required to with lobbyists. When challenged, Ofcom has refused to acknowledge that there might be aspects of stakeholder engagement and consultation which would be improved through consulting a wider range of stakeholders.
- 3.8. The Equinox consultation also saw Ofcom publish consultation responses just a couple of days before it issued its statement, rather than "as soon as we receive them", as per the aim set out in its consultation guidance. The excuse was that a couple of stakeholders had not yet submitted their

redactions. This should not be a reason to delay publishing responses from other stakeholders. We suspect that Ofcom was concerned about that the responses risked highlighting a potential institutional bias towards BT Openreach, the incumbent UK operator.

- 3.9. One of the reasons for the decline in the quality of Ofcom's regulatory decision-making could be that its responsibilities have grown exponentially since it was created in 2003. It is now responsible for regulating postal services, Video on Demand, the BBC and, in the near future, internet regulation, as well as all of the responsibilities of the five regulators it replaced. The scope of Ofcom has not been reviewed despite these changes. In our view, the scope of Ofcom is so large that it is difficult for its

Board and Senior Executive team to properly oversee the regulation of a complex sector like telecoms.

- 3.10. **Recommendation:** Government should bring forward legislation to amend the changes to the appeal regime that it introduced in the Digital Economy Act 2017 and require Ofcom to publish lists of which stakeholders it has met on a regular basis. It should also establish an independent review to look at the scope of Ofcom's responsibilities and whether it is feasible for these responsibilities to be governed effectively by one organisation with a single Board and Executive team.

4. DCMS action on Barrier Busting

- 4.1. The DCMS Barrier Busting Task Force (BBTF) was set up towards the end of 2017. Its key objective is to identify and address the barriers preventing the fast, efficient, and cost-effective deployment of gigabit-capable broadband and improved mobile coverage, including next generation 5G technology. We welcome the establishment of such a task force, but despite being well-intentioned, the task force has made limited progress. Octopus would welcome progress on several areas:
- 4.2. **Access to infrastructure:** The Government rightly seeks to make it easier for telecoms operators to reuse existing passive infrastructure - e.g. ducts, poles or masts - to deploy new telecoms networks. To do this, the Government ran a Call for Evidence on the Access to Infrastructure Regulations in June 2020. A Government response was promised in Spring 2021, according to the latest Barrier Busting update published on the DCMS website in March 2021. But the response has not yet materialised.
- 4.3. **New builds:** Ensuring that new homes are built with gigabit connections is an important priority given that approximately 20% of newly built premises in 2019 did not have access to gigabit connectivity. A consultation on changes to building control regulations to mandate gigabit connectivity in new builds was promised in Spring 2021. This consultation has not yet been published. The government has stated that it will introduce final legislation to enact new build connectivity policy as soon as possible after the consultation, so further delay to this important legislation is likely.
- 4.4. **Leasehold Properties:** The Telecommunications Infrastructure (Leasehold Property) Act 2021 is a welcome step in addressing the issue of unresponsive landlords holding up digital infrastructure deployment. DCMS ran a consultation on how to implement this legislation in June 2021. The response to this consultation and implementing regulations were promised in Autumn 2021 but have not materialised to date.
- 4.5. **Electronic Communications code:** Government published a consultation on further reform of the Electronic Communications Code in January, because of the importance of access to land for

digital infrastructure deployment. The Barrier Busting update promised a response in Summer 2021, ahead of legislation being introduced into Parliament, but it has still not been published.

- 4.6. Accelerating broadband rollout across the UK is a key stated aim of the Government. The private sector is stepping up and investing billions into full fibre broadband, However, the necessary urgency and action from Government required to support this private sector led rollout is not taking place. Whilst we welcome the Government's engagement via consultations, it is critical that responses and implementation of the relevant policy move from consultation to action without delay, or the Government risks holding back the UK's connectivity.

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