

Ofcom October 2020 Copper Retirement Consultation

Response from Fern Trading Limited

1 December 2020

Introduction

1. As part of its January 2020 Wholesale Fixed Telecoms Market Review (WFTMR) consultation, Ofcom set out proposals for the circumstances under which Openreach ('OR') would be allowed to stop providing copper-based broadband services. At that time, it was thought that this would not occur until after the end of this review period (March 2026), so Ofcom did not propose retirement rules within the WFTMR.
2. Since then, OR has notified Ofcom that it has accelerated its fibre deployment plans, and has asked Ofcom to provide a framework which allows it to start retiring copper during this charge control period. Ofcom has agreed and has set out its proposals in this consultation.
3. This response to Ofcom's consultation is submitted by Fern Trading on behalf of Jurassic Fibre Limited ('Jurassic') and Swish Fibre Limited ('Swish').
 - a. Swish and Jurassic are each backed with £250m from Fern Trading Limited, an alternative investment group with £9bn of funds under management, and which is advised by Octopus Investments Limited.
 - b. They have a large potential fibre footprint (the whole of the South West in Jurassic's case; the whole of the UK in Swish's case).
 - c. They have board-approved plans to pass over 750,000 homes within these footprints by 2026, and extension plans to go even further. They have so far passed around 30,000 homes.
 - d. They supply businesses as well as consumers, offering products.
 - e. They offer multiple products including leased lines (i.e. high-speed, high-quality, point-to-point uncontended data connections, targeted at businesses).

Ofcom's copper retirement proposals

4. Ofcom proposes a minimum period of 5 years from OR issuing a 'stop sell' notice to it being allowed to shut down and retire physical copper plant¹. The process is summarised below:
 - a. OR can issue a stop sell notice a minimum of 12 months before it expects to have achieved 75% coverage of an exchange area. The stop sell takes effect after 12 months have passed, or when 75% coverage is achieved, whichever is latest.
 - b. Once stop sell is achieved, a 24-month period of parallel charge control of both copper- and fibre-based 40/10 broadband services commences. At the end of that

¹ Some exceptions may be applied where OR will be obliged to continue supply of copper-based services after that date.

period, price regulation on copper-based broadband services is removed and OR is free to increase pricing to encourage customer migration to fibre-based services.

- c. At the expiry of the 24-months parallel price regulation, OR can issue 24 months' notice of its intention to stop providing copper-based services, provided:
 1. it has achieved 100% coverage of the exchange areas (with exemption as approved ad-hoc by Ofcom); and
 2. no more than 10% of customers in the exchange area remain on copper-based broadband connections.
5. Ofcom's proposals aim to ensure that communications providers ('CP's) using the OR platform can migrate their customers from copper to fibre in a reasonable manner and timeframe. They also aim to protect vulnerable users who rely on copper-based services for which there may not be fibre-based substitutes in the short term.
6. Consistent with its January 2020 WFTMR and July copper retirement consultations, Ofcom highlights a concern that OR could (and would be incentivised to) deploy fibre tactically in some areas to deter competitor deployments, and then leave these part-completed while it focuses on other areas with a high competition risk. Ofcom suggests the 75% coverage threshold will deter OR from doing this, because it cannot benefit from either the removal of copper price regulation, or, ultimately, copper retirement, until it meets this requirement.
7. Fern Trading does not believe that this will act as an effective deterrent from tactical deployment and therefore considers that Ofcom's proposal will not prevent anticompetitive behaviour by OR as it retires copper. We set out below our concerns in more detail.

Impact of Ofcom's proposal

8. We recognise that efficiency demands that OR must have a regulatory path to stop selling new and existing copper-based services, and to remove its copper plant. This consultation response does not, therefore, seek in any way to prevent the copper retirement programme. In addition, Ofcom's overall framework and timeframe appear reasonable to us, from the perspective of both competition and end customers.
9. However, we believe that Ofcom has paid insufficient attention to OR's incentives to use copper retirement to deter competitive fibre investment and to tie in downstream retail CPs to the OR platform.
10. Our concerns fall into the following categories, which we discuss in turn below:
 - a. Failure to consider altnet coverage when assessing the point at which OR can justify stop sell and/or retirement of copper;
 - b. OR incentive structures for CPs using its platform;
 - c. Copper retirement and fibre migration communications to end customers; and
 - d. End-customer lock-in.

(i) Exclusion of altnet coverage from OR copper retirement coverage assessment

11. Ofcom's proposals do not allow OR to announce stop sell or copper retirement until it has reached 75% exchange coverage. However, there are many places where this will never happen², or where forcing OR to reach these thresholds will stifle competition.

- Most locations eligible for public subsidy will not support fibre on a commercial basis; there is only likely to be one fibre network in these areas. State aid terms require all subsidised networks to provide wholesale access. Where OR does not win tenders to supply these areas, it is unlikely ever to build there.
- Some locations will only support a single fibre infrastructure on a commercial basis. Where an altnet deploys first in these areas, OR is highly unlikely to overbuild. In many instances these altnets will allow wholesale access once they achieve sufficient market penetration to recover their investment. Where this does not happen, Ofcom has the power to impose SMP wholesale access conditions if it sees fit.

12. In both instances, Ofcom's proposals force OR to maintain its copper network, even if consumer demand for this service is limited, and even where an alternative network is present which allows multiple providers to offer competing services.

13. Even in areas which will support two or more networks, BT Group should have the commercial freedom to seek wholesale access to altnet fibre infrastructure instead of deploying its own. In many such areas altnets will achieve 75% coverage before OR has even started to plan its own build.

14. We therefore believe that Ofcom is over-reaching with its proposals. It has no powers to force OR to deploy fibre nationwide. It has no powers to force it to retain its copper services and assets, providing it has made adequate provision to offer services to all end customers in the relevant exchange area (in accordance with its universal service obligations).

15. We are not suggesting that OR should be forced to recognise altnet fibre coverage when seeking to retire copper, but Ofcom should not prevent this from being a possibility. Failure to allow this will hamper competition.

(ii) OR discounting loyalty and incentive arrangements with downstream retail CPs

16. Ofcom acknowledged in the WFTMR consultation that OR/BT has the ability and the incentive to engage in commercial arrangements with its wholesale customers, in a way that could deter competitive fibre deployment.

² OR and BT Group have made clear that they do not expect to reach 100% fibre coverage nationally. Clive Selley (OR CEO), in response to a question on the government target for 1G broadband, said *"That is a very significant challenge, I think we will make a massive contribution in getting the nation to that milestone, but we can't do it alone. I expect others to help."* (<https://www.telegraph.co.uk/technology/2020/01/26/OR-boss-clive-selley-one-home-every-23-seconds-gets-full/>). Similarly, Philip Jansen (BT CEO) has suggested that rivals must be allowed to co-operate in building networks in sparsely populated regions, and proposed a "single rural network" scheme to allow companies to avoid overlapping each other (<https://www.telegraph.co.uk/business/2020/01/16/bt-chief-warns-boris-johnson-rural-threat-broadband-pledge/>).

17. Further, in its response to Ofcom’s first specific copper retirement consultation (July 2020), OR stated that it was looking to “*agree appropriate commercial constructs with our customers to drive migration from copper to fibre-based services*”.³
18. Annex 15 of the WFTMR consultation set out Ofcom’s concerns in relation to potentially anticompetitive pricing (whether local, regional, or national), discounting, loyalty, and incentive arrangements with downstream retail CPs. The copper retirement process is a prime example of when OR has maximum incentive to engage in such behaviour. We urge Ofcom to strengthen its January WFTMR proposals to reduce the scope for market distortion resulting from such behaviour.
19. The consequences of OR behaving anticompetitively are likely to be irreversible. If this reaches a level where it is no longer commercially viable for an altnet to continue providing a network, this risks becoming a stranded asset. The result would be a reversal back to an OR/BT network monopoly, contrary to Ofcom’s explicit objective of encouraging infrastructure competition in the majority of the country.
20. The reasons that discounts, loyalty- and incentive-schemes represent a significant risk to competitive fibre deployment are two-fold:
 - a. If these schemes have the effect of migrating customers currently served by the large national retail CPs en-mass from copper to fibre, then that significant switching opportunity is foreclosed to altnets deploying competitive fibre. Once an end-customer has migrated from copper to fibre, it becomes much harder to persuade them to switch again. By contrast, if the customer is presented with a range of fibre migration options which do not form part of a cross-subsidy or migration incentive scheme, they can make an informed decision, and some would select the altnet over OR providers.
 - b. Where an altnet chooses to offer wholesale access to its network, OR’s loyalty, incentive, and discount schemes would have the intended consequence of deterring retail CPs from engaging with altnets to use their fibre infrastructure to serve their retail customers. This could cause significant harm to the altnet business case and harm the overall altnet fibre investment prospects for altnets.
21. WFTMR Annex 15 suggests Ofcom has concerns that over-regulation in this area could lead to consumer harm. However, it is difficult to conceive of OR initiatives in this category that would deliver greater long-term benefits to consumers than would be achieved by the existence of infrastructure competition. On the contrary the (likely irreversible) likely harm to competition from such initiatives are real and tangible. We therefore urge Ofcom to ensure that OR cannot use commercial wholesale arrangements anticompetitively.

(iii) End-customer communications

22. Clear, transparent and effective communications are key to a successful migration process. However, there are also risks associated with those communications. Any communication

³ OR, 7 September 2020. Response to Copper retirement – process for determining when copper regulation can be removed, paragraph 4. https://www.ofcom.org.uk/data/assets/pdf_file/0024/204567/OR.pdf.

which draws consumers away from full-fibre services offered by altnets, and towards retail CPs which use OR's platform, cannot be considered to be in the best interests of consumers.

23. We believe Ofcom should engage actively with industry to develop a communications framework which ensures consumers can make informed and balanced switching decisions, and which helps prevent distortion of competition. It might be appropriate for Ofcom to establish an industry working group (potentially overseen by Ofcom or the OTA2) to establish the right terminology and communications timing during the migration process.

(iv) End-customer lock-in

24. We are similarly concerned that the migration process may be used to prevent altnets from competing fairly for customer connections in the migration process, as copper is retired.
25. If OR's retail CPs are allowed to migrate their end-customers from copper to fibre before the expiry of their copper contract, this would foreclose any altnet from competing for these customers as they would incur contract termination penalties if they switched before expiry.
26. This issue could also be addressed through an industry forum (or Ofcom could consider issuing a framework of pro-competitive rules). For example, if retail ISPs wish to offer migration to fibre before the expiry of copper contracts, then they should offer customers a 6-month window during which they can switch to any fibre service without suffering financial consequences.
27. The details of such measures would need further work. But Ofcom should address the broader issue upfront. The fibre migration process is a pivotal point for customer switching, and it is critical both for the welfare of end-customers and for the viability of fibre infrastructure competition that it is subject to appropriate safeguards.

Conclusion

28. There are significant risks to fibre infrastructure competition arising from the copper retirement process. Ofcom must acknowledge these risks and engage with industry to find a way to mitigate them to the benefit of consumers. In particular, it should:
- Allow BT Openreach to include altnet fibre coverage when it makes stop sell and copper retirement notifications (providing OR/BT has wholesale access to the altnet infrastructure in question);
 - strengthen the draft provisions set out in Annex 15 of the WFTMR;
 - set up an industry group to establish a pro-competitive communications framework for the fibre migration process; and
 - ensure that altnets are able to compete for retail ISP customer customers and that altnets are not unfairly prejudiced by ISPs migrating copper customers to fibre before contract expire.