

**Copper retirement – conditions under which copper regulation could be completely withdrawn in ultrafast exchanges**

**26 November 2020**

## Foreword

This response is provided by Openreach Limited<sup>1</sup>. Openreach is a wholesale network provider. We support more than 600 Communications Providers (CPs) to connect the 30 million UK homes and business to their networks. We sell our products and services to CPs so they can add their own products and provide their customers with bundled landline, mobile, broadband, TV and data services.

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<sup>1</sup> Openreach Limited is a wholly owned subsidiary of BT Group Plc.

## Executive Summary

1. Openreach welcomes the opportunity to respond to this consultation which considers the conditions under which we could withdraw legacy copper-based services with the move to full-fibre. This is an important step in the copper retirement process which Openreach has been consulting on extensively with its industry customers and builds on Ofcom's generally supportive WFTMR proposals. It is important that a supportive regulatory framework for Openreach copper retirement is established if the Government's and Ofcom's FTTP objectives are to be realised. Openreach has made significant commitments regarding FTTP and is building at pace, and it is therefore crucial that the appropriate regulatory conditions are in place to facilitate the retirement of the copper network and prevent the duplicative cost of running parallel fibre and copper networks – this is a key building block of our FTTP strategy. Regulation also needs to send the right signals to our Communications Provider (CP) customers and other stakeholders to help them prepare in a timely manner for the inevitable switchover to the new full fibre platform.
2. Whilst we welcome the fact that Ofcom is now consulting on the approach to copper withdrawal by Openreach, we are very disappointed that the combination of thresholds and other conditions proposed by Ofcom in this consultation will have the practical effect of making copper retirement impossible, and indeed risk setting back not only the whole copper retirement process but also WLR withdrawal, by sending out the wrong signals regarding the need to migrate.
3. Firstly, Ofcom's proposed threshold for copper withdrawal takes as its starting point the coverage threshold for removing legacy price regulation from fibre-served premises that Ofcom has previously consulted on. Openreach continues to disagree with Ofcom's '100% coverage minus exceptional circumstances' approach to this 'second' copper retirement threshold. Our experience shows it is not reasonable to expect our ultrafast coverage to approach 100% in an exchange area given the practical and economic challenges faced when deploying fibre on a wide scale.
4. We have previously argued<sup>2</sup> there is a need for a different approach to this second threshold and the phasing of copper retirement, which would give industry greater certainty, encourage earlier migration onto the new fibre platform and ensure a smooth transition for consumers and businesses. Our proposed approach would enable the withdrawal of copper-based price regulation for premises within the FTTP footprint at an earlier stage than Ofcom has proposed in order to encourage migrations to the fibre platform: we proposed this should take place 12-months after the implementation of stop-sell, without a further coverage threshold beyond the 75% ultrafast coverage required for implementation of stop-sell.
5. Secondly, we believe that Ofcom's timescales are unnecessarily elongated. Under the proposals in this consultation, copper retirement can only take place in a given exchange at the earliest 4 years after the implementation of stop-sell. We believe this could and should be reduced by 12 months, which could be achieved, as indicated above, by allowing legacy price regulation to be removed one year after stop-sell within the FTTP footprint.
6. Third, Ofcom has introduced in this consultation a further proposed threshold of 90% FTTP take-up before the regulation that requires us to provide legacy services can be removed in an exchange area. This proposal was unexpected and completely changes the approach to copper retirement thresholds which have hitherto been based on fibre coverage. Introducing what is essentially a retail target means this threshold is largely outside of

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<sup>2</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0024/204567/openreach.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0024/204567/openreach.pdf)

Openreach's control, dependent on CPs' willingness and ability to migrate customers, including where it relates to take-up on non-Openreach platforms. Further, this is an extremely high target, beyond anything currently achieved in relation to current generation broadband despite the relative longevity of these services – Ofcom's own data for the UK<sup>3</sup> shows a take-up figure for any fixed broadband service to be 80% with a take-up figure for superfast broadband or above to be around 55% of UK premises, and ultimately the whole industry will move at the pace of the slowest CP. We believe it is practically impossible for CPs to achieve anything approaching the high take-up levels proposed by Ofcom in the suggested timescale for this threshold and we do not believe imposing a retail take-up threshold which is outside Openreach's control is necessary or proportionate.

7. Finally, Ofcom's proposal to permanently exclude from copper retirement those end users subscribing to an electronic communications service which supports Critical National Infrastructure (CNI), regardless of whether fibre is available, is misplaced and likely to be damaging to the whole copper retirement process. The proposal seems to completely misunderstand the process for migration of these services. It is the CNI organisation itself that is in control here, deciding the technology migration path it wishes to follow and the timing, including the access technology, with mobile potentially a key element, and the selected provider to deliver the migration, with Openreach only a possible access provider. There are multiple technology options for CNI use cases. Openreach has been working extremely hard with all relevant stakeholders - industry, utility bodies, government agencies – to generate awareness of the need to migrate to All-IP and full-fibre services at the appropriate time, and to ensure that they identify suitable product alternatives. We have also established a robust exceptions process that allows CNI orders for legacy products to be progressed beyond stop sell if needed and an emergency service restoration capability to deal with instances where migrations are problematic and need to be reverted back in order to maintain service.
8. Ofcom's proposals in relation to CNI are extremely unhelpful in this regard and undermine the efforts taking place across industry to incentivise migrations by indicating that CNI premises can remain on copper, particularly given the current extremely broad definition of CNI within the draft legal instrument. We believe Ofcom's proposed exemption will also negatively impact PSTN switch-off in 2025 and create a risk of CNI services remaining on an obsolescent platform and we would ask Ofcom to confirm that they do not intend any such exclusion with respect to WLR withdrawal. Rather than propose such blanket exceptions from copper retirement, we would like Ofcom's support in raising awareness and encouraging CNI organisations to develop migration plans. Ofcom should also clarify the definition of CNI in line with government guidance Notwithstanding then our view that any exemption is both unnecessary and indeed potentially damaging to the whole copper retirement process, in the event that Ofcom feels compelled to maintain its proposed exclusion, Ofcom should clarify its description of those lines which would be excluded for this purpose in line with government guidance and limit any exemption to lines actually supporting specific CNI applications rather than, as currently, seemingly applying to any lines used by CNI organisations.
9. Ofcom also proposes that copper withdrawal is conditional on Openreach putting in place reasonable measures to support the migration of vulnerable end users. Openreach is fully committed to ensuring these customers are protected throughout the copper retirement journey and has been working hard with industry on a best practice guide and suitable industry-wide processes, including a robust exceptions process, which includes emergency service restoration capabilities, to deal with instances where customers cannot migrate. However, as Ofcom

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<sup>3</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0026/203759/cmr-2020.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0026/203759/cmr-2020.pdf)

acknowledges, this is a shared industry issue – indeed CPs ‘own’ the direct customer relationship and communication and only they, rather than Openreach, are in a position to know which end customers are ‘vulnerable’. It is unclear how Ofcom will judge what are ‘reasonable measures’ from Openreach in ensuring compliance with this as a prerequisite for publishing a Third Threshold Notice in respect of an exchange area, particularly as it would imply Openreach would have to audit CPs’ adherence to process. We therefore believe that not only is this proposal unnecessary and disproportionate but also potentially damaging, as it removes the focus from CPs who have to manage the process effectively. Ofcom should instead focus on ensuring industry-wide processes, such as the Best Practice Guide, are implemented and followed.

10. We need an approach to retirement that protects customers, is practical in an operational sense, and reflects the commercial realities at both a wholesale and retail layer. This is a complex set of issues and anticipating all of them ‘up front’ is challenging. We see trials as a key tool to better understand and work through these issues. Those trials today are at an early stage, and we still have a lot to learn from them. There is also learning from international markets that may be brought to bear. We look forward to working with Ofcom, Government and CPs to learn from the trials and develop a practical approach.

## Introduction

11. Openreach welcomes the opportunity to respond to this consultation which considers the conditions under which we could withdraw legacy copper-based services as part of the move to full-fibre. We note that Openreach is subject to a unique set of regulatory obligations and that unlike other network operators we therefore require changes to this regulation to allow migration and withdrawal to happen. This is an important step in the copper retirement process which Openreach has been consulting on extensively with its industry customers and builds on Ofcom’s generally supportive WFTMR proposals. It is important that a supportive regulatory framework for Openreach’s copper retirement is established if the Government’s and Ofcom’s FTTP objectives are to be realised. Openreach has made significant commitments regarding FTTP and is building at pace, and it is therefore crucial that effective regulatory conditions are in place to facilitate the retirement of our copper network and prevent the duplicative cost of running parallel fibre and copper networks. Regulation also needs to send the right signals to industry and other stakeholders to help them prepare in a timely manner for the inevitable switchover to the new full fibre platform.
12. Openreach welcomes Ofcom’s ongoing support for our approach to copper retirement. Ofcom’s proposals in its January WFTMR consultation were generally pragmatic and provide a broadly appropriate regulatory framework for the move to an All-IP and full fibre platform. In line with our accelerating FTTP coverage and build announcements, we are continuing to move forward on the copper retirement journey in conjunction with our industry customers. Following the commencement of the fibre-upgrade trial in Salisbury, we announced that copper ‘stop-sell’ will be implemented for a further 117 exchange areas covering c.1.2m premises in June 2021, with another 51 exchange areas covering c.500k premises to follow in October 2021. We plan to make further stop-sell notifications on a quarterly basis in line with our FTTP build programme. This is on the basis that Ofcom’s WFTMR proposal for a threshold for stop-sell of 75% ultrafast coverage in an exchange area is confirmed.



13. Ofcom's follow-up consultation on copper retirement<sup>4</sup> took forward the discussion on the important second threshold that would enable the removal of regulation relating to the pricing of legacy copper services, with regulation thereafter focused on the FTTP 40Mb anchor product. In the initial WFTMR consultation, Ofcom proposed that this 'flipping' of regulation from copper to fibre could happen in an exchange area a minimum of two years after the implementation of stop-sell and when ultrafast coverage was complete. Ofcom acknowledged that there would be 'exceptional circumstances' preventing us from achieving 100% ultrafast coverage in an exchange area and signalled a further consultation to consider in more detail such factors. That consultation proposed to defer decisions on how to define these circumstances until after the WFTMR has concluded in April 2021 when there is further evidence available from our FTTP roll-out experience. Ofcom would then consult at a later date on the circumstances in which premises would be excluded from the definition of a completed ultrafast exchange when we have further progressed our network build and use their powers to make an appropriate Direction.
14. In our response to that follow-up consultation, Openreach disagreed with the '100% coverage minus exceptional circumstances' approach to the second threshold. Our experience to date shows it is not reasonable to expect our ultrafast coverage to approach 100% in an exchange area given the practical and economic challenges faced in deploying fibre on a wide scale. These factors include the difficulty of gaining landlords' permission to access multi-dwelling units (MDUs) and premises where the build cost for FTTP is prohibitively expensive and/or too disruptive. More broadly, the definition of relevant premises for the purpose of coverage obligations needs to be reviewed, including whether it is appropriate for Openreach to be obliged to connect 'unserved premises' (for example, traffic lights) and to address premises, both brownfield and greenfield, where other providers own the physical network infrastructure rather than Openreach and we therefore cannot gain access<sup>5</sup>. This is a complex area that requires further discussion and analysis given the point that we have reached on our FTTP build programme, with build underway but not yet complete in a significant number of exchange areas.
15. We therefore believe there is a need for a different approach to the second threshold and the phasing of copper retirement, which would both give industry greater certainty and encourage earlier migration onto the new fibre platform. Earlier this year, we announced that we have increased our FTTP target from 15 million to 20 million premises – almost two thirds of the UK – by the mid- to late-2020s and we expect to invest around £12 billion to reach this target, making this the biggest investment in the UK's digital infrastructure for a generation. It is clearly important then that the right framework is put in place to incentivise connections to this platform; clearly, commercial arrangements will play a major part in incentivising take-up but sending the right signals through future regulation will also play a key role. Given the complexities of launching long-term pricing agreements, which would have created greater certainty on FTTP take-up, we believe it is now even more crucial that there is a balanced set of incentives in place.
16. Whilst we welcome the fact that Ofcom is now consulting on the approach to copper withdrawal, we are very disappointed that the combination of thresholds and other conditions proposed by Ofcom in this consultation will have the practical effect of making copper retirement impossible, and indeed risk setting back the whole copper retirement process by sending out the wrong signals regarding the need to migrate.

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<sup>4</sup> <https://www.ofcom.org.uk/consultations-and-statements/category-1/copper-retirement-process>

<sup>5</sup> The Communications (Access to Infrastructure) Regulations 2016 were designed to afford access to other providers' physical network infrastructure but practical experience has shown the current legislation to be unworkable; Openreach has separately responded to the DCMS review of this area

## The approach to thresholds

17. As indicated above, in this consultation Ofcom's proposed threshold for copper withdrawal takes as its starting point the coverage threshold for removing legacy price regulation that Ofcom has previously consulted on. As outlined above, Openreach continues to disagree with Ofcom's '100% coverage minus exceptional circumstances' approach to this second copper retirement threshold. It is not reasonable to expect our ultrafast coverage to approach 100% in an exchange area given the practical and economic challenges we encounter in rolling out our fibre deployment at scale.
18. We have previously set out why<sup>6</sup> there is a need for a different approach to this second threshold and the phasing of copper retirement, which would give industry greater certainty, encourage earlier migration onto the new fibre platform and ensure a smooth transition for consumers and businesses. Our proposed approach would enable the withdrawal of copper-based price regulation for premises within the FTTP footprint at an earlier stage than Ofcom has proposed in order to encourage migrations to the fibre platform: we proposed this should take place 12-months after the implementation of stop-sell, without a further coverage threshold beyond 75% ultrafast coverage required for implementation of stop-sell.
19. We continue to believe that a revised approach to the second threshold and the phasing of copper retirement would both give industry greater certainty and encourage earlier migration onto the new fibre platform. We previously set out a suggested set of milestones, summarised below, which build on those we have consulted on with industry and Ofcom's own proposed phased approach.
  1. Milestone 1: We give 12-months' notice of stop sell of copper-based services in an exchange area;
  2. Milestone 2: No less than one year later, at the point of implementation of stop-sell (i.e. when 75% ultrafast coverage has been reached – Ofcom's First Threshold Notice), we give 12-months' notice of withdrawal of regulation on pricing for all copper-based services for all premises passed by FTTP in the exchange area;
  3. Milestone 3: One year later, at the point that legacy regulation on pricing is removed for all premises passed by FTTP (Ofcom's Second Threshold Notice), we give two years' notice of the withdrawal of copper-based services for all premises passed by FTTP in the exchange area, i.e. the removal of all remaining regulation<sup>7</sup> on these products; and
  4. Milestone 4: Two years later, we are able to withdraw copper-based services for all premises passed by FTTP in the exchange area (a new Third Threshold Notice).
20. As indicated above, our proposals do not include a further ultrafast coverage threshold beyond 75% of premises in an exchange area, but if Ofcom remains minded to mandate a higher threshold, it is crucially important that the definition of exclusions based on 'exceptional circumstances' does remain open post the conclusion of the WFTMR to reflect our FTTP build experience.
21. In addition to disagreeing with Ofcom's proposed coverage threshold, we believe that Ofcom's timescales are unnecessarily elongated. Under Ofcom's proposals, copper retirement can only take place in an exchange area at

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<sup>6</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0024/204567/openreach.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0024/204567/openreach.pdf)

<sup>7</sup> The requirement to provide network access to these products on a fair and reasonable basis (excluding charges).

the earliest 4 years after the implementation of stop-sell. We believe this could and should be reduced by 12 months, which could be achieved, as indicated above, by allowing legacy price regulation to be removed one year after stop-sell within the FTTP footprint.

## The proposed take-up threshold

22. In this consultation, Ofcom has introduced a further threshold of 90% FTTP take-up before legacy regulation can be withdrawn in respect of fibre-served premises within an exchange area. This proposal completely changes the approach to copper retirement thresholds which has hitherto been based on fibre coverage. Although we note the threshold relates to all operators, not just those on the Openreach platform, we believe it is practically impossible for CPs to achieve anything approaching the high take-up levels proposed by Ofcom in the suggested timescale for this threshold. We also believe it is unreasonable to create what is essentially a retail target, making Openreach's achievement of this threshold dependent on dependent on CPs' willingness and ability to migrate customers and the take-up of end-customers which is beyond Openreach's immediate control, including where it relates to take-up on non-Openreach platforms. Openreach does not have a direct relationship with end customers and it is unclear to what extent any pricing signals from Openreach to CPs – including when charge controls on copper products are removed at the Second Threshold - will lead to significant migrations of end users moving to FTTP products and over what timescales. It is also unclear why what happens on other operators' networks should be relevant to decisions on Openreach's copper retirement process.
23. Ofcom's proposed take-up threshold is extremely high, beyond anything currently achieved in relation to current generation broadband despite the relative longevity of these services. Ofcom's own data for the UK<sup>8</sup> shows a take-up figure for any fixed broadband service to be 80% with a take-up figure for superfast broadband or above to be around 55% of UK premises. It should be noted that Openreach has offered superfast broadband (Fibre to the Cabinet) since 2009 and there has been intensive marketing by CPs since then without achieving the take-up levels Ofcom propose to be achieved over a much shorter period. It is also our understanding that no other country has reached FTTP penetration levels anywhere near the level proposed by Ofcom, including those EU countries, such as France and Spain, who are more advanced in their roll-out of FTTP. This evidences the extent of customer inertia which Ofcom seriously underestimates. Ofcom also has to understand that the migration to FTTP is a full access product migration, with many customers' migration decisions unaffected by any price rises on legacy products that could be enabled by the removal of price regulation. Given the above, it is hard to see how achieving a 90% take-up of ultrafast broadband in the medium to long term is realistic – and certainly not 4 years after the start of stop-sell as Ofcom envisages.
24. Ofcom itself acknowledges in this consultation that whilst fibre deployment/coverage continues with rapidity, the fact that fibre migration is currently at an early stage means there is considerable uncertainty as to the speed at which end customers will in fact migrate from copper to fibre. It may, for instance, transpire that the appetite for and pace of fibre take-up amongst end customers is materially behind Ofcom's current expectations. Ofcom therefore proposes to allow itself flexibility to vary the percentage threshold of customers which remain on copper-based services in an exchange area in order for Openreach to be able to publish a Third Threshold Notice. In

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<sup>8</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0026/203759/cmr-2020.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0026/203759/cmr-2020.pdf)



doing so, Ofcom acknowledges the likelihood that as fibre rollout progresses, further information on take-up and challenges to achieving take-up figures may become apparent. Having said that, we do not then understand Ofcom's view at this early stage of the take-up journey (absent any significant evidence) that this proposed flexibility is, in practice, unlikely to be needed.

25. Taking the above considerations into account, we do not believe imposing a retail take-up threshold which is outside Openreach's control is necessary or proportionate.

## Supporting vulnerable customers

26. Ofcom proposes that copper withdrawal is conditional on Openreach putting in place reasonable measures to support the migration of vulnerable end users. Openreach is fully committed to ensuring these customers are protected throughout the copper retirement journey and has been working hard with industry on a best practice guide and suitable industry-wide processes, including a robust exceptions process, which includes emergency service restoration capabilities, to deal with instances where end customers cannot migrate. The Best Practice Guide, available on the OTA website,<sup>9</sup> has been written by Openreach and the OTA with input from CPs and interested industry stakeholders with the objective of ensuring the protection of the consumer and to minimise CP and end customer disruption, especially to vulnerable end customers and CNI services.
27. As Ofcom acknowledges, this is a shared industry issue – indeed CPs 'own' the direct customer relationship and communication and only they, rather than Openreach are in a position to know which customers are 'vulnerable'. The schematic shown at Annex 1 covers the end to end process for vulnerable customers and shows the responsibilities for the end customer, CP and Openreach. As can be seen, Openreach only plays a part at certain points in the process.
28. Given this is an industry-wide issue with a number of elements outside Openreach's control, it is unclear how Ofcom will judge what are the 'reasonable measures' Openreach should undertake as a prerequisite for the removal of the regulation that requires us to provide legacy services. We believe this proposal is both unnecessary and disproportionate and Ofcom should instead focus on ensuring industry-wide processes, such as the Best Practice Guide outlined above, are implemented and followed.

## Critical National Infrastructure

29. Openreach agrees with Ofcom on the importance of ensuring that critical national infrastructure services, such as emergency services and utilities, are protected during the migration to All-IP and full-fibre networks.
30. However, Ofcom's proposal to permanently exclude all CNI lines from copper retirement, regardless of whether fibre is available, is misplaced and likely to be damaging to the whole copper retirement process. Ofcom's proposals draw no distinction between (say) PSTN lines into offices versus copper lines used for remote monitoring purposes. Yet it is clear that the migration path and alternatives open to CNI users will be very different. Openreach has been working extremely hard with all relevant stakeholders – industry; utility bodies such as Energy

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<sup>9</sup> <http://www.offta.org.uk/best-practice-guide>

UK; government departments and agencies, particularly DCMS and the Crown Commercial Service; Local Resilience Forums – to generate awareness of the need to migrate to All-IP and full-fibre services at the appropriate time, and to ensure viable product alternatives to copper are available.

31. Openreach is actively developing suitable products on its new platform but it is also likely to be the case, as Ofcom acknowledges, that there are more suitable alternatives available from other providers on other technologies, such as wireless.
32. Openreach is supporting the testing of fibre services by CNI organisations (Electricity and Gas supply) in trial areas to understand the effectiveness of the products for their needs. We have also established a robust exceptions process that allows CNI orders for legacy products to be progressed beyond stop sell if needed on an exceptional basis and an emergency service restoration capability to deal with instances where migrations are problematic and need to be reverted back in order to maintain service. The processes will be fully tested in Salisbury.
33. Ofcom’s proposals are extremely unhelpful in this regard and undermine the efforts taking place across industry to incentivise migrations by indicating that end users subscribing to a service which supports CNI can opt to remain on copper indefinitely, particularly given the current extremely wide definition of CNI at Condition 1.14(e) of the draft legal instrument. We believe Ofcom’s proposed exemption will also negatively impact PSTN switch-off in 2025 and create a risk of CNI services remaining on an obsolescent platform and we would ask Ofcom to confirm that they do not intend any such exclusion with respect to WLR withdrawal – we have already had comments from CNI organisations that “they don’t need to migrate off the PSTN now”. Rather than propose such blanket exceptions from copper retirement, we would like Ofcom’s support in raising awareness and encouraging CNI organisations to develop migration plans.
34. It should also be noted that, as with vulnerable customers, discussed above, this is a shared industry issue – indeed CPs ‘own’ the direct customer relationship and communication and only they, rather than Openreach, are in a position to know which customers/lines support CNI. Ultimately the CNI organisation itself will determine the timing and technology evolution of their estate, with their CP (or other Service Provider) of choice. It is also within their control, rather than Openreach’s, to identify suitable replacement products, which do not necessarily need to be sourced from Openreach or indeed any telecoms infrastructure provider. There are multiple technology options available for CNI use cases, as demonstrated in the many countries that have either finished their equivalent migrations or are well down the road to doing so. Options include:
  - a. Full IP level evolution
  - b. On premise media gateways to replicate existing functionality
  - c. Mobile driven IoT or FWA type solutions
  - d. Multiple fixed access options – EAD, FTTP, SoGEA

There are very few potential use cases where the only option is an existing copper line for access.

35. In this context, it is also important to be clear on the definition of CNI. In the UK, there are 13 national infrastructure sectors: Chemicals, Civil Nuclear, Communications, Defence, Emergency Services, Energy, Finance, Food, Government, Health, Space, Transport and Water. Several sectors have defined ‘sub-sectors’; Emergency Services for example can be split into Police, Ambulance, Fire Services and Coast Guard. However, not everything

within a national infrastructure sector is judged to be ‘critical’ and the UK government’s official definition of CNI is as follows:

‘Those critical elements of infrastructure (namely assets, facilities, systems, networks or processes and the essential workers that operate and facilitate them), the loss or compromise of which could result in:

- a) Major detrimental impact on the availability, integrity or delivery of essential services - including those services whose integrity, if compromised, could result in significant loss of life or casualties - taking into account significant economic or social impacts; and/or
- b) Significant impact on national security, national defence, or the functioning of the state<sup>1011</sup>

36. Notwithstanding then our view that any exemption is both unnecessary and indeed potentially damaging to the whole copper retirement process, in the event that Ofcom feels compelled to maintain its proposed exclusion, Ofcom should clarify its description of those lines which would be excluded for this purpose in line with the Government guidance set out above. Crucially, the description should be limited to ensure that Ofcom’s proposed exclusion would apply only to those lines which support specific CNI applications. Openreach is particularly concerned that Ofcom’s current drafting could be interpreted as applying the exclusion to all lines used by a CNI organisation, regardless of whether or not they are used to support CNI. Any proposed exemption should not, for example, apply to the head office of a utility provider. Ofcom’s draft legal instrument is ambiguous in that it proposes that an end user for the purposes of Condition 1.6B ‘*shall exclude any end user that subscribes to an electronic communication service which supports Critical National Infrastructure*’. If Ofcom is minded to confirm such an exemption, we suggest this is amended so as to only exempt ‘*any line which supports Critical National Infrastructure*’. We set out in Annex 2 our suggested changes to Ofcom’s draft legal instrument.

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<sup>10</sup> <https://www.cpni.gov.uk/critical-national-infrastructure-0>

<sup>11</sup> It should be noted that where CNI is defined for the purposes of Condition 1 of the draft legal instrument, (Condition 1.14(d)), Ofcom has for the most part copied the CNI definition from the Government website referenced in footnote 10. However, Ofcom’s definition excludes the government’s list of what constitutes critical elements of infrastructure and there is a difference in drafting around ‘essential services’ where Ofcom has removed a reference to services which if compromised could lead to significant loss of life or casualties. Whilst the government definition does not provide an exhaustive list of what is CNI, it offers more guidance as to the types of things they consider are really ‘critical’ national infrastructure, giving less room for wide interpretation

## Response to questions

### **Question 1: Do you agree with our proposals to set conditions under which remaining regulation of existing copper-based services would be withdrawn?**

Whilst we welcome the fact that Ofcom is now proposing to set conditions under which remaining regulation of existing Openreach copper-based services would be withdrawn, we are very disappointed that the various thresholds and other conditions proposed by Ofcom in this consultation will have the practical effect of making copper retirement impossible, and indeed risk setting back the whole copper retirement process by sending out the wrong signals regarding the need to migrate. We set out the reasons for this in this response.

### **Question 2: Do you agree with our proposal that those conditions should take effect two years after Openreach has given notification, in respect of an exchange, notifying that fewer than 10% of relevant premises remain on copper-based services in the completed exchange, and only where measures are in place to support vulnerable consumers?**

The proposed threshold requiring that no more than 10% of relevant premises remain on copper-based services in the completed exchange is a very high target, beyond anything currently achieved in relation to current generation broadband despite the relative longevity of these services. Although we note the threshold relates to all operators, not just those on the Openreach platform, we believe it is practically impossible for CPs to achieve anything approaching the high take-up levels proposed by Ofcom and we do not believe imposing a retail take-up threshold which is outside Openreach's control is necessary or proportionate.

Ofcom also proposes that copper withdrawal is conditional on Openreach putting in place reasonable measures to support the migration of vulnerable end users. Openreach is fully committed to ensuring these customers are protected throughout the copper retirement journey but, as Ofcom acknowledges, this is a shared industry issue – indeed CPs 'own' the direct customer relationship and communication and only they, rather than Openreach know which customers are 'vulnerable'. Given this is then an industry-wide issue with a number of elements outside Openreach's control, we believe it is unclear how Ofcom will judge what are 'reasonable measures' from Openreach in ensuring compliance with this as a prerequisite for the removal of legacy regulation. We therefore believe this proposal is both unnecessary and disproportionate and Ofcom should instead focus on ensuring industry-wide processes, such as the Best Practice Guide, are implemented and followed.

### **Question 3: Do you support the exclusion of services that support CNI from our proposals allowing for full copper deregulation?**

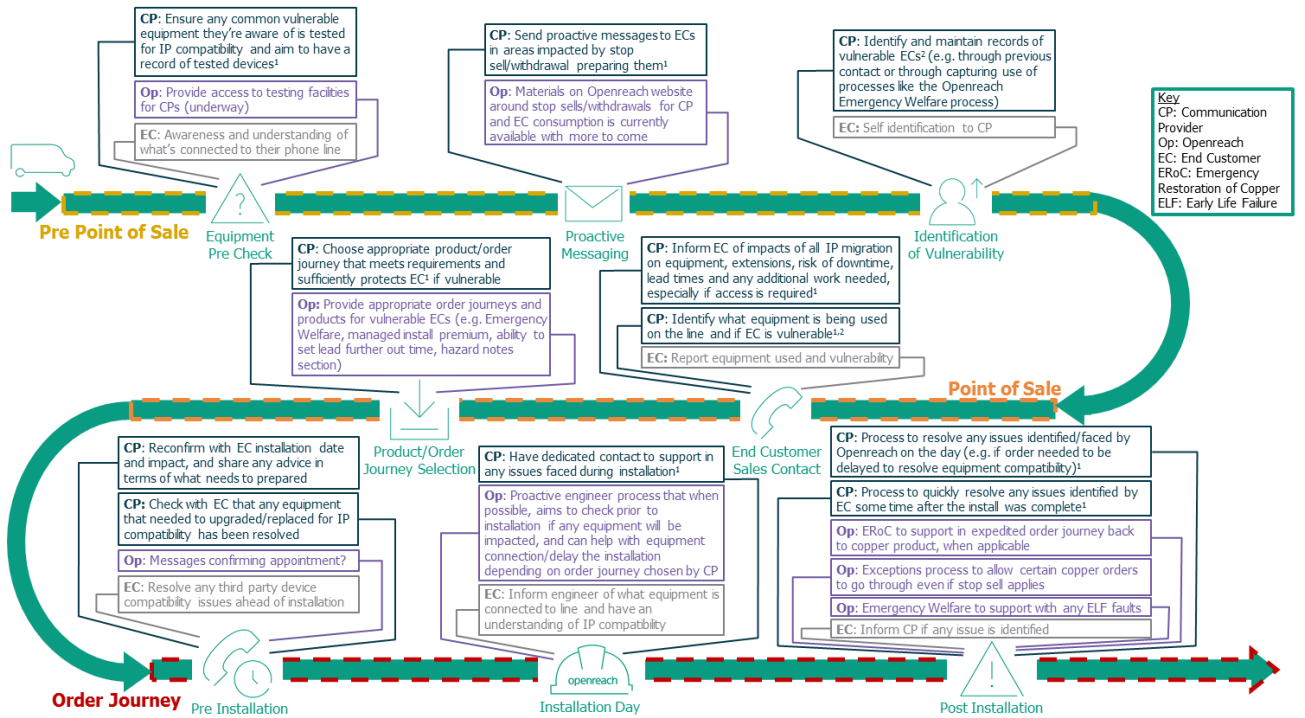
Ofcom's proposal to permanently exclude CNI lines from copper retirement, regardless of whether fibre is available, is misplaced and likely to be damaging to the wider copper retirement process. Openreach has been working extremely hard with all relevant stakeholders - industry, utility bodies, government agencies – to generate awareness of the need to migrate to All-IP and full-fibre services at the appropriate time, and to ensure suitable product alternatives to copper are available.

We have also established a robust exceptions process, including emergency service restoration capabilities, to deal with instances where on an exceptional basis CNI lines (and also vulnerable customers) cannot migrate. Ofcom's proposals are extremely unhelpful in this regard and undermine the efforts taking place across industry to incentivise migrations by indicating that CNI 'end users' can remain on copper indefinitely, particularly given the current extremely wide definition of CNI in the draft legal instrument. Rather than propose such blanket exceptions from copper retirement, we would like Ofcom's support in raising awareness and encouraging CNI organisations to develop migration plans.

As a matter of importance, Ofcom should also clarify the definition of CNI, limiting it to lines supporting specific CNI applications rather than, as currently, seemingly applying to any lines used by CNI organisations. If Ofcom is minded to confirm an exemption in respect of CNI, we propose a change to the draft legal instrument to narrow the scope of the exemption to cover only those lines which support CNI.



## Annex 1 – The industry approach to supporting vulnerable customers



<sup>1</sup>as covered in the OTA trial best practice guide, <http://www.ofcom.gov.uk/best-practice-guide> <sup>2</sup>as covered in the Ofcom Treating vulnerable customers fairly guide, <https://www.ofcom.gov.uk/consultations-and-statements/category-2/treating-vulnerable-consumers-fairly>

## Annex 2 – Proposed changes to Ofcom’s draft legal instrument

### Condition 1.6B

For the reasons set out in this response, to the extent Ofcom remains of the opinion that it is necessary to exclude services which support the provision of CNI from those copper-based services that Openreach will no longer have to provide access to following the removal of legacy regulation, the text within Condition 1.6B which sets out the parameters of such an exclusion should be amended. In order to achieve the objective that we understand Ofcom is seeking to pursue in imposing such an exclusion, in a manner which does not go beyond what is strictly necessary, the definition should be limited to ensure that the proposed exclusion would apply only to those lines which support specific CNI applications. Openreach is particularly concerned that Ofcom’s current drafting could be interpreted as applying to all copper-based electronic communications services subscribed to by a CNI organisation, regardless of whether or not those services are used directly to enable a CNI function or capability. The updated wording proposed by Openreach is as follows:

### 1.6B

*Where the Dominant Provider has published a Third Threshold Notice in relation to a Local Serving Exchange and that Third Threshold Notice has taken effect in relation to that Local Serving Exchange, the requirement to provide network access under Condition 1.1 does not apply to requests for Copper-based network access in respect of any end user supplied with electronic communications services using that Local Serving Exchange, provided that Fibre-based network access is available to a Third Party on reasonable request in respect of any such end user.*

*An end user for the purposes of this Condition 1.6B shall exclude any end user that subscribes to an electronic communications service which supports Critical National Infrastructure. For the avoidance of doubt, this exclusion shall apply only in respect of copper-based network access which is subscribed to by that end user for the direct purpose of supporting a Critical National Infrastructure function or capability.*

### Condition 1.14(d)

For the reasons set out in this response, we propose that the definition of Critical National Infrastructure (‘CNI’) currently included within the draft legal annex at Condition 1.14(d) requires updating to reflect more fully the UK government’s official definition of CNI, as set out on the website of the government’s Centre for the Protection of National Infrastructure. That definition is as follows:

### 1.14(d)

*Those critical elements of infrastructure (namely assets, facilities, systems, networks or processes and the essential workers that operate and facilitate them), the loss or compromise of which could result in:*

*i) Major detrimental impact on the availability, integrity or delivery of essential services – including those services whose integrity, if compromised, could result in significant loss of life or casualties – taking into account significant economic or social impacts; and/or*

*ii) Significant impact on national security, national defence, or the functioning of the state*