



**Ofcom supplementary consultation to the Wholesale Fixed
Telecoms Market Review**

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regulation could be completely withdrawn in ultrafast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

TalkTalk submission

November 2020

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This is TalkTalk Group's response to Ofcom's supplementary consultation to the Wholesale Fixed Telecom Market Review (WFTMR) on the conditions under which copper regulation could be completely withdrawn at ultrafast exchanges, published on 15 October 2020.

1 Overview

1.1 This document is divided into two sections:

- Section 1: Ofcom's approach to copper retirement; and
- Section 2: Ofcom's proposal for withdrawing copper regulation.

1.2 In section 1, we provide our view of Ofcom's approach to copper retirement as a whole and its impact on consumers and competition. We recommend that Ofcom changes its regulatory approach to address the risks of consumer detriment identified in this submission, either by moving the charge control anchor from 40Mbps to 80Mbps, or by extending the time period before the stop-sell can be introduced. In addition, we reiterate our proposal that Ofcom should apply a set of 'operational readiness' conditions that must be met before proceeding with the stop-sell and triggering the removal of the charge control from copper when 'complete coverage' is achieved. The purpose of these conditions is to ensure that Openreach, CPs and resellers are collectively ready to manage customer migrations from copper to fibre with minimal disruption and can protect vulnerable customers through the process.

1.3 In section 2, we set out our position on the specific regulation proposed to support copper withdrawal. Overall, we support Ofcom's proposal to apply a 'third threshold' to enable copper withdrawal, which will allow Openreach to give two years' notice of copper withdrawal after 'complete coverage' has been achieved, fewer than 10% of relevant premises are on copper, and when measures to protect vulnerable customers are in place. Copper withdrawal will be allowed only where FTTP is available and excluding Critical National Infrastructure (CNI) lines. We propose a secondary threshold should apply for demand external to BT Group, which should be set so that no more than 15% of non-BT lines within the exchange remain on copper products. We also set out some considerations that need to be worked on collaboratively by Ofcom, Openreach and industry to support the implementation of Ofcom's proposals for vulnerable customers and CNI lines.

2 Ofcom's approach to copper retirement

2.1 Customers must be central to Ofcom's approach to adapting regulation to support FTTP roll-out and migration to new services. As we explained in our response to the January 2020 WFTMR consultation proposals on copper retirement, and reiterated in our response to the June 2020 supplementary consultation, Ofcom must ensure that any regulation protects consumers from harm and that Openreach's CP customers (who will incur significant costs from migration) do not face unreasonable burdens. We therefore proposed in our previous responses some changes to Ofcom's approach to copper retirement which we consider would strike a better balance between incentivising FTTP investment and protecting customers during the migration. We reiterate these proposals below (see §§ 2.14-2.21).

- 2.2 Further to our previous responses to the WFTMR consultations, we are concerned that Ofcom has not sufficiently considered how its proposals for copper retirement may have a detrimental impact on consumers. We therefore elaborate on the risks below for consideration by Ofcom as it reaches its final decisions in the WFTMR. We recommend some further changes to its regulatory approach, in addition to the previous proposals we have made, to address the risk of consumer detriment.

Ofcom must assess the risk of consumer detriment from its copper retirement approach

- 2.3 Ofcom's copper retirement measures essentially force CPs and customers to rapidly migrate from MPF/FTTC to FTTP where FTTP is available, as customers will be unable to move house, change providers, or change speeds without being switched to FTTP. This has the potential to deliver benefit to consumers as it allows BT to shut the copper network earlier, which will reduce its costs and encourage more Openreach FTTP investment on a faster timescale. However, this forced migration has a number of detrimental consumer impacts that Ofcom has, for the most part, not considered at all in developing its proposals.
- 2.4 The first detrimental impact is that, in the majority of the UK where Openreach builds FTTP first, the copper retirement regulation effectively forecloses subsequent altnet FTTP investment, meaning that the market will simply transition from an Openreach copper monopoly to an Openreach FTTP monopoly. This is because, once Openreach has built FTTP, the copper retirement regulation forces CPs to move their customers rapidly to Openreach FTTP (we estimate about 80% of customers within just three years of build), even if altnet FTTP is planned or being built. This leaves too small a pool of remaining MPF/FTTC customers for altnets to migrate to FTTP and means they would be unable to build scale quickly enough for the investment to be viable. It is much more difficult and expensive for an altnet to capture customers who have already migrated to Openreach FTTP due to the lack of any significant quality advantage, and the significant disruption of installing FTTP, leading to substantial switching costs.
- 2.5 The second consumer detriment caused by the copper retirement regulation derives from its impact on wholesale and retail prices, and thereby on competition. Ofcom has proposed very limited price regulation: an above cost CPI+0% price cap, which applies only to 40Mbps products. This means that in future only a small proportion of demand will be subject to any direct price regulation given the shift to higher bandwidths, which has been further accelerated by the COVID-19 pandemic. For the majority of demand, the constraint from regulated prices (or from competition) will be very weak.
- 2.6 Copper retirement regulation exacerbates the lack of any constraint on Openreach prices in two ways:
- It kills off any prospect of altnet competition in the majority of areas where Openreach builds FTTP first, which means there will no competitive constraint on Openreach; and
 - It removes the need for Openreach to offer commercially viable wholesale FTTP prices to encourage rapid migration since Openreach will get FTTP volume anyway as a consequence of the effect of stop-sell.
- 2.7 These consequences of the proposed copper retirement regulation have already affected Openreach's behaviour: 80%. The result of higher wholesale prices will be higher retail

prices as well as weaker competition and less choice in the retail market, which will harm consumers.

- 2.8 The copper retirement proposals also mean that the lower Openreach costs that copper retirement regulation allows through earlier copper network closure are all captured as extra profit by BT's shareholders rather than being passed on to customers in lower prices. The reduction in Openreach cost has the potential for longer term consumer benefit only to the extent it is taken account of by Ofcom when setting price caps in future reviews.
- 2.9 The third consumer detriment is the potential for disruption and undue costs to customers, particularly vulnerable customers, if they are forced onto FTTP rather than able to voluntarily choose when to switch. Unlike the other two detriments above, Ofcom has taken this into account to some degree, for example through requiring measures such as emergency restoration processes for vulnerable customers. However, as our responses outline, we think there is more that Ofcom should do in this regard: for example, not imposing a stop-sell until operational readiness thresholds are met.
- 2.10 Therefore, whilst we support Ofcom's objective of rapid migration from legacy networks to FTTP, we think Ofcom's proposal to use copper retirement regulation to force migration will, in the context of lax price regulation and the shift in demand to higher bandwidths, harm consumers. There are alternative regulatory approaches that could substantially reduce these harms.

Ofcom must consider amending its copper retirement proposals to address the risks of consumer detriment

- 2.11 We think the most effective amendment would be to change the anchor product for the charge control from 40Mbps to 80Mbps so that there are effective constraints on the price of higher bandwidths. By continuing to use 40Mbps as the anchor, Ofcom is regulating for yesterday's market rather than tomorrow's. Moving the anchor would also mean that the majority of customers who are on FTTC80 do not, when stop-sell is implemented, face the invidious option of having to move to FTTP80 at a large price premium or downgrade to FTTP40. The copper retirement regulation should also be amended so that the connection charge is zero on migrations to FTTP80 when subject to the stop-sell, as proposed for FTTP40.
- 2.12 Another possible change to regulation that would partly address the detriment would be to modify the copper retirement proposals so that the obligation does not force such rapid migration. This would encourage Openreach to set prices to encourage voluntary migration and would therefore ensure that retail prices are reasonable and competition remains effective; whilst still providing Openreach with the certainty that it will be able to close its copper network and realise cost savings (albeit slightly later). This could be implemented by recalibrating the triggers. For instance, the stop-sell could begin 12 months after achieving 75% coverage within an exchange, rather than 12 months after notification is given that Openreach will achieve 75% coverage. This not only reduces the risks of consumer detriment as outlined above, it also removes industry uncertainty over whether the 75% coverage will have been achieved 12 months after the stop-sell notice is issued, thus providing industry participants with greater certainty.
- 2.13 We have consistently highlighted to Ofcom the significant customer harm that its proposed regulation will cause. Further, from the January 2020 WFTMR consultation and subsequent

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discussions with Ofcom it appears to us that Ofcom has already made up its mind on the outcomes of the review. It appears closed to understanding or assessing the impacts of its proposals; and is unwilling to amend regulation to ensure that consumers are properly protected. Our view has been reinforced by the additional consultations published since January, which all propose further weakening of regulation and do not address the consumer harm that its proposals are likely to cause. Accordingly, we are now exploring with a QC options for legally challenging Ofcom's upcoming decision if it is not substantially amended.

Additional conditions must apply to the stop-sell and 'complete coverage' thresholds to ensure customers are adequately protected

- 2.14 Our previous proposals included the introduction of requirements on Openreach to meet 'operational readiness' criteria prior to proceeding with MPF/FTTC stop-sell, in addition to the 75% coverage threshold proposed by Ofcom. We also argued that the assessment of whether Openreach has met coverage thresholds should only take account of FTTP, and not include G.fast connections above 300Mbps, as proposed by Ofcom. These proposals stand and should be considered alongside the additional recommendations for amendments to the copper retirement approach, which we set out above (see §§ 2.11-2.12).
- 2.15 We proposed that the 'operational readiness' criteria may include requirements for the following to be delivered by Openreach and industry before proceeding with the stop-sell and the removal of the charge control when 'complete coverage' is reached:
- the full suite of products required to support CPs in migrating their customers to like-for-like services: these must include the appropriate service maintenance levels for vulnerable and business customers, for example;
 - 'Best Practice' processes for vulnerable customers and edge cases, including CNI, and agreement on Openreach's voluntary commitments on pricing approaches to these customers that will apply to provide a buffer when the charge controls are removed on copper services;
 - a cross-industry communications strategy for the relevant exchanges;
 - a process for applying learning from the trials to other exchange areas and modifying products, processes and 'best practice' accordingly; and
 - an agreed approach to any premises that are exempted from the coverage threshold for 'complete coverage' and managing the risk of orphaned customers.
- 2.16 We suggested that the OTA could be given responsibility for reporting to Ofcom on progress against these measures and assessing if these pre-requisites have been met before changes in regulation are triggered when Openreach reaches 75% and 'complete coverage' in an exchange area.
- 2.17 In the current consultation, Ofcom states at §2.14 that the Salisbury and Mildenhall trials *"and the early progression of the broader stop sell at the notified exchanges, will provide valuable lessons for migration to fibre and copper retirement, and IP migration, that can then be applied more broadly across the country"*. We are concerned that the "early progression" of the stop-sells in 117 exchanges in June 2021 and a further 51 exchanges from October 2021 has been accepted without consideration of whether sufficient learning

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will have been generated from the Salisbury trial and reflected in communications, products, processes and best practice before proceeding.

- 2.18 We note that the customers affected by stop-sell will rise sharply in June 2021 and again in October 2021, significantly increasing the impact of poor customer experiences and providing for a greater range of edge cases. If additional checks and balances are not introduced, Openreach will be imposing a stop-sell without evidence that industry is collectively ready to minimise customer disruption, as required by Ofcom. Therefore, we consider that before such a large number of customers are affected by a stop-sell there is robust evidence from the small-scale trial in Salisbury that the stop-sell will not be detrimental to customers. This is likely to require an extended trial period, in order that edge cases can emerge in a controlled way, where they can be given individual attention.
- 2.19 We are disappointed that the proposal to introduce additional conditions for Openreach before allowing it to proceed with stop-sell has not been the subject of further consideration by Ofcom in its supplementary consultations on copper retirement. We consider that there is a risk of customer disruption and harm if these additional criteria are not applied, specifically with respect to vulnerable customers. For example, the 'emergency restoration' process will not have been sufficiently adequately tested to give confidence in its effectiveness prior to June 2021. Furthermore, the Openreach device testing facility will not open until March 2021 due to COVID-related delays. This will limit the ability of special services vendors to test the interoperability of their devices, including care alarms, with circuits on a range of CP's networks at a single location. We also note that the definition of service maintenance levels for FTTP has not yet been completed, which will affect vulnerable and business customers who require higher service maintenance levels. More broadly, the 'professional' grade FTTP product has not yet been specified, which will impede CPs' ability to serve business customers and offer them equivalent products to migrate to.
- 2.20 We see a risk of reputational damage to FTTP overall if there is negative media coverage from early experiences in Salisbury and subsequent stop-sell exchanges. We anticipate that a significant proportion of customers and businesses will be affected by the stop-sell but will not yet be able to move to FTTP due to lack of appropriate products and processes. CPs' ability to assure customer journeys for vulnerable customers and edge cases will be limited as the testing and development of 'best practice' to support them will still be at an early stage.
- 2.21 We have written to Openreach setting out our specific concerns about the timing of the trial and the subsequent stop-sells from June 2021. We wish to explore how we can ensure that the risks we have identified are mitigated and the benefits of the Salisbury trial can be fully leveraged. Our preference would be for Ofcom to formalise the protections by applying additional conditions to the stop-sell and 'complete' coverage regulatory triggers. In any case, we expect to see Ofcom strengthen its oversight of the trial and stop-sell process by actively reviewing progress through the OTA Steering Board and calling for a cross-industry view of milestones, risks and issues. Transparent reporting and monitoring of a joint set of metrics (including FTTP take-up and levels of testing of specific use cases) needs to be established to help inform collective decision-making.
- 2.22 Openreach has not yet issued its consultation on exchange closure, which was due in November 2020. Full consultation by Openreach on its exchange closure plans is vital to support CPs in planning an efficient and orderly migration.

3 Ofcom's proposal for withdrawing copper regulation

3.1 Ofcom has proposed (§§3.26-3.28, October consultation) to withdraw the access obligations for copper products and remaining regulatory obligations, apart from where lines are used for Critical National Infrastructure (CNI), by allowing Openreach to give two years' notice of copper withdrawal when the following conditions are met:

- 'complete' ultrafast coverage is reached in an exchange - and notified by Openreach - triggering the removal of the charge control on MPF/FTTC;
- Take-up of copper services (e.g. WLR, ISDN, SMPF, MPF, SLU, FTTC, G.Fast, SOGEA, SOG.fast) is less than 10% of relevant premises in a completed exchange; and
- Measures are in place to support vulnerable consumers.

3.2 Ofcom has proposed that the obligation for Openreach to supply copper products should remain where lines are used for CNI or where no FTTP is available. We comment on the proposed conditions and the exception for CNI below.

3.3 Openreach will trigger the withdrawal of copper regulation, apart from on CNI and where no FTTP available, by issuing a 'third threshold notification' after the 'complete' coverage threshold is passed, and providing the above conditions are met, giving two years' notice of the withdrawal of copper. We note that our comments on the proposal for a 'third threshold' are contingent on Ofcom reaching a reasonable definition for 'complete coverage' in its subsequent consultation.

3.4 We welcome Ofcom's engagement on the conditions under which copper may be withdrawn. We agree it is important to provide as much regulatory certainty as possible to help support industry in making a smooth transition from copper to fibre. We note that TalkTalk had supported Ofcom's previous proposal to maintain the general and specific access obligations on copper (see §6.36 of TalkTalk's response to the January WFTMR consultation). However, Ofcom indicates in the current consultation that only Openreach and The Communications Managers Association commented on this aspect of its proposals. We expect Ofcom to review our responses to the January and June 2020 WFTMR consultations again to ensure that they have been fully taken account of in Ofcom's decision-making process. Notwithstanding this, we note that this response supersedes our previous support for maintaining the general and specific access obligations on copper throughout the market review period.

A minimum of two years to migrate remaining copper customers following 'complete coverage'

3.5 We agree with Ofcom's proposal (§§3.29-3.30, October consultation) to make Openreach's ability to notify its intention to withdraw copper contingent on completing coverage at an exchange. We continue to support Ofcom's proposal in the June 2020 supplementary consultation to delay consultation on how it will define the circumstances in which premises can be excluded from the calculation of 'complete coverage' of an exchange area until after the WFTMR statement. We welcome the further incentives for Openreach to achieve 'complete coverage' provided by the proposals in the current consultation by making it a requirement that must be met before notifying that it will withdraw copper services. This increases the value to Openreach of achieving 'complete coverage', therefore increasing its

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incentives to do so in a welfare-enhancing manner. It is paramount that Ofcom strictly limits the circumstances in which premises can be excluded from the coverage calculations to ensure that FTTP coverage is as extensive as possible and customers and businesses are not left behind on inferior connections.

- 3.6 We look forward to responding to Ofcom's further consultation on this topic. In addition, we would welcome engagement with Ofcom and across industry on the roadmap for premises that will not be served by FTTP and how we ensure effective solutions for these customers to limit the risk of widening the 'digital divide'. The risk of stranded copper customers with limited choice needs to be considered and addressed.
- 3.7 Two years appears to be an appropriate minimum period for migration from copper to fibre following the removal of the charge control on copper services when 'complete coverage' is reached (§3.34, October consultation). We consider that at least a two-year period will be vital to allow CPs time to communicate effectively with their customers who remain on copper services at this stage and in accordance with Ofcom's migration principles. We expect that a series of notifications will be required leading up to offering customers and businesses new contract terms. By nature, these customers will be the most resistant to change, or have complex requirements, so it is important due time is given to allow effective management of the transition.

Fewer than 10% of relevant premises remaining on copper

- 3.8 As Ofcom notes, while it anticipates that there would be a limited number of customers remaining on copper at the point when the charge control is lifted, the pace of migration may vary (§§3.31-3.32, October consultation). Factors that could affect or delay the pace of migration include:
- Availability of products to support migrations for all types of customer and business, including those with specialist requirements;
 - Challenges in serving and supporting vulnerable customers;
 - Engagement with resellers and reseller readiness to consume FTTP and VOIP, and to issue new in-home equipment;
 - Customer concerns about disruption from FTTP installation and/or to pay a price premium for FTTP if they are currently on basic products; and
 - Capacity for Openreach to migrate customers given other demands on engineering resource.
- 3.9 We therefore agree it is appropriate for Ofcom to apply a minimum take-up threshold that must be met before Openreach can issue the third threshold notification of its intention to withdraw copper in two years' time. A take-up requirement is critical to ensure Ofcom's objective to promote investment in FTTP is appropriately balanced with its objective to support a smooth migration.
- 3.10 Ofcom proposes that no more than 10% of 'relevant premises' in the exchange area should still be on copper-based services when the notification is issued (§3.36, October consultation). We note that CNI will be counted within this calculation, despite Ofcom's

proposal to continue to apply the access obligation for CNI lines. We agree with this approach as it further incentivises cooperation from Openreach on developing suitable migration solutions for CNI customers prior to the third threshold notification. 'Relevant premises' will be defined as all premises within the exchange when Openreach notifies the stop-sell, excluding those that have been built since this point and those that no longer exist.

- 3.11 10% appears to be a reasonable threshold to apply and the threshold should not be any higher than this. We expect the threshold to be set at a level which appropriately incentivises Openreach to support CPs in managing the migration to fibre by addressing all customer and business use cases and requirements. To this end, we think there should be a secondary threshold for demand external to BT Group, which should be set so that no more than 15% of non-BT lines within the exchange remain on copper products. This will encourage Openreach to engage with all CPs, rather than relying heavily on BT Consumer.
- 3.12 We support Ofcom's proposal to retain flexibility to adjust the coverage threshold as further information about the pace of take-up of FTTP and the challenges of migration emerge (§3.38, October consultation). It is appropriate for Ofcom to recognise that we currently have limited information that would allow us to predict likely progress and the measures required to sufficiently protect customers in the transition.
- 3.13 We agree that G.fast should be counted as a copper service and that this is consistent with Ofcom's objective of incentivising fibre deployment where possible. In line with this, we maintain that G.fast connections above 300Mbps should not count towards the 75% and 'complete coverage' thresholds that trigger the preceding relaxation in regulation. Including G.fast reduces the incentive on Openreach to invest in FTTP which is contrary to Ofcom's stated objective, and the Government objective of widespread availability of gigabit-capable broadband. We do not consider an ISP Review article as cited by Ofcom at §3.7 is an appropriate source of evidence to rely on with respect to Openreach's intentions for the use of G.fast. It is also inconsistent for Ofcom to treat G.fast as a legacy product when considering withdrawal of regulation but as a non-legacy product when assessing BT's coverage versus the 75% and 'complete' coverage thresholds. Further, we do not see how the inclusion of G.fast in these thresholds benefits consumers, contrary to Ofcom's assertion, and consider that it unnecessarily complicates the calculations. Additional reasons against the inclusion of G.fast above 300Mbps within the thresholds are set out in TalkTalk's response to the January WFTMR consultation (see §§6.38-6.40, TalkTalk's response to January 2020 consultation).

Measures in place to support vulnerable customers

- 3.14 Ofcom's proposal that Openreach must provide measures to support vulnerable customers before issuing the third threshold notice is very welcome (§3.42-3.48, October consultation). We consider this to be a vital component of Ofcom's copper retirement approach that must be implemented. As noted above, there is a case for making the earlier thresholds also contingent on adequate provision for vulnerable customers, to ensure FTTP is an inclusive product available to all people regardless of their personal circumstances. We comment below on the issues that must be addressed to support the implementation of this condition.

Access obligation on copper maintained for CNI lines

- 3.15 It is appropriate to make an exception for CNI and maintain the copper access obligation for these lines even if FTTP is available. We agree that it would not be appropriate to withdraw

the copper service due to the complex communications needs of these organisations. We consider that it is prudent to allow more time for the development of solutions to serve these customers' needs.

Implementation of the provisions for vulnerable customers and CNI

3.16 The following items need to be established to support the effective implementation of these important conditions to support vulnerable customers and CNI:

- A shared definition of vulnerable customers between Ofcom, Openreach and its wholesale customers for the purposes of this policy. While we acknowledge each individual CP must consider how to discharge its responsibilities in respect of its vulnerable customers, if this condition is to be effective, we will require a shared view of what 'vulnerable' means in this specific context so that Openreach's delivery of 'reasonable measures' to support them can be assessed;
- A common view on the minimum levels of protection required and 'best practice' for vulnerable customers. For example, agreements on the approach to 'emergency restoration' for different types of FTTP deployments including when pole access is used;
- A shared definition of CNI use cases relevant to the exemption. We note that CNI, as defined by the Cabinet Office, encompasses a broad range of sectors and suggest it may be appropriate to define the specific CNI use cases that need to be captured by the exemption from the copper withdrawal regulation in order to mitigate the risk of disruption to their services. Some use cases may fall into the broad definition of CNI, but not be at risk due to the migration from copper to fibre;
- Voluntary commitments from Openreach to maintain copper prices at regulated levels for some sets of vulnerable and CNI customers after the charge control is removed to ensure the appropriate management of risk, especially safety-of-life. It may be that some sub-categories are defined to support the appropriate management of different customer types during the transition. We note that price increases will play an important role in incentivising migration but this may not be appropriate in all cases; and,
- Cross-industry collaboration on the identification of vulnerable and CNI customers to develop a common view on an exchange-by-exchange basis. A common view of CNI customers will be required to support their exclusion from the copper withdrawal proposals.

3.17 We agree the OTA will be central to coordinating the above but note that this work is at its early stages and will require active support and oversight from Ofcom. The 'best practice' guide due to be published in December 2020 will set out relevant principles but significant work is required to establish detailed policies and procedures. A shared data set reporting on progress in the trial and stop-sell exchanges, available to all relevant parties, must be established as a matter of priority. This is required to monitor progress and support shared assessment of risks, issues, and mitigations from the start of the Salisbury stop-sell in December 2020 onwards.