

Zzoomm response to Ofcom consultation:

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completely withdrawn in ultrafast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



Contents

Introduction and background	3
FTTP coverage definition	3
Fibre migration communications to end customers.....	5
Openreach incentive arrangements	6
Risk of customer lock-in	7

Introduction and background

1. Zoomm is pleased to present its response to the “Copper Retirement – conditions under which copper regulation could be completely withdrawn in ultrafast exchanges” consultation (the Copper Retirement Consultation), which is a follow-on consultation to the wholesale fixed telecoms market review (WFTMR) issued in January 2020, and to the “Copper Retirement - process for determining when copper regulation can be removed Consultation”, which closed on September 3rd 2020. The WFTMR and its associated consultations are of critical importance to Zoomm and the conditions on which Openreach could retire its copper network and the communications to support that process are of particular concern.
2. In the January WFTMR consultation (and the subsequent first copper retirement consultation launched in July this year), Ofcom’s working assumption was that Openreach would not commence the actual withdrawal of copper services (and the physical copper network) until during the next market review period, starting April 2026.
3. Since then, Openreach has stated that it believes it could start the copper retirement process earlier and has proposed amendments to the previously proposed copper retirement schedule and process to enable it to give 2 years notice of copper withdrawal at the time price regulation is removed from copper-based products and services.
4. Ofcom now proposes to partially accommodate Openreach’s request, with the addition of some safeguards to ensure that Openreach cannot issue the notice to withdraw copper-based services in an exchange areas unless only 10% or less of customers in that exchange area remain on copper-based services. For this 10% threshold, it would be helpful for Ofcom to clarify whether that refers to 10% of customers served by the Openreach network, or 10% of all customers in that exchange areas.
5. Zoomm understands the need for a transparent process for Openreach to retire its copper services and physical assets, and, on the face of it, it seems that Ofcom’s proposed processes and timeframes are reasonable. Zoomm has no intention to in any way obstruct the efficient migration to fibre for Openreach.
6. Our main concern, however, is that almost all of Ofcom’s measures to prevent Openreach from using the copper retirement process to harm competition or end users is focused on the protection of downstream operators that use the Openreach platform to deliver their services to customers, and on protecting vulnerable customers, to the exclusion of protecting Openreach’s infrastructure-based competitors from harm caused by Openreach behaviour during the copper retirement process.
7. This response therefore focuses on issues that may be faced by investors in and operators of competing fibre networks.

FTTP coverage definition

8. The entire copper retirement process is based on Openreach FTTP deployment and does not discuss the scenario where an altnet deploys FTTP in an exchange area either as the only

fibre network in that location or in advance of the Openreach deployment.

9. Unless the process caters for the possibility that an altnet may be the only FTTP network operator in an exchange area, this would leave Openreach in a state of limbo, where it would have a perpetual obligation to operate its copper network, despite the exchange potentially being 90% or even 100% covered by FTTP.
10. Zoomm, and other altnets, have in the past argued that there needs to be a provision in the copper retirement process which allows Openreach to issue a stop sell notice for a time when it believes 75% of an exchange areas is covered by FTTP, even if that FTTP deployment is undertaken by another provider than Openreach. There would be no obligation on Openreach to do so, but Openreach should have the option of doing so.
11. Not enabling an altnet FTTP coverage stop sell trigger would be to deny the possibility that an altnet may be the only FTTP provider in an exchange area, however, Ofcom has assured Zoomm and INCA that it understands that this may be what happens in some locations. For Ofcom to not accommodate that scenario in the copper retirement process suggests that Ofcom wishes to see an outcome where Openreach has full national FTTP coverage, with no possibility that some locations will be served by altnets only.
12. Not enabling the altnet FTTP coverage stop sell trigger would effectively force Openreach to overbuild altnet infrastructure in locations that clearly cannot support more than one physical infrastructure and would constitute Ofcom intervention against altnet investment in rural locations. Zoomm is extremely concerned that Ofcom is contemplating this course of action and believes this to be in direct contravention of its duties including its duty to further the interests of consumers (and where appropriate by promoting competition).¹
13. Additionally, it should be BT's commercial choice whether to deploy its own fibre network or to purchase access to a fibre infrastructure deployed and operated by an altnet. In countries across Europe we are increasingly seeing that incumbent operators do not deploy new fibre networks in some locations where altnets have already done so. A key and very relevant example of this is the commercial arrangement between Deutsche Telecom and Deutsche Glasfaser². It is entirely inappropriate that Ofcom should institute a copper retirement process that assumes that BT will deploy new fibre networks to cover 100% of the UK.
14. Zoomm also believes that only allowing Openreach to retire its copper services (and assets) in exchanges areas where it has deployed its own FTTP/H (and not where another operator has made such deployment) would be in direct conflict with the Government's Outside-In programme, which will be issuing lots for operator to bid for to deploy ultrafast infrastructure, covering locations where it is unlikely that even a single fibre infrastructure would be commercially viable. It is unlikely that Openreach will overbuild the majority of lots won by altnets, as that is extremely unlikely to be commercially viable. At the extreme, Ofcom's proposed approach would force BT to operate its copper services and assets in

¹ Section 3.1 through 3.4; section 4.3 (a); and 4.6 of the Communications Act 2003. Zoomm also believes that Ofcom's approach would be in conflict with several provisions found in the European Electronic Communications Code, due to be transposed into UK legislation later this year.

² The reason this example is particularly relevant for the BT and the UK, is that DT is a significant shareholder of BT Group, of which Openreach is part.

perpetuity in some parts of the country, or to make unviable investments in overbuilding altnet networks, likely causing those altnets to cease trading as they do not have the national business to cross-subsidise such loss-making locations which can only support a single infrastructure.

15. BT has publicly stated that it cannot and will not deploy fibre everywhere. Clive Selley (Openreach 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.”*³ Philip Jansen (CEO of BT) has also 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 in the 20-30% of the country which cannot support multiple networks.⁴
16. Zoomm intends to participate in the Outside-In programme to build new fibre infrastructure in non-commercially viable locations, but now has real fears that Openreach will ultimately be forced to overbuild those networks, simply because Ofcom would otherwise force it to continue operating a redundant copper network in those locations.
17. We understand that it would be complex to determine what level of altnet coverage could justify stop sell and withdrawal notices, but Ofcom could have presented this issue in its several consultations and sought industry input. Instead, Ofcom has ignored repeated calls for this, proposing to recognise only Openreach fibre deployment to justify copper retirement.
18. We urge Ofcom to urgently consult on this in order that the overall WFTMR regulatory package is pro-competitive and will not have significant unintended adverse consequences, nor lead to the WFTMR Statement being challenged.
19. As for the stop sell notice, the triggers for any additional notices that Openreach may have to give in order to proceed to withdraw copper-based services and copper assets should be designed to accommodate Openreach giving such notice based on the FTTP coverage by an altnet.

Fibre migration communications to end customers

20. Zoomm understands that it will be necessary and important that consumers are informed about the changes to their services resulting from fibre deployment and by the subsequent retirement of copper, our concerns relate to ensuring that such communications are undertaken within clear parameters to ensure that they are not used in a manner that could have an unduly negative impact on the business case for competitive fibre deployment, by causing effective market foreclosure.

³ <https://www.telegraph.co.uk/technology/2020/01/26/openreach-boss-clive-selley-one-home-every-23-seconds-gets-full/>

⁴ <https://www.telegraph.co.uk/business/2020/01/16/bt-chief-warns-boris-johnson-rural-threat-broadband-pledge/>

21. We recommend that Ofcom oversees the development of a code of conduct to govern consumer communications relating to copper retirement and copper to fibre migration. This could, for example, include the specification of terminology to describe the new services and the number and type of communications that can be issued.
22. Zoomm considers it essential that there is oversight of the customer communications throughout the migration period. The harm resulting from inappropriate communications would not be reversible and could significantly impact the viability of otherwise well-run and well-funded alternative fibre network providers, potentially resulting default and a reversion to Openreach monopoly infrastructure provision in locations where the economics could support competing infrastructures.
23. We do not believe it is appropriate to make specific proposals here in terms of what rules and restrictions should be applied to migration-related customer communications, such rules would be best developed in industry fora with the oversight of Ofcom or perhaps the OTA2 to ensure that outcomes are produced within a timeframe to be useful from the onset of migration communications programmes by Openreach and its downstream customers.

Openreach incentive arrangements

24. The WFTMR consultation (in particular Annex 15) also addressed the potential risks to competition and competitive investment incentives arising from Openreach engaging in commercial and/or contractual arrangements that could result in market foreclosure for competing network operators.
25. We note that Openreach in its response to the previous copper retirement consultation stated that it looks to *“agree appropriate commercial constructs with our customers to drive migration from copper to fibre-based services”*.⁵
26. It is important that the WFTMR and/or the copper retirement regulations set appropriate frameworks to prevent the abovementioned from having an anticompetitive impact on the market, potentially incentivising downstream retail providers to use the Openreach fibre connections in favour of those offered by competing network providers and tying them in to such use through incentive structures that make it impossible or very difficult for alternative providers to compete for those connections.
27. Zoomm and other altnets have commented previously on Ofcom’s proposals to reduce the risk of anticompetitive pricing, commercial and contractual practices by Openreach, explaining why we consider that those proposals are too weak and that the risk of over-regulation in this instance is substantially lower than the risk of under-regulation.

⁵ Openreach, 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/openreach.pdf

Risk of customer lock-in

28. The time of moving from copper to fibre is a significant opportunity for customers to change supplier, if they are well informed and are aware of all their options.
29. Zoomm is concerned that retail providers on the Openreach platform could use the migration to offer existing customers the possibility to migrate mid-contract, but entering new contracts and thus locking in their existing customers for a full contract term regardless where those customers are in their existing contract period.
30. Customers that are in the fixed contract period cannot (without financial consequences) switch supplier, so it is important that their existing supplier cannot use the migration process to extend that period, during which alternative providers cannot compete for those customers.
31. Zoomm urges Ofcom to engage proactively on preventing the customer migration journey from becoming a tool to lock out infrastructure competition for an extended period by migrating customers over to new contracts without the option to move to alternative providers at that time.