Call for inputs: Openreach proposed FTTP offer starting 1 October 2021

Openreach submission

Introduction

In the Wholesale Fixed Telecoms Market Review (WFTMR) Statement of 18 March 2021, Ofcom set out that where pricing or other terms offered by Openreach were conditional on the volume or range of services purchased this could raise concerns by making it harder for CPs to use alternative network builders for some of their access requirements. Ofcom therefore introduced a 90-day notification requirement for any offers that included such conditionality and explained that it would use this period to assess the specific detail of such offers and consider whether this was consistent with Openreach's SMP obligations and Ofcom's policy objectives.

On 1 July 2021, Openreach notified a new FTTP pricing offer, known as Equinox, to take effect from 1 October 2021 (ACCN OR728). Under the proposed terms of the offer, CPs would receive discounts on FTTP connection and/or rental charges so long as a certain percentage of new Openreach orders placed in a defined period were placed on the FTTP network, where available.

Openreach is of the view that the structure of the Offer does not in itself trigger the requirement of a 90 days' notification period[1]. Moreover, for the reasons set out below, it does not consider that the Offer raises any competition concerns and, in particular, does not create a barrier to using alternative networks. However, given this is the first FTTP pricing initiative to be published since Ofcom's WFTMR Statement, we have taken the decision to nevertheless give 90 days' notice to allow Ofcom to review the terms of the Offer.

In its call for inputs,[2] Ofcom has invited stakeholders to raise any initial comments to assist Ofcom in forming a provisional view on the offer. This brief submission sets out Openreach's position that no elements of the offer should be considered to raise valid competition and regulatory concerns and that it is open to all new network builders to compete 'on the merits' with the Equinox pricing. It also sets out the benefits of the offer structure in terms achieving full fibre rollout and the migration of customers from copper to FTTP, in line with Ofcom and Government's policy objectives.

[1] In the WTMR Statement (para 7.194) Ofcom clarified that reference to "range of services purchased" was meant to capture *"… arrangements where the price or contractual conditions were contingent on ISPs purchasing a particular set of services from Openreach (effectively allowing Openreach to leverage across different services. Examples could include where a discount on FTTC pricing is conditional on purchasing FTTP or a discount on (competitive) leased line prices in the CLA is conditional on purchasing WLA services"* Under the terms of the Equinox offer, the the discounts on FTTP pricing are not conditional on on the set of services purchased by the CP but on a minimum proportion of total new Openreach orders being placed on the available FTTP network. This means a CP could get discounts on FTTP services even if no orders were placed on copper/VDSL (or, indeed, any other Openreach services). This offer structure does not therefore allowi Openreach to leverage sales across products and/or markets.

[2] [Call for inputs: Openreach proposed FTTP offer starting 1 October 2021 (ofcom.org.uk)]

Ofcom's analytical framework for assessing certain commercial terms

In the WFTMR Statement, Ofcom set out a concern that:

"Openreach could design commercial terms which undermine alternative network operator rollout. For example. Commercial arrangements such as loyalty discounts or pricing contingent on large volume commitments from wholesale customers, which penalise access seekers for moving volumes from Openreach to an alternative network operator." [para 7.18]

Ofcom went on to state that:

"Openreach could design commercial terms which mean access seekers face a significantly higher average charge for services purchased from Openreach if they don't purchase all their services from Openreach. This would undermine the business case for sub-national competitive entry." [para 7.30]

Ofcom did not introduce an outright prohibition on particular terms, as allowing some flexibility could generate consumer benefits. Instead, Ofcom proposed to consider terms on a case-by-case basis as they are notified and set out some guidance on the types of terms that could be acceptable and unacceptable. Ofcom identified particular concerns with arrangements which <u>penalise</u> CPs for switching volumes to new networks, including:

- Exclusivity discounts
- Retroactive rebates
- Structures where pricing paid in one geographic area is contingent on volume purchased in another
- Arrangements where discounts on unregulated services are contingent on buying a certain volume and/or mix of regulated services

Under all the above arrangements, prices paid to Openreach for access services could be higher if the CP used an alternative network provider for some of their network access needs. As such, an alternative network access provider may need to more heavily discount against Openreach prices in order to win business. Ofcom may not consider this to be 'competition on the merits'.

In contrast, Ofcom suggested that it would be less concerned with Openreach introducing terms designed to migrate customers from copper to FTTP where the use of alternative networks did not affect the prices the CP pays for Openreach services (WFTMR Statement, para 7.169). Ofcom was also clear that "Openreach can offer long term attractive pricing without exclusivity conditions." (para 7.171)

To allow Ofcom to consider whether certain commercial terms might be problematic and raise competition concerns, a new SMP remedy was introduced requiring Openreach to provide a minimum 90 days' notice of any pricing and/or other terms where that was conditional on the volume or range of services purchased from Openreach. Ofcom then set out that it would use the following analytical framework to conduct assessments within 90 days (para 7.160 and para 7.154):

1. If commercial terms clearly had no impact on access seekers incentives to use alternative networks, then they are unlikely to be a concern.
2. If commercial terms potentially create a barrier to using alternative networks then these would only be justified where:
    a. The impact on nascent network competitors is unlikely to be material; and
    b. The arrangements will generate clear and demonstrable benefits.

Applying Ofcom's analytical framework to the Equinox offer

Under the notified terms of the Equinox offer, CPs would pay discounted prices to Openreach for FTTP services if, for a given 3-month "Measurement Period", a relevant 'Fibre Only' percentage is hit. The denominator for this percentage for each CP is the total volume of that CP's new orders that are placed with Openreach to premises where FTTP is available to order at the start of the Measurement Period. The numerator is the volume of new orders placed on FTTP in the Measurement Period. New orders placed with or migrated to any Alternative operators are not counted in either in the numerator or in the denominator.

The table below summarises the Fibre Only targets that apply in the first year ('On boarding Period 1' and 'On boarding Period 2') and from October 2022 onwards (when a Threshold measure of 80% also applies, offering discounts on all FTTP rentals, but not on connections).

Main offer conditions*

%Fibre only Target	
On boarding Period 1 Oct 21 – Mar 22	75%
On boarding Period 2 Apr 22 – Sep 22	80%
Rest of Offer Period Oct 22 – Sep 31	90%

- Forecasting accuracy
- Use of correct order journeys
- No return to copper

* Outline only. Full terms & conditions apply. See details in contract.
** In addition, a Year 6 review applies per terms & conditions.
*** Rental discounts are unlocked at Fibre Only Threshold, which is same as Fibre Only Target until Sep 22 and 80% thereafter.

'Catch-up' mechanisms are available if CPs fail to hit the target (or, from October 2022, threshold) in any individual Measurement Period and greater flexibility is available in the initial 6 month period of the Equinox offer – i.e. from October 2021 to March 2022 – where CPs can – as a backstop if the Fibre Only targets are missed – receive lower discounts on FTTP prices by reference to Fibre Only performance in a selected subset of exchange areas and/or selected subset of brands/resellers using their network. (Full details on the measurement of performance and the catch-up mechanisms are set out in the Equinox contract.)

It can be clearly seen that the structure of this Offer does not create barriers or disincentives to using alternative networks. The prices paid to Openreach at any point in time within the Equinox offer are unaffected by a CP's decision to use an alternative network provider for some of their network access requirements. Specifically:

- The CP faces no obligation to place any particular level of FTTP orders or other orders with Openreach in any measurement period, simply that of the orders the CP chooses to place with Openreach, a certain percentage must be on FTTP
- The CP faces no obligation to retain any particular level of FTTP or other access volumes with Openreach at any point in time.
- As stated above, lines that the CP places with or migrates to any Alternative operator are not counted either in the numerator or in the denominator. Therefore, considering the Fibre Only commitment within the offer, these lines do not impact the achievement of the Fibre only target/threshold in any way. Ofcom indicated in the WFTMR "*We would be less likely to be concerned where use of an alternative network does not affect the prices that an ISP pays for Openreach services*".
- The CP faces no penalty or loss of accrued discount in case they decide to migrate any line to an Alternative provide at any point in time.

The CP can choose to use an alternative network provider to meet its network access needs in any area where they provide service at any point in time based on the relative pricing and/or service offering that alternative network provider is offering – i.e. the alternative network provider is competing 'on the merits' to meet the CP's network access needs. For instance:

- If the alternative network operator builds network in areas where Openreach is currently only selling copper/VDSL access services, then the CP can choose to place any or all new access orders with that alternative provider and/or migrate any or all existing Openreach access lines to the new network with no impact on the Fibre Only measure within Equinox
- If the alternative network operator builds network within the existing Openreach FTTP footprint, then the CP could either:
    - place any or all new orders for access lines in that area with the alternative provider with those volumes not counting in the denominator or numerator in the Fibre Only measure; or
    - Migrate any or all existing Openreach copper/VDSL lines and/or any or all existing Openreach FTTP lines to the alternative network with those volumes not counting in the denominator or numerator of the Fibre Only measure for that period

And to be clear, the Fibre Only measure only sets a minimum percentage of new Openreach orders that must be placed on FTTP (where available); there is no obligation to place a set number of orders with Openreach within or outside the available FTTP footprint in any period and/or to place any volume or percentage mix of orders on the Openreach copper/VDSL network in a given period. That is, as under stop-sell conditions trigger where coverage thresholds are met, CPs can place 100% of new network access orders in a Measurement Period on FTTP.

Furthermore, all 'catch up' mechanisms are driven by a straight average across periods and are not driven by any absolute number of orders, meaning that CPs are completely free to choose whether to place their orders on the Openreach network or with an Alternative network, without feeling the need to place a greater overall volume of orders with Openreach in catch-up periods – i.e. if a CP place 750 out of 1,000 orders in one period on Openreach FTTP (75%) and 95 out of 100 orders in the second period on Openreach FTTP (95%) then the average percentage would be measured at 85%.

Price levels with the Equinox offer

The discounted price levels within Equinox establish a pricing ladder starting at the regulated FTTP 40M anchor price. Ofcom set that anchor price at a level that was considered to be consistent with efficient entry by an alternative network provider based on Ofcom's modelling during the WFTMR. It therefore follows that efficient network builders are able to compete effectively with Equinox prices on the merits.

The benefits of the Equinox offer structure

The above shows that there is no impact of access seekers' incentives to use alternative networks. As a consequence, under Ofcom's analytical framework for assessing commercial terms, there is no specific requirement to establish the clear and demonstrable benefits of the offer structure. We nevertheless, set out below the benefits of the offer in terms of supporting Openreach's roll-out of full fibre., The Equinox offer structure has been designed to ensure CPs commit, when choosing to place business with Openreach, to using our FTTP platform as it becomes available over our the existing copper/FTTC platform for new orders. This has obvious benefits not only for our investment case, as we expect to see earlier adoption of the FTTP platform as a result, but also for end-customers, who will benefit from lower prices for more reliable and a better quality FTTP products – in line with Government's desire for broader FTTP roll out and take-up by CPs and end-customers across the UK.

This also drives broader competitive dynamics as access competition clearly shifts towards the provision of ultrafast-capable connections and the offer drives demand for services at ultrafast speeds. As more customers access ultrafast speeds, more services and applications utilising the increased network capability will emerge, leading to a virtuous circle of demand for such services which will benefit *all* ultrafast network builders as pent up demand for ultrafast capabilities grows over time.

Concluding comments

In summary, while Openreach does not consider that the terms of its Equinox Offer requires it to give 90 days' notice, given that this is the first FTTP pricing offer following the publication of the WFTMR, we have done so to allow Ofcom to consider the terms of the offer. As set out in our note above, we consider there are no grounds for competition concerns and that the offer does not create a barrier or disincentive to CPs placing orders with or moving existing customers to alternative networks should they wish to do so. Our Offer allows for fair competition on the merits. Further, as set out above the Offer supports our investment in full fibre by encouraging earlier adoption of our new FTTP platform rather than our existing copper network where a CP chooses to place its business with Openreach. This is consistent with Ofcom and Government's wider policy objectives of wider FTTP take up and coverage across the UK, to the ultimate benefit of consumers.

Openreach

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