

OFCOM finalises regulatory approach to full-fibre in WFTMR Statement

Fieldfisher Telecoms Sector Group—March 2021



OFCOM WFTMR Statement

OFCOM sets out its approach to regulating fibre networks in Wholesale Fixed Telecoms Market Review

On 18 March 2021, OFCOM published its final statement on its approach to promoting competition and investment in fibre networks as part of its Wholesale Fixed Telecoms Market Review covering the period from April 2021 to March 2026 (the "Decision Statement").

OFCOM's statement builds on its preliminary proposals published in January 2020 (in the 'Wholesale Fixed Telecoms Market Review Consultation Paper') and previous market reviews on wholesale local access and broadband access in 2018, the Business Connectivity Market Review and the Physical Infrastructure Market Review (each published in June 2019). In this overview, we summarise the key decisions set out in the Decision Statement and the extent to which the key objectives of promoting competition and investment in fibre networks are likely to be met.

OFCOM's decision on geographical regulation

Since the publication of the Future Telecoms Infrastructure Review in 2018, the UK has made substantial progress in relation to the roll out of superfast broadband networks. DCMS' Project Gigabit Phase One Delivery Plan published on 19th March 2021 states that thirty-nine per cent of premises in the UK now have access to gigabit broadband. The document states that some areas still need state subsidy to make gigabit delivery commercially viable but elsewhere there tend to be multiple alternative operators offering an alternative to established players such as Openreach.

OFCOM has finalised its statement on the geographical regulatory regime (depending on levels of competition for full-fibre build in each area) that will take effect from April 2021:

- In non-competitive areas where Openreach is the only operator providing a large-scale network (Area 3), OFCOM will be supporting investment by allowing Openreach to recover its costs on both its existing copper network and its investment in building a new full-fibre network (allowing Openreach to recover its costs on a regulated asset base model thereby reducing the risk of its investment);
- In potentially competitive areas (Area 2), Openreach will continue to be required to provide wholesale access to its network (with OFCOM maintaining flat, inflation adjusted, regulated prices for Openreach's entry-level superfast broadband service) there will be no regulation of Openreach's prices in relation to its higher-speed services; and
- In competitive areas with established competition (Area 1), OFCOM proposes that, on the basis that consumers already benefit from a choice of multiple networks, it will not regulate Openreach's broadband products. There are currently no such areas so identified in the UK.

Much of the debate centres on the delineation of Area 3 with significant concerns that OFCOM has only considered committed investment plans and has ignored planned investment by independent operators. There are also concerns that the incentives offered to Openreach in Area 3 would render investment by smaller independent operators commercially unviable in precisely the sorts of geographical areas where they have tended to offer a compelling alternative to Openreach.

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No significant changes in respect of PIA

As part of its 2019 Physical Infrastructure Review, OFCOM found that BT had significant market power ("SMP") in relation to the supply of wholesale access to telecoms physical infrastructure in each of the four distinct geographical areas: Central London Area ("CLA"), High Network Reach Areas (those areas outside CLA with a high presence of rival telecoms physical infrastructure to support leased line networks), alternative multi-service network areas and BT only areas.

As part of its finding of SMP in the 2019 Physical Infrastructure Review, OFCOM proposed its specific network access remedy, Physical Infrastructure Access (PIA). OFCOM proposed that Openreach would be subject to a:

- specific access obligation to provide unrestricted PIA, including network adjustments;
- specific requirement to provide unrestricted PIA ancillary services; and

- specific requirements for the publication of a reference offer.

There has been significant criticism about the introduction of the PIA remedy particularly in respect of the network adjustment obligation whereby Openreach is required to repair or clear out duct blockages in specific circumstances. There have been calls for the introduction of more stringent quality of service obligations in respect of PIA. However, OFCOM has decided that, although the current SMP conditions allowed them to impose non-discrimination KPIs in the physical infrastructure market, the voluntary KPIs already agreed within the industry are sufficient to allow for transparency in relation to PIA.

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Retirement of the Copper Network

OFCOM has also confirmed its policy that network access requirements, charge control and other supporting obligations on Openreach will transition from access based on copper to access based on fibre to support the business case for full-fibre deployment. Openreach is planning to retire its copper access network on an exchange area by exchange area basis, in some cases beyond December 2025 (the date by which the PSTN is due to be switched off), after it has deployed full-fibre and customers have been migrated to the new network.

In order to ensure that Openreach does not incur unnecessary costs in running two parallel networks, OFCOM plans to remove regulation on Openreach's copper-based products in any exchange areas where fibre is built and transfer regulation (including price protections) from the copper to the fibre services. OFCOM also argues that its proposals will promote investment by other operators in Area 2 by focussing Openreach's incentives on its ability to migrate customers rather than on reducing prices.

OFCOM has decided upon a three-stage regulatory transition from copper to full-fibre services:

- The first stage is the threshold that Openreach must meet to stop selling new copper services ("stop sell") in an exchange area. At this point customers who want to switch providers, upgrade or move homes will need to purchase broadband and voice services over an Openreach full-fibre connection or from an alternative network operator. It applies when:
 - Openreach has published a notice at least 12 months in advance of the date when it expects 75% of premises in an exchange area to be covered by ultrafast services (i.e. capable of delivering >300Mbit/s services); and
 - Openreach makes ultrafast services available at 75% of premises in the exchange area.
- The second stage is the threshold that Openreach must meet for the charge control on copper services to be withdrawn in a completed exchange area where ultrafast services are available. This applies when:

- Openreach has published a notice at least 12 months in advance of the date when it expects the exchange to be completed;
 - Openreach makes ultrafast services available at all premises in the exchange area other than those excluded (a 'completed exchange'); and
 - at least two years has passed since the stop sell has come into effect.
- OFCOM has decided that it is too early in the migration process to define the conditions for the third stage: i.e. the threshold conditions that Openreach must meet for the complete withdrawal of regulation of copper services where ultrafast services are available in an exchange area.

Additional measures introduced by OFCOM

- As part of the overall package of remedies, OFCOM has allowed Openreach to charge more for full-fibre broadband: Openreach will be able to charge £1.70 per month extra for a 40 Mbit/s service if delivered over full-fibre.
- Openreach will be required to provide dark fibre access in non-competitive areas at cost to support mobile and other network growth. This should allow operators to deploy their own fibre and equipment to deliver services at lower cost, as well as enabling MNOs to connect their masts and base stations from their own networks.
- OFCOM has set out its plans for future decision-making in relation to the regulation of fibre (beyond March 2026):
 - The expectation is that cost-based price controls and wholesale access prices will likely remain until 2031;
 - Beyond 2031, if competition and investment is still emerging in the UK, regulation is likely to continue;

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- If cost-based regulation is required, in the future OFCOM has confirmed it will honour the fair bet principle which essentially gives BT the opportunity to earn a return above its cost of capital over the whole fibre investment cycle.
- OFCOM plans to continue to regulate Openreach's leased lines (i.e. high-speed data connections used by large organisations which form the backbone of the UK's mobile and broadband networks) in a similar way to residential broadband products, by varying its approach geographically to reflect the level of current or prospective competition. OFCOM has introduced a prohibition on Openreach providing geographically targeted discounts on its full-fibre wholesale services (a similar prohibition had been put in place in respect of its superfast wholesale products).

Has OFCOM met its objectives?

The Decision Statement does not deviate in many ways from the initial proposal made in the previous WFTMR Consultation which closed in April 2020. OFCOM's statement gives service providers certainty as to the approach to regulation of wholesale fixed telecoms services for a five-year period. However, alternative network providers are likely to have concerns that the definition of Area 3 and the attendant incentives offered to Openreach may present a curb on their investment plans in those geographical areas. Likewise, the industry still has concerns about the manner in which the PIA remedy is administered and the delays this can cause in fibre rollout projects.

