

**CONSULTATION: APPROACH TO THE
COPPER RETIREMENT SECOND
THRESHOLD CALCULATION (“THE
CONSULTATION”)**

CITYFIBRE RESPONSE

1. SUMMARY

The Consultation represents a radically different approach to copper retirement to that adopted in both the Telecoms Access Review 2026-2031 (“TAR”) and previous market reviews. The adoption of a Fixed Percentage Approach at 90% is arbitrary and presents serious risks to consumers and to competition. It is unclear why Ofcom has chosen to depart from its previous position and CityFibre would urge Ofcom to think again. In the event that Ofcom decides to proceed with the Fixed Percentage Approach, it is critical that this is not implemented until March 2029 at the earliest if Ofcom is to sufficiently mitigate the impacts on consumers and competition.

2. THE COPPER RETIREMENT RULES

2.1. The current rules around copper retirement were established in the Wholesale Fixed Telecoms Market Review 2021-2026 (“WFTMR”). Those rules set two sets of thresholds:

- First Threshold: Openreach can stop selling new copper lines once it has reached 75% FTTP coverage in an exchange area and has provided 12 months’ notice of its intention to stop selling copper.
- Second Threshold: Openreach is no longer subject to price controls on copper services once (a) it has reached 100% coverage in an exchange area; (b) 24 months have passed since stop sell was introduced; and (c) Openreach has provided 12 months’ notice of its intention to raise prices above the charge controls.

2.2. The WFTMR made clear that exclusions would be permitted from the 100% coverage requirement of the Second Threshold in accordance with any direction made by Ofcom. In the TAR consultation, Ofcom proposed to adopt largely the same approach as the WFTMR but put forward the alternatives of a Defined Exclusions Approach or a Fixed Percentage Approach. Ofcom considered that the Defined Exclusions Approach was attractive but that it would consider alternatives, including the Fixed Percentage Approach, should it not be possible to operate the Defined Exclusions Approach in a way which was not reasonably accurate and practicable.¹

3. DEFINED EXCLUSIONS APPROACH

3.1. In CityFibre’s response to the TAR consultation (“the CityFibre TAR Response”), we set out how the Defined Exclusions Approach could be implemented effectively. In particular:

- Premises that cannot be accessed should only be excluded where all avenues, including Court proceedings have been exhausted;²

¹ TAR Consultation, Volume 3, paragraphs 2.95 and 2.96

² Paragraphs 2.51 to 2.54 of the CityFibre TAR Response

- Publicly funded premises should only be excluded once subsidised premises have been built, in accordance with published BDUK data;³ and
 - Premises that are too costly to serve should only be excluded where the cost to serve exceeds £4,500.⁴
- 3.2. CityFibre set out how such an approach could be implemented in an accurate and practical way noting the importance of implementing the copper retirement rules in a way which does not undermine consumers and competition. All respondents to the TAR Consultation, including Openreach, favoured the Defined Exclusions Approach and CityFibre would therefore have expected any further consultation to have covered the implementation of the Defined Exclusions Approach rather than rejecting it in its entirety.
- 3.3. However, the Consultation sets out that, on further consideration and in the light of feedback received to the TAR consultation, a Defined Exclusions approach is impractical to implement. In respect of the points raised in the CityFibre TAR Response, the Consultation considers:
- Premises that Openreach cannot access: Ofcom concludes that it would be unduly burdensome for Openreach to gather information to report on these for Defined Exclusion purposes;⁵
 - High cost-premises served by other providers using public funding: Ofcom asserts that, due to incomplete data on subsidised premises, this would be likely to result in significant inaccuracies as well as being administratively burdensome for Ofcom, Openreach and indeed altnets who have received subsidy;⁶
 - Premises that are too costly to serve: Ofcom states that it would be unduly administratively burdensome for Ofcom to oversee the necessary modelling and data capture to accurately identify such premises.⁷
- 3.4. For the reasons set out in the CityFibre Response, CityFibre does not consider that any of the practical objections set out by Ofcom in relation to individual Defined Exclusions criteria are insuperable and none of the classes of Defined Exclusion previously identified appear unduly burdensome for Ofcom to implement. Neither does capturing data at the appropriate level to implement a Defined Exclusions approach appear unduly burdensome for Openreach.
- 3.5. The Consultation fails to meaningfully engage with any of the measures proposed by CityFibre which would have addressed these issues:

³ Paragraph 2.57 of the CityFibre TAR Response

⁴ Paragraphs 2.49 and 2.50 of the CityFibre TAR Response

⁵ Consultation paragraph 3.93

⁶ Ibid para 3.96

⁷ Ibid para 3.97

- For premises that Openreach cannot access, there are significant legislative efforts, both implemented and in train which facilitate the obtention of wayleaves except in particular circumstances.
- For subsidised premises, BDUK is continually improving its reporting processes and this can be used to inform an assessment of whether a premises should be excluded.
- For premises that are too costly to serve, CityFibre fails to understand why Ofcom could not monitor Openreach's cost assessments. A similar approach is adopted for the Universal Service Obligation which Ofcom does not consider to be onerous and there is therefore no reason why that approach could not also be followed here.

3.6. CityFibre continues to consider that the Defined Exclusions Approach is the right one and would urge Ofcom to reconsider its position. As Ofcom itself recognised in the TAR Consultation, the Defined Exclusions Approach is attractive, presenting the least risks to consumers and competition. Ofcom should not depart from that approach lightly.

4. FIXED PERCENTAGE APPROACH

4.1. In the Consultation, Ofcom advocates for a Fixed Percentage Approach which it proposes to set at 10%. This conclusion appears to be reached primarily on the basis of practicality and a consideration of the effect of different approaches to the Second Threshold on Openreach incentives to invest.

Impact of the Fixed Percentage Approach on Consumers and Competition

- 4.2. As set out above, a Defined Exclusions Approach would be practicable and should not be excluded. It is neither inaccurate nor impracticable. A Fixed Percentage approach benefits from greater practicability, however the risks to consumers and competition are significantly greater.
- 4.3. A Fixed Percentage Approach presents two distinct forms of harm to the interests of consumers:
- First, that significant numbers of consumers currently on copper, but who could migrate to fibre, fail to do so due to low levels of engagement with the market and/or other vulnerabilities which impair their capacity to switch from copper to fibre. They are then exposed to the effects of pricing freedom;
 - Second, that a significant cohort of consumers are left on copper for an indefinite period.
- 4.4. In the first case, consumers, in particular vulnerable consumers may not have the necessary understanding of broadband services to switch to FTTP. If the Second Threshold is triggered too early, those customers will face higher charges for their existing broadband services.

- 4.5. In the second case, once the Second Threshold has been met, Openreach will have little, if any, incentive to further extend its FTTP network in an Exchange Area. Consumers not served by FTTP will therefore be deprived of that opportunity and will remain on copper services at a higher price.
- 4.6. The Fixed Percentage Approach also presents risks to competition if alternative network operators are not in a position to compete for copper customers at the point that pricing freedom on copper is introduced, leading to strong incentives for both ISPs and their end-customers to migrate rapidly to fibre. It is welcome that Ofcom recognises this risk in the Consultation.⁸
- 4.7. Given those risks, CityFibre would have expected Ofcom to be cautious in adopting the Fixed Percentage Approach. However, in reaching its conclusion that the Fixed Percentage Approach is appropriate, it appears that Ofcom has prioritised Openreach's full fibre investment case.⁹
- 4.8. That is entirely inconsistent with Ofcom's primary duty under section 3 of the Communications Act 2003 to further the interests of consumers, where appropriate by promoting competition. Ofcom's duties in respect of promoting investment are subservient to its primary duty and any inconsistency should weigh in favour of the approach which best protects the interests of consumers and competition.
- 4.9. In any event, it is unclear from the Consultation how Ofcom considers that the Fixed Percentage Approach will in fact serve to deliver Openreach's full fibre investment case. As set out in paragraph 4.5, the Fixed Percentage Approach in fact dissuades Openreach from rolling out FTTP once it has reached the Second Threshold. Lowering the level of that threshold through the Fixed Percentage Approach therefore risks Openreach not delivering on its full fibre investment case in contrast with the Defined Exclusions Approach which incentivises Openreach to deliver FTTP to as many premises as possible.

10% Fixed Percentage Threshold is Arbitrary

- 4.10. The Consultation proposes to adopt a 10% Fixed Percentage Threshold. In reaching a decision to adopt the 10% figure, the Consultation marks a stark departure from Ofcom's previous approach to exclusions. In the TAR Consultation, Ofcom indicated that a fixed percentage should amount to '*a reasonable approximation for premises which are unable to receive ultrafast services due to exceptional circumstances beyond Openreach's control*'. In the Consultation, that approach is abandoned in favour of setting a '*fixed percentage of exclusions that is realistic and achievable, while being at a level where there is a reasonable prospect of Openreach actually retiring copper-based services.*'¹⁰
- 4.11. No reasoning is provided for this change in policy approach. Neither is there any meaningful reasoning provided for the 10% figure. Given the indicative

⁸ Consultation, paragraph 3.137

⁹ Consultation, paragraphs 3.132 to 3.134

¹⁰ Consultation para 3.109

approach in the TAR Consultation of adopting a 2% Fixed Percentage Threshold, it is surprising that Ofcom has chosen not to consult on a wider range of options which might best deliver its policy goals.

- 4.12. The Consultation suggests that the adoption of a 10% figure is an exercise of regulatory judgment.¹¹ Yet there is no assessment of the adoption of the 10% figure as against Ofcom's duties or any policy rationale. The assessment of the 10% figure appears to be concerned solely with the extent to which Openreach can reasonably deliver FTTP to 90% of premises within an exchange area rather than a detailed consideration of the impacts of setting the Fixed Percentage Threshold at 90%.
- 4.13. It is incumbent upon Ofcom to provide reasoning for its decision on the Fixed Percentage Threshold, including an assessment of the impact of that threshold on competition and consumers. Had it done so, it would have realised that a threshold set at 10% presents significant risks which are not outweighed by Openreach's own interests. If Ofcom remains of the view that it should adopt a Fixed Percentage Approach, it should revisit the level of the threshold, taking into account the risks to competition and consumers from a threshold which is set too high.

5. OFCOM'S APPROACH MUST NOT UNDERMINE COMPETITION

- 5.1. If Ofcom remains committed to the Fixed Percentage Approach, the risks to competition and consumers can be mitigated to some degree by delayed implementation.
- 5.2. The risks to consumers must be managed in such a way that they are not suddenly affected by bill shock once the Second Threshold comes into effect and Openreach raises copper prices. This could be done through advanced notice for ISPs to effect plans, informed by learnings from the PSTN switch-off process, to contact disengaged and/or vulnerable consumers in this cohort and convince them to switch from copper to fibre products and remove any practical barriers for them to do so. However, this risks being an unsatisfactorily open-ended approach, given that Ofcom itself will not be directly involved in overseeing the process and does not propose any concrete measures to drive engagement and switching, nor any intermediate milestones or metrics for determining whether these measures are proving effective.
- 5.3. Any advanced notice measures for consumers must, however, act in a way which is competitively neutral. If the programme of work implemented to drive consumer engagement and encourage switching is focused solely on switching consumers from *Openreach* copper to *Openreach* fibre, alternative networks may be foreclosed from addressing a significant consumer segment, further entrenching Openreach's incumbency advantages. Industry-led activity preparing Telecare users for PSTN has given rise to such an unsatisfactory

¹¹ Consultation, paragraph 3.118

situation has arisen whereby it is extremely difficult to migrate Telecare users to alternative fibre networks.¹²

- 5.4. Further, the Fixed Percentage Approach should not be implemented in a manner which allows Openreach to undermine competition. As Ofcom rightly notes, the use of the Second Threshold before alternative networks are established would allow Openreach to use copper pricing to drive migration onto its own network.
- 5.5. This risk can be managed through ensuring that the Fixed Percentage Approach does not come into effect until alternative networks reach a steady footprint state. In terms of build, CityFibre recognises that the majority of build plans will be complete by 2029. However, there is likely to be residual build ongoing, particularly under the Project Gigabit Programme, until 2031.
- 5.6. Further, the process of altnet consolidation and conversion of retail altnet businesses to wholesale is unlikely to be fully complete by this time, with timescales for this necessarily dependent on commercial transactions and integration work being completed.
- 5.7. CityFibre considers, therefore that an implementation date of April 2029 is predicated on the most optimistic view of altnet build and consolidation. As Ofcom will be aware, build plans and business plans have changed significantly during the rollout phase and will continue to do so. Ofcom should carefully consider whether April 2029 remains an appropriate implementation date if it is to proceed with the Fixed Percentage Approach.

¹² This situation arises because, in order to fulfil the requirements of the Government's Network Operators' Modernisation Code, alternative network operators have to cancel inbound orders where the customer is a Telecare user, given the risk that their device will not function on the fibre network and hence the customer may be left without a functioning device. Telecare users switching to Openreach fibre can, if their devices prove to be incompatible with the fibre network, be switched back by Openreach to the copper network. No such failsafe is available for switches to alternative fibre networks.