Zzoomm pre-consultation submission to Ofcom's Telecoms Access Review

Non-confidential

July 2024

Contents

Executive Summary

1. Whilst the WFTMR set the right high-level objectives, its implementation has not delivered to those objectives, nor to the specific requirements in the government's Statement of Strategic Priorities (SSP)[1].In particular, the SSP called for the application of the 'fair bet principle' to be applied to all investors in new gigabit-capable networks, but Ofcom focused its application of that principle to BT only.

2. For the Telecoms Access Review (TAR), Ofcom must engage positively with the investors in competing full-fibre networks and ensure that it consistently applies the fair bet principle to those as well as to BT. This should manifest itself in many areas including:

    - Incentivising all investors to deploy full-fibre networks in both rural and urban settings;
    - Ensuring that BT is not able to favour its own network construction arm by giving access to parts of its existing infrastructure that it either refused to supply to its competitors or for which it applies a surcharge;
    - Ensuring that the BT exchange closures and the copper retirement programmes are not used to deter competitive network investment;
    - Preventing BT from pricing in a manner to squeeze out infrastructure competitors and lock in retail ISPs, whether on a permanent, discount or special offer basis; and
    - Requiring BT to deliver the PIA product in a non-discriminatory manner and that BT can only recover efficiently incurred PIA costs that have not already been recovered in previous charge control periods.

3. Ofcom now has access to data on the actual investments and deployment by infrastructure competitors to BT. Whilst there may have been reason for Ofcom's reluctance to embrace the likelihood of many new market entrants in the infrastructure market back in 2019/20 when the WFTMR analysis was done, that is no longer a reasonable position to take.

[1] https://assets.publishing.service.gov.uk/media/60016add8fa8f55f6156b4a4/SSP_-_as_designated_by_S_of_S__V2.pdf.

Introduction

4. Zzoomm welcomes the opportunity to submit its views and concerns to Ofcom to help Ofcom understand the impact of its decisions on operators like Zzoomm and the issues that are most significant to them. It is important that Ofcom invests in building a deep understanding of the different market players in the UK telecoms market - not only the very largest.

5. Zzoomm was, in general, pleased with the direction set in the Wholesale Fixed telecoms Market Review (WFTMR), but subsequently found that the high level pro-network competition statements in the WFTMR were not followed up in the manner expected. The Telecoms Access Review (TAR), whilst a 'continuity review' to deliver on Ofcom's 10-year objectives of encouraging investment in new fibre networks and competition at the network level (infrastructure competition), needs to be more explicit in how Ofcom intends to implement and enforce its provisions.

6. At the time of completing the WFTMR, Ofcom was in receipt of information from many new market entrants in the fibre network market, including Zzoomm, but did not have confidence that many of these would be successful in attracting funding and deploying new fibre networks as per their plans. The WFTMR, therefore, only assumed that BT would face material and sustainable competition from the very largest network operators (VMO2 and CityFibre).

7. However, Ofcom's regulatory design to create a 'race to invest', as stated in Ofcom's Equinox 2 Statement[2] and by Lindsey Fussell in the house of Lords,[3] resulted in just that a - race to invest and build new fibre networks as quickly as possible. Ofcom's policies going forward must embrace the results and consequences of its own design and policy and must embrace the current market status with multiple fibre network operators. Ofcom must not simply look to a future scenario in which that number has substantially reduced through a consolidation process.

8. With the benefit of hindsight, and the very material deployment by a large number of network competitors to BT, Ofcom needs to recalibrate its market perception and recognise that material and sustainable competition is viable in a much larger portion of the UK, than it had originally anticipated. In order to deliver on Ofcom's objectives of investment in fibre and infrastructure competition, the TAR needs to adopt the presumption that competition will emerge everywhere, unless there are clear signs of that not being the case.

9. The TAR must not presume that BT/Openreach will build everywhere, and that competitive infrastructure is an optional extra, but rather that at least one commercial deployment will happen everywhere, except where public subsidies are required. It should also seek to ensure that the party to first deploy in a location does not face market conditions that prevents it from benefiting from first mover advantages.

10. Zzoomm agrees that the WFTMR objectives remain valid, but it is important that the detailed interventions by Ofcom in the TAR reflect the current market conditions and are not simple extensions of the current WFTMR interventions.

---

[2] Equinox 2 statement paragraph 3.110.

[3] House of Lords Communications and Digital Committee – Corrected oral evidence: Digital Exclusion and the cost of living. Evidence by Lindsey Fussell, page 6.

Introducing Zzoomm

11. Zzoomm builds and operates new networks providing Full Fibre services to over 200,000 homes and businesses in 28 market towns across the UK. Established in 2018, Zzoomm now serves over 28,000 customers, delivering symmetrical residential services of between 150Mbps and 2000Mbps, and is adding over 1800 new Full Fibre customers each month. Over the same network, Zzoomm delivers business services including symmetric Ethernet access up to 10Gpbs today, with the ability to deliver up to 100Gbps on demand.

12. Zzoomm primarily builds in smaller market towns in semi-rural settings, and we are aware of premises within and surrounding our commercial builds that we are unable to serve commercially. Zzoomm would welcome the possibility to make 'network infill' viable so we can serve 100% or very close to 100% of the communities covered by our build plans.

Market definitions

Product markets

13. Zzoomm considers that the product markets defined in the WFTMR are likely to be appropriate for the TAR, with just two exceptions.

Inclusion of EAD and OSA circuits for FTTP aggregation in wholesale leased lines market

14. As a consequence of Ofcom limiting the scope of the wholesale leased lines market to circuits that connect end-user sites, Openreach has introduced a 100% surcharge on 1Gbs EAD circuits that are used by Openreach's full-fibre competitors for FTTP traffic aggregation.

15. This change has put significant financial strain on existing and planned deployment by Zzoomm, where Zzoomm has used Openreach EAD circuits to connect locations with a smaller number of premises, which could not cost-justify the self-build of a connection using PIA.

16. Zzoomm does not agree with Ofcom's position in the 2019 BCMR and the 2021 WFTMR, that PIA is an effective substitute for the EAD/OSA circuits. The fact that Openreach has access to its existing estate of fibre gives it a significant cost advantage over its potential competitors which is inconsistent with Ofcom's objective to encourage infrastructure competition. Zzoomm considers that Ofcom's current approach has distorted the market and given the dominant provider the opportunity to selectively penalise its competitors, effectively foreclosing part of the market from infrastructure competition.

17. Zzoomm has separately provided data to Ofcom on how the EAD surcharge has affected its build plans, as part of a wider Altnet data collection exercise.

The Inter-Exchange market

18. Although Zzoomm does not co-locate in Openreach exchanges, it does use PIA and it has commercial relationships with third party backhaul providers that co-locate at Openreach exchange sites. The closure of >80% of Openreach Exchanges will cause a major disruption to the wider telecoms market and Ofcom needs to carefully consider what it could and should do to prevent this change by Openreach from harming infrastructure competitors to Openreach.

19. Zzoomm considers that Ofcom needs to review whether the IEC market remains relevant or whether either a different market should be defined or inter-exchange connections (and connections to locations that have previously had exchange sites) should become a subset of the wholesale leased lines market. Significant investment has already happened based on access to the current level of commercial and regulated backhaul. If that were to be

significantly changed and reduced the knock-on impact on full-fibre deployments to smaller locations could be to render them economically unviable.

Geographic markets

20. Zzoomm builds and operates full fibre networks primarily in small towns and semi-rural locations. Most of those locations were classified by Ofcom in the WFTMR as ‘Area 3’, where the explicit regulatory objective was to encourage Openreach only to deploy fibre. There was no objective from Ofcom to encourage competitors to deploy full-fibre networks in Area 3.

21. For the TAR, Ofcom must recognise that Zzoomm and other Altnets represent material and sustainable competition to Openreach, and that commercial deployment is happening throughout the locations in the WFTMR Area 3 market. The impact of the competitive pressures on Openreach in Area 3 is evidenced by Openreach having already exceeded its 3.2m premises passed Area 3 commitment, only three years into the 5-year WFTMR period.

22. It is Zzoomm’s view that, except where subsidies are required to make full-fibre deployment viable, Openreach faces equal levels of competition regardless of whether urban or rural. The 2024 INCA report on Altnet progress shows that, by the end of 2023, Altnets had covered 32% of premises in both areas 2 and 3, even slightly exceeding the Openreach coverage in Area 3.

23. Ofcom must, therefore, adjust its approach to geographic market segmentation and ensure that there are equal incentives (and potential rewards) for Zzoomm, Openreach and any other provider deploying new full-fibre networks without subsidies.

24. Additionally, Zzoomm is concerned that, where government subsidy is provided due to no provider (including Openreach) having declared plans for commercial deployment, Openreach is seen to announce build plans very soon after government subsidy contracts are awarded. This potentially makes the subsidised build unviable, due to the very large retail market share held by ISPs solely on the Openreach network. As a pattern of behaviour this suggests anticompetitive intent and Ofcom should look to define markets and remedies to address that behaviour.

Remedies

25. At present, Zzoomm is a vertically integrated provider and does not offer wholesale access to its network. That is primarily due to the fact that larger, specialised wholesale-only providers are struggling to attract the large ISP brands to their networks, and therefore it would not be likely that Zzoomm would succeed in achieving that either. It is, therefore, more expedient for Zzoomm to develop its own retail brand to generate take-up on its network. It is, however, Zzoomm’s mid- to long-term plan to offer wholesale access to its network and Ofcom’s interventions in relation to wholesale products and pricing is directly relevant to Zzoomm’s ability to successfully do that. Zzoomm uses PIA to build its network and the usability and pricing of PIA is of material importance to Zzoomm’s long-term success.

Wholesale broadband access pricing

26. In the WFTMR, Ofcom adopted the approach of regulating the price of an anchor product (the 40/10) broadband access product). The anchor price was set at the level in place at the conclusion of the previous WLAMR - with a CPI-0% charge control, effectively allowing the anchor price to move with inflation.

27. The underlying rationale for this approach was to encourage investment in new full-fibre networks by BT and others – allowing BT to price higher for higher speed products. This approach was informed, as we understand it, by BT's historically consistent approach to wholesale pricing – namely to profit maximise.

28. The actual market developments since March 2021 have seen BT breaking with that profit-maximising pricing approach and today some higher-speed products are priced below that of the anchor product (which Openreach continues to price at the highest level allowed under the charge control). It is, therefore, appropriate to query whether an anchor pricing approach, which regulates the maximum price BT is allowed to charge, remains suitable for the current market conditions.

29. There are two elements to that question:

- Is it still appropriate to use the anchor pricing approach (and if so, what is the correct anchor product)? and
- Is it appropriate to only set the maximum price BT can charge (a price ceiling) or should Ofcom also introduce a minimum price that BT charge (a price floor)?

The use of an anchor product

30. Anchor pricing is suitable when the regulated company seeks to profit maximise. The regulated product limits the incremental pricing that can be charged for higher value product variants due to the limitation to how much extra consumers are willing to pay for the added functionality.

31. With its two Equinox offers, Openreach has demonstrated that it considers it more important to move customers across from copper to fibre quickly and to incentivise the retail ISPs on the Openreach network to promote FTTP and to stay with Openreach rather than move to Altnet networks, than to maximise short term profits. In that situation, anchor pricing is not the optimal approach for price regulation.

32. The TAR, however, is a 'continuity review' and Ofcom has indicated its reluctance to depart from the anchor pricing approach at this time. Zzoomm understands that position and, providing that other measures are taken to address the competition issues arising from the anchor pricing approach, believes that any weaknesses of the anchor pricing approach can be overcome.

33. The choice of the most appropriate anchor product for the TAR needs to be informed by the role of the anchor price. As the first half of the WFTMR period has shown that the anchor price is unlikely to materially influence pricing of higher-speed product variants, the role of the anchor price may therefore (in addition to constraining pricing of higher speed product variants) also need to function as a minimum price for a relatively low-value product variant, below which the pricing of higher value product variants must not go. Whether a single anchor product price can perform both of those roles depends on the choice of anchor product and how Ofocm determines to set the anchor price. If the role of the TAR anchor price is to both be a price ceiling for the individual product variant and price floor for all product variants, then it is important that the relevant anchor product chosen is not a relatively high-spec product variant – even if the trend may be towards the consumption of such products.

Moving from price ceiling to price floor

34. As infrastructure competition intensifies in the UK, the incentive on the dominant incumbent moves from short term profit maximising to short term price squeezing, to deter

competitors from building and gaining market share and thus securing the long-term profitability of the dominant operator.

35. Whilst Ofcom will wish to continue protecting consumers from potential over-pricing by Openreach at the wholesale level (as BT is unregulated in the broadband retail market), the most significant concern must be to prevent Openreach from pricing in a manner that deters infrastructure competitors from continued deployment and/or makes it much harder for those competitors to attract sufficient take-up of their networks to become established and economically resilient long-term competitors to Openreach.

36. From the perspective of the wholesale broadband charge control, Zzoomm considers that Ofcom's only credible approach would be to introduce a price floor. As mentioned above, a suitable anchor product could potentially constitute both a price ceiling and a price floor (this would not unduly constrain BT's pricing freedom, as it has been pricing to the maximum level allowed for the anchor price consistently in the past and also during the WFTMR).

37. In the WFTMR, Ofcom did not set the anchor price for the 40/10 anchor product using the unit cost from the fibre costing model (FCM). Rather, Ofcom decided to use the 40/10 price at the conclusion of the previous WLAMR charge control and then check that price against the FCM unit costs as to whether it was within the range of its calculated unit costs for a reasonably efficient operator (REO). If Ofcom signals that it intends to do the same for the TAR (and indicates its preferred anchor product), that could incentivise Openreach to manipulate the anchor product price to a level that suits it purposes for the commencement of the TAR charge control. If, however, the anchor price is set using the FCM unit costs, then the role of the FCM becomes much more important and the assumptions used by Ofocm need to be subject to careful analysis and should not use Openreach as its starting point for creating a REO costing model.

38. Zzoomm considers that Ofcom should consult on its charge control approach with proposals for price ceiling and floor and with a rationale for a proposed anchor product. That consultation could be issued towards the end of 2024 and feed into the main 2025 TAR consultation.

Discounts and special offers

39. The introduction by Openreach of the two Equinox offers brought the market pricing form its higher speed product variants down materially and caused significant disruption and concern in the market. Ofcom will be aware that Zzoomm and other Altnets were very concerned about the impact of those offers both in the form of reduced wholesale and corresponding retail prices and the loyalty-inducing nature of the offers.

40. Further, Zzoomm understands that, recently, Openreach has started a trial of offering retail vouchers to customers of its retail ISPs that move from Openreach's copper services to its fibre services. Separate discussions are ongoing on that matter, and it is not the purpose of this paper to replicate those, but this latest initiative by the dominant provider is indicative that the ex-ante regulatory regime needs to be sufficiently flexible and fleet of foot to engage with any future initiatives that will almost certainly appear during the TAR period.

41. The remaining two years of the WFTMR and the beginning of the TAR periods will largely determine the shape of the UK telecoms competitive market. The WFTMR adopted a relatively cautious and 'soft' approach to restricting Openreach's pricing flexibility. Openreach has since proven its dexterity in navigating those rules and it is necessary for Ofcom to reconsider how to prevent future pricing and other commercial terms from

preventing the successful introduction of sustainable infrastructure competition in the UK fixed telecoms sector.

42. Zzoomm considers that Ofcom should move the burden of proof in its assessment of 'other commercial terms' from the need for competitors to prove that the offer would in the future harm competition to Openreach proving that in would not. Zzoomm also considers that Ofcom needs to make its definition of offers that need notification more inclusive. It would seem that Openreach did not consider it necessary to notify the introduction of the retail voucher trial, whereas Zzoomm considers that such an initiative definitely should be covered by the pre-notification requirement.

Copper retirement

43. The WFTMR set out the framework for Openreach to be allowed to (give notice to) withdraw copper-based services once it reaches pre-determined levels of FTTP coverage within exchange areas. Zzoomm understands that it is legitimate for the incumbent to be allowed to modernise its network and that it should not be forced to continue offering legacy services that result in inefficient network management and operations.

44. However, with an explicit policy to encourage infrastructure competition and investment in competing full-fibre networks, it is essential that the terms under which the copper retirement process is allowed, builds in as many safeguards as possible against the copper retirement process effectively becoming a simple 'lift and shift' of customers using Openreach's copper network across to Openreach's full-fibre network.

45. It is important to recognise that the change from copper to fibre represents a critical point at which consumers may also chose to change provider. The move to fibre often involves installation of a new connection to the premises and new in-house equipment. Once that change has happened it is significantly harder for a competing provider to persuade the consumer to go through that process again. *This 'switching window' must represent equal opportunities to all providers with FTTP presence to serve the relevant consumers*.

46. One example of how Openreach is able to ensure that copper product customers (which are *ALL* on the Openreach network) to Openreach fibre products, is that it offers to waive the wholesale early termination charge (ETC) for the copper contract if the customer moves to its FTTP service. That means that the customer doesn't reach its contract termination point, when it would be feasible for Altnets to win them over to their service. Once on the Openreach FTTP network, as per above, it is much harder to persuade the customer to go through the change of network provider again.

47. Zzoomm considers that the waiving of ETCs constitutes a special offer that should be notified to Ofcom under the WFTMR 'other commercial terms' provision, and that Ofcom should consult and publish its analysis of the impact of that particular pricing practice. This should be done now, under the WFTMR.

48. If the objective is to move customers off copper, then Openreach should offer to waive ETCs for all customers moving off copper, regardless which network they move to. That would achieve the objective of accelerating copper retirement in a competitively neutral manner.

49. When long distance calling was liberalised in the USA, consumers were offered a choice of long-distance providers – there was no default move to their old vertically integrated providers. That approach used a change in the market to create a competitive long-distance market that has served consumers well, the copper retirement is a similar pivot-point and it

is remiss of Ofcom to not seek to protect consumers' interests by facilitating an active choice of FTTP service provider.

50. For example, Ofcom could mandate that a formal notification is sent to all residents in an exchange at the time that Openreach does its copper stop sell notification for that exchange area. That notification could include a website address where residents can look up both which networks and which service providers offer a full-fibre service at their address. (The data to support this process is already collected periodically by Ofcom)

51. Zzoomm considers that the whole copper retirement framework needs a thorough review. The focus in the WFTMR was almost entirely on the protection of vulnerable consumers (which we agree is important) and downstream retail ISPs, with very little recognition that the process could be detrimental to infrastructure competition.

PIA

52. Zzoomm uses PIA for its network build. Despite having recently announced that we will be pausing our build due to the current cost of capital, we continue to drive take-up on the existing network. We plan to start building again once funding conditions change, and we remain dependent on the PIA product for our existing network.

53. The current PIA product is much improved from its pre-2018 version, the result of significant efforts from PIA users and support by the OTA. Despite that, the administrative processes supporting PIA are cumbersome and time-consuming. It is not at all clear to us that Openreach has to follow the same cumbersome processes for their own use of the same infrastructure.

54. The WFTMR set out clearly that Openreach should incorporate PIA customers in the planning and design of new systems and processes as well as upgrades to those already in place. It also said that all new and upgraded systems and processes should be compliant with the principle of Equivalence of Inputs (EoI) wherever possible.

55. That, however, has not happened. The improvements that have happened have been designed by Openreach, with consultation with PIA customers post-design and, in some instances, missing critical customer requirements. And not one single such development or upgrade has attempted to be EoI compliant. Ofcom has, to the best of our knowledge, not attempted to enforce its clear commitments in the WFTMR but has repeatedly pointed to the Openreach Internal Reference Offer (IRO) as the measure for whether Openreach was engaging in undue discrimination between its own downstream network construction business and PIA customers.

56. Zzoomm agreed with Ofcom at the time of the WFTMR, that a change to full EoI would not be proportionate, would take too much time and funding, and would likely slow down the development of important functional improvements to the PIA product. That was, however, in the context that there would be a gradual move towards equivalence – especially through the development of new and upgraded systems and processes. Zzoomm took comfort that, over time, the material differences between how Openreach itself and PIA customers can use the passive assets would reduce. It is, therefore, with disappointment that Zzoomm notes no progress in this area at all.

57. The existing Network Adjustments (NA) process is disruptive to our build, and we urge Ofcom to insist that Openreach proceed with the proposed Proof of Concept for PIA customers to undertake NAs without prior approval and then claim the payments later (subject to the necessary evidence and documentation). The billing, damages and dispute

resolution processes are poor and one-sided with contractual obligations on PIA customers but no obligations on Openreach to operate reasonably or in a timely manner.

58. Nearly two years remain of the WFTMR. Ofcom should use that time to properly enforce the provisions of the WFTMR, so that the TAR can be forward looking on the base of significant improvement and a real shift towards EoI.

59. For the TAR, Zzoomm still considers that PIA regulation remains essential. Whilst the majority of new FTTP deployment will likely be completed by April 2026, some build will still be ongoing for at least a couple of years after that. We hope that WFTMR-based improvements will be sufficient for the TAR to not need any major improvement in those aspects of the product.

60. We will, however, be using the PIA product for decades to come and it is essential that the ongoing management, incident management, repairs, billing, damages, and dispute resolution processes are the focus of the TAR, and that those processes are subject to a strong push towards EoI.

61. Zzoomm urges Ofcom to consult specifically with PIA customers on which are the biggest pain-points in the PIA management processes and to gain commitment from Openreach to a programme of significant systems and processes changes and redesigns that involve the PIA customers from end-to-end and which, where appropriate, allow PIA customers to contribute to the funding of those developments.

PIA costing and pricing

62. The costs recoverable by Openreach through the PIA product must only reflect the efficiently incurred costs by Openreach to deliver the PIA services. In particular, Openreach should only be allowed to recover the costs of assets that have not been previously recovered and Openreach must, in the regulatory financial statements (RFS), charge itself on a similar basis as its charges to external PIA customers. This is standard practice in accounting separation and is not dependent on EoI or even on Openreach using the PIA services.

63. Zzoomm is aware that, at present, Openreach charges itself at cost, but charges PIA customers the regulated price in accordance with Ofcom regulation. Due to the accounting practices used (as specified by Ofcom) this has resulted in Openreach charging itself at much lower levels than the regulated price payable by PIA customers, which creates a fundamental imbalance in the market and creates a windfall for Openreach which is not justifiable by any Openreach efficiency improvements. Rather, these changes are due to the very high levels of inflation seen in the last few years. Zzoomm calls on Ofcom to urgently rectify that situation and to ensure that the windfall Openreach is currently receiving will be redistributed to all users of the Openreach physical infrastructure either as a single repayment to PIA customers or built into the TAR PIA charge control.

64. With regards to PIA pricing, Zzoomm is concerned that the current approach (as adopted by Ofcom very late in the WFTMR process and subject to minimal consultation and scrutiny) favours Openreach and, whilst well-intended, does not achieve its objective of reflecting the benefits to PIA customers of using the PIA product. Zzoomm urges Ofcom consider simplifying the PIA pricing and assess whether PIA costs are recovered fairly between Openreach and PIA users.

Exchange closures

65. Openreach has announced plans to close more than 80% of its exchanges in the next 10 years or so. 103 are scheduled for closure by 2030, followed rapidly by significantly larger numbers (more than 4000 exchanges will close). Although only around 103 exchanges are scheduled to close within the TAR period, the impact of the planned closures during and after the TAR period is already being felt in the market. The range of impacts from exchange closures include:

    - Third party backhaul providers vacating exchanges significantly in advance of their scheduled closure dates in order to secure accommodation at surviving exchanges, thus increasing the number of 'BT-only' exchanges in the period running up to their closure;
    - Increased distances from Altnet points of connection to surviving exchanges for PIA build or commercial backhaul links (making the case for substituting EAD/OSA connections with PIA even harder);
    - Congestion in the PIA infrastructure around the surviving exchanges;
    - Uncertainty about the continuity of inter-exchange dark fibre (DFX) availability as exchanges close.

66. Even though Zzoomm does not make use of the physical Openreach exchange buildings and facilities, their future closure will impact our business through a combination of the above effects. It is difficult to conceive a telecoms provider in the UK that will not, in some way, be affected by the planned closures. It is, therefore, essential that Ofcom engage actively in this topic.

67. The OTA is facilitating industry discussions related to exchange closures, which are very helpful. But the OTA can only help facilitate collaboration and understanding. It cannot direct Openreach in how it should conduct the exchange closure programme, nor set any specific requirements that must be fulfilled before an exchange can be closed.

68. There are clear knock-on impacts from exchange closures on how Ofcom regulates BT. It is important that such decisions are made in full understanding of the full range of possible impacts from exchange closures.