

# International benchmarking and best practice approaches to *ex ante* regulation: SMP in the UK fixed line markets

**A report produced for UKCTA**

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## About Wiggin

Wiggin LLP is a leading law firm specialising in media, technology, and intellectual property. With a reputation for delivering innovative, tailored legal solutions.

The report has been prepared by Wiggin LLP, leveraging its international expertise and experience in regulatory analysis in the electronic communications sector.

## About this document

This study and report, prepared for the UK Competitive Telecommunications Association (UKCTA), examines key regulatory issues in competitive electronic communications markets. It analyses the success of network deployment and competition, along with the risks posed by deregulation and regulatory inertia.

The report evaluates these challenges as they are likely to arise in the next Ofcom fixed line market review, providing insights into the associated risks for stakeholders and principles to address them, drawing on international benchmarks.

While UKCTA members broadly support the analysis and conclusions presented, they each hold individual positions and viewpoints on the topics discussed. It should not be assumed that every UKCTA member agrees with all points covered in the study and report.

Furthermore, although the report anticipates issues likely to arise in the next market review, it does not represent the individual responses of UKCTA members, who will engage directly with Ofcom and the Government on substantive matters.

The analysis provided herein is prepared on a best-efforts basis across the multiple jurisdictions reviewed. Please note that documents have been translated from the local language to English using machine translation tools.

This report is for informational purposes only and does not constitute legal advice.

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# 1. Executive Summary

- 1.1 The UK telecoms market is at a critical juncture as Ofcom prepares for the Telecoms Access Review (TAR) for 2026–2031. Significant investments by Openreach, VMO2, CityFibre, and alternative network providers have expanded gigabit-capable network coverage to 83% of UK premises, with full-fibre services reaching 69%. Despite this progress, only 49% of premises take-up broadband services on gigabit-capable networks where such services are available. The evolving market conditions, technological advancements, and growing competition necessitate a regulatory framework that remains fit for purpose, balancing investment incentives with consumer and market protection.
- 1.2 **Deregulation poses risks to competition and consumers.** While increased network coverage suggests potential competition, relying solely on this metric risks underestimating the persistence of Significant Market Power (“**SMP**”). International examples show the importance of a nuanced SMP assessment. Recent regulatory decisions in Croatia, Slovenia, Italy, Portugal, and France have provided remedies to reflect market conditions, maintaining obligations where the local incumbent retains dominance. As copper is retired and customers migrate to new networks, accelerating this process creates risks for competitors and consumers. The feedback from international examples, including the recent BEREC draft report, identifies these risks around this process and emphasise the need for clear timelines, sufficient fibre coverage, and stakeholder involvement to ensure a smooth and fair transition, and before the removal of effective regulatory remedies.
- 1.3 **Ineffective remedies could fail to protect competition and consumer interests.** The current SMP measures in effect in the UK lacks robust Quality of Service (“**QoS**”) standards and minimum service levels or fibre, increasing risks of inconsistent and/or reduced service quality and discrimination. Lessons from Ireland’s ComReg and Italy’s AgCom provide useful examples of QoS frameworks, including Service Level Agreements (“**SLAs**”) and automatic penalties, for regulating fibre services and which are critical to maintaining fair competition across verticals. Similarly, maintaining service quality for copper networks during the transition from copper to fibre is vital in protecting consumers who remain on the legacy network. International benchmarks show the need to prevent degradation of copper service provisioning.
- 1.4 **Accountability in regulation must be strengthened.** A thorough and robust attempt at quantification of costs and benefits that stakeholders may incur due to a regulatory decision is critical to a robust impact assessment. This includes direct financial impacts, such as compliance expenses for operators, as well as indirect effects like potential market distortions or reduced innovation incentives. Ofcom must assess the impact of its decisions (where it chooses to act or to refrain from intervening) on the effect it has ultimately on businesses and consumers. In this context of ex ante controls in telecoms markets, Ireland’s ComReg offers an example model for impact assessments which quantify costs, benefits, and stakeholder effects.

Similarly, retrospective evaluations are important for assessing whether regulations meet their objectives and have therefore been effective. The OECD and European Commission provide models of systematic ex post evaluations to ensure regulatory effectiveness and inform future policy adjustments.

- 1.5 The Telecoms Access Review presents an opportunity for Ofcom to reinforce its commitment to a competitive and consumer-focused market. By addressing the risks of premature deregulation and ineffective remedies, while enhancing accountability through robust impact assessments and ex post evaluations, Ofcom can adapt its framework to changing conditions. Drawing on international benchmarks ensures that regulatory measures protect business and consumer interests, promote sustainable competition, and foster a resilient UK telecoms market.

## 2. Introduction

### Overview

#### Market developments

- 2.1 In recent years, concerted efforts in policy and regulation by both Government and Ofcom have significantly advanced the deployment of gigabit-capable networks across the UK.
- 2.2 The latest Ofcom figures<sup>1</sup> show 25 million premises (83% of UK households) are now able to access gigabit-capable network services and 20.7 million premises (69% of UK households) have access to full fibre services.
- 2.3 This success has been underpinned by both Government<sup>2</sup> and Ofcom's<sup>3</sup> strategic policies and regulatory decisions aimed at fostering competition at the wholesale and infrastructure level, with the ultimate goal of delivering better outcomes for downstream providers and consumers.
- 2.4 Network operators with significant scale like Openreach, VMO2, and CityFibre, along with numerous alternative network providers ("**altnets**"), have invested heavily in upgrading and expanding their networks, bidding for contracts in rural areas through programs like Building Digital UK ("**BDUK**") Project Gigabit<sup>4</sup>, and striving to meet ambitious coverage targets.
- 2.5 As Ofcom begins considering the regulatory conditions it will set for the next market review period (2026–2031), a growing debate has emerged about the future of the current *ex ante* obligations in place. These obligations, updated during the 2021 market review, are designed to address BT (Openreach's) Significant Market Power ("**SMP**") across most fixed-line markets in the UK (excluding Hull<sup>5</sup>). However, since the last review, the aforementioned developments in gigabit-capable network coverage, technological advancements, and shifts in wholesale market conditions have created a need to reassess whether these regulatory measures remain fit for purpose.

#### Market reviews

- 2.6 Ofcom has conducted market reviews for over 20 years, regularly assessing the evolving landscape of the telecoms sector to ensure its regulatory framework addresses the needs of the market. Each review has required careful consideration of technological advancements and market changes, with the latest developments continuing this trend.
- 2.7 Telecoms markets are increasingly converging, as gigabit-capable networks deliver higher bandwidth services to a broader range of customers and technologies like satellite services (including direct-to-device or 'D2D') emerge to address edge cases, such as coverage in remote or hard-to-reach areas. These innovations add to the ever-changing dynamics that market reviews must account for.
- 2.8 Markets naturally evolve over time, driven by shifts in competitive conditions, investment priorities, technological advancements, and wider economic factors. Ofcom's ongoing reviews

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<sup>1</sup> Ofcom (2024) 'Connected Nations UK report 2024'. 5<sup>th</sup> December 2024 ([Link](#))

<sup>2</sup> DCMS (2018) 'Future Telecoms Infrastructure Review'. 23<sup>rd</sup> July 2018 ([Link](#)), DCMS (2019) 'Statement of Strategic Priorities (SSP)'. 18<sup>th</sup> July 2019 ([Link](#)).

<sup>3</sup> Ofcom (2015) 'Digital Communications Review'. 11<sup>th</sup> March 2015 ([Link](#)) and Ofcom (2016) 'Initial conclusions from the Strategic Review of Digital Communications'. 25<sup>th</sup> February 2016 ([Link](#)).

Ofcom (2018) 'Regulatory certainty to support investment in full-fibre broadband: Ofcom's approach to future regulation'. 24<sup>th</sup> July 2018 ([Link](#)).

<sup>4</sup> BDUK Project Gigabit (2024) 'Project Gigabit progress update – April 2024'. 10<sup>th</sup> April 2024 ([Link](#)).

<sup>5</sup> For historic reasons, KCOM is the incumbent in Hull and is regulated by Ofcom under the SMP framework ([Link](#)).

reflect these changes, adapting to the developments that continually shape competition and services in the telecoms sector, with regulation required to reflect these dynamics.

- 2.9 In this context, the deployment of altnet gigabit-capable networks has been a key driver of these shifting market dynamics. With greater wholesale-level competition between gigabit-capable networks and services than when Ofcom last reviewed the market in 2021, the question arises of how regulation should adapt to reflect these changes and the continuing growth in competitive deployment we will see during the next market review period. Specifically, this involves evaluating whether (a) deregulation of certain services is now appropriate and (b) whether remedies should be modified, or even left unchanged.

## The regulatory risks

- 2.10 The deregulation of services risks weakening the constraints on BT's<sup>6</sup> ability to act anti-competitively at the wholesale level, undermining the significant progress achieved so far and jeopardising future ambitions for network growth and competition. Furthermore, such missteps in regulation can cause irreversible damage to the market and undermine the conditions necessary for wholesale "material and sustainable"<sup>7</sup> competition to arise and eventually lead to effective levels of competition. Therefore, preventing the best outcomes for consumers that both Government and Ofcom have set out to achieve.
- 2.11 Deregulation also threatens downstream competition by limiting the availability of wholesale options for downstream retail providers, reducing their ability to choose between operators and eroding the benefits that wholesale competition provides. Furthermore, it increases the risk of BT leveraging its scale and dominance, and the constraints it currently has on discriminatory and self-preferential practices in favour of its own downstream units.
- 2.12 These combined effects on wholesale and downstream competition ultimately harm consumers, leading to higher prices, lower-quality services, and undoing the progress Ofcom has made in the last 20 years, fostering competition across the value chain.
- 2.13 These risks are further compounded by the existing appeal framework in the UK, which presents notable limitations. The high threshold for mounting a successful appeal restricts stakeholders' ability to effectively both challenge and also clarify Ofcom's decisions. While it is critical to maintain a degree of certainty in regulatory decisions to ensure stability and predictability in the market, there is a clear need for a balanced approach. The appellate process must be both accessible and sufficiently skilled to address disputes in a timely manner, ensuring that errors or ambiguities can be resolved without undermining confidence in the regulatory framework or entrenching suboptimal outcomes for the market and consumers.

## This report

- 2.14 We're now at a critical juncture in terms of attaining effective competition in the UK fixed line markets, and Ofcom's vision for wholesale competition and widespread gigabit-capable network coverage.
- 2.15 Achieving this vision depends on a regulatory framework that provides certainty and safeguards wholesale and retail competition against anti-competitive behaviour which promotes and

<sup>6</sup> BT and BT (Openreach) are used interchangeably in this note. Whilst it is Openreach who manages and operates BT's fixed network infrastructure in the UK, it is BT who is the subject of Ofcom's SMP decisions and which Ofcom regulates through its legal instruments ([Link](#)).

<sup>7</sup> Ofcom (2021) 'Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 Volume 2: Market analysis'. Statement. March 2021. Paragraph 7.23. ([Link](#)).

protects investment incentives. Deregulation and ineffective regulation risks undermining this progress, jeopardising the necessary conditions for sustainable competition and innovation.

- 2.16 This report explores the challenges of deregulation, ineffective regulation, and the absence of robust mechanisms to hold Ofcom accountable when its decisions fall short. It examines the risks these challenges pose to consumers, competitors and wider stakeholders as Ofcom looks to set the regulatory conditions for 2026 to 2031 in its Telecoms Access Review (“**TAR**”)<sup>8</sup>.
- 2.17 Since Ofcom's last market review in 2021, other European jurisdictions have conducted their own reviews of fixed-line telecoms markets. The resulting decisions offer valuable insights into how they have addressed issues that Ofcom must now consider in its TAR, particularly in the context of the maturing market structures emerging in the UK.
- 2.18 We examine these jurisdictions to identify best practices for Ofcom to consider when applying the SMP framework in the TAR. It also highlights the need to review existing accountability mechanisms, advocating for stronger recourse measures to ensure Ofcom's decisions are both robust and subject to effective oversight and correction when necessary.
- 2.19 By adopting this analytical perspective, we seek to provide actionable insights to help Government and Ofcom strike the right balance between pressures to deregulate and the need to maintain stable, and competitive wholesale and retail markets.
- 2.20 In doing so, this we aim to support the development of a regulatory environment underpinned by effective remedies that ensures long-term market stability, encourages investment, protects business and consumer interests, and upholds the conditions necessary for effective and sustainable competition at wholesale and retail level.

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<sup>8</sup> Ofcom (2024) ‘Telecoms Access Review 2026: Starting work on the 2026 – 2031 review’. 26<sup>th</sup> March 2024. ([Link](#))



### 3. The Telecoms Access Review (TAR) and the risk of regulatory failure

- 3.1 As Ofcom looks to enter the consultation and stakeholder engagement process for the forthcoming TAR it confronts a telecoms market that has evolved significantly since its last review. The industry has witnessed significant investment in gigabit-capable networks, with Openreach and numerous other operators contributing to a scenario where gigabit-capable broadband is now available to 79% of UK premises, and full-fibre broadband reaches 61%. Operators have substantial plans for network deployment over the next market review period (2026 – 2031), indicating sustained momentum in infrastructure deployment.
- 3.2 In its latest policy statement, Ofcom outlines its continued commitment to promoting competition and investment in gigabit-capable networks—the "future-proof infrastructure" essential for delivering faster, better broadband across the UK.
- 3.3 Ofcom emphasises the importance of regulatory certainty and stability, recognising that the long-term nature of network investments necessitates a consistent regulatory environment. This approach is rooted in the overarching 10-year strategy established in the WFTMR, which serves as the self-proclaimed foundational starting point for the current review.<sup>9</sup>
- 3.4 With greater wholesale-level competition for gigabit-capable networks and services than in 2021, the question arises of how regulation should adapt to reflect these changes and the continuing growth in deployment (and therefore competition) we will see during the next market review period. Ofcom must therefore ensure it does not undermine the huge amounts of investment (and progress) that has been made in relation to gigabit-capable networks over the current period and the accompanying long term investment horizons for the same. .
- 3.5 Openreach has made very explicit statements<sup>10</sup> in the public domain on this issue, going so far as setting this out as one of the key consideration's Ofcom must look at going into the TAR<sup>11</sup> *"reducing regulation where entry has occurred, and competition is effective"*.
- 3.6 Specifically, the issue of regulatory review in this context involves evaluating whether deregulation of certain services is now appropriate or whether remedies should be modified, or even left unchanged in light of changing market conditions.

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<sup>9</sup> Ofcom (2024) 'Telecoms Access Review 2026: Starting work on the 2026 – 2031 review'. 26<sup>th</sup> March 2024. Page 1. ([Link](#))  
See also: Ofcom's recent response to the Government's letter to regulators requesting ideas to stimulate growth in their sectors: *"Our strategy since 2016 has been to create a thriving new wholesale market for fixed telecoms by driving competition in fixed networks and creating incentives for investment from new players, while ensuring that there are sufficient safeguards in place to manage Openreach's Significant Market Power"* ([Link](#)).

<sup>10</sup> Jackson, Mark (2024) 'Openreach's Katie Milligan Talks Future FTTP Price Cuts and 3Gbps Broadband'. 2<sup>nd</sup> October 2024. ([Link](#)). Katie Milligan (Openreach) on Openreach and regulation: *"When you've got this level of competition, actually we [Openreach] think there could be even further deregulation ... There will be geographic areas where we will look for deregulation, very similar to what we've seen in the Ethernet market where there's a central London area etc. We have to be able to compete."* [emphasis added]

<sup>11</sup> Openreach (2024) 'A blueprint for continuing success in the UK's telecoms market: Telecoms Access Review 2026'. 6<sup>th</sup> September 2024. Page 13. ([Link](#)).

## The consequences of regulatory failure

### Risk to wholesale and network competition

- 3.7 The deployment of telecom networks is highly capital-intensive, requiring significant upfront investment for infrastructure construction and ongoing funds for maintenance. These investments are largely sunk costs, with recovery dependent on achieving sufficient market penetration and generating long-term revenue, making the economic viability of such projects particularly challenging.<sup>12</sup>
- 3.8 This capital-intensive dynamic occurs in the context of a market dominated by BT (Openreach), with its significant scale and market power. BT (Openreach) can leverage its extensive infrastructure, ubiquitous geographic reach customer base, and financial resources to maintain its dominance, at the expense of competitors and new entrants in the market. This ability to exploit economies of scale and established market positions creates barriers to entry, making it even more challenging for smaller operators or new market participants to compete effectively.<sup>13</sup>
- 3.9 Market conditions that are unstable can jeopardise the feasibility of the investment, leaving little opportunity for do-overs or course corrections. This inherently fragile investment environment can stifle innovation, limit consumer choice, and slow down the development of robust network competition.
- 3.10 In this context, regulation plays a critical role in safeguarding the incentives and conditions for competitive investment. By fostering an environment that ensures fair competition and mitigates excessive market power, regulation helps to balance the playing field for new and smaller entrants.
- 3.11 Furthermore, regulatory certainty is essential for encouraging investment, with assurances that the regulatory framework that underpins Ofcom's strategy will remain stable, transparent, and predictable over time – where changes are required due to material changes in market conditions these must be based on the pre-established principles and processes which govern this regulatory framework. Investors need confidence that rules governing access, pricing, and market behaviour will not change unpredictably, which could otherwise undermine the business case for these high-risk and long-term projects. Regulatory certainty thus reduces perceived risks, provides clarity on the terms of competition, and supports sustainable investments by creating a stable environment in which operators can plan and execute their network strategies with confidence.<sup>14</sup>

<sup>12</sup> Ofcom (2021) 'Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021 – 2026. Volume 1: Overview, summary and structure'. 18<sup>th</sup> March 2021. Page 1. ([Link](#)).

**See also:** Ofcom (2021) 'Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 Volume 2: Market analysis'. Statement. March 2021. Paragraphs 8.48 – 8.55. Pages 169 - 171. ([Link](#)).

<sup>13</sup> Ofcom (2021) 'Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 Volume 2: Market analysis'. Statement. March 2021. Paragraph 8.46. Pages 169 - 170. ([Link](#)).

<sup>14</sup> Ofcom (2021) 'Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021 – 2026. Volume 1: Overview, summary and structure'. 18<sup>th</sup> March 2021. Page 1. ([Link](#)). "[...] Our decisions incentivise that investment – giving regulatory certainty and allowing companies to make a fair return whilst ensuring consumers continue to have access to affordable broadband as new networks are rolled out."

**See also:** Ofcom (2021) 'Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 Volume 2: Market analysis'. Statement. March 2021. Paragraph 7.227. Page 159. ([Link](#)).

"[...] Third, competition law does not provide enough regulatory certainty, which itself can undermine competition – and regulatory certainty is important in encouraging long-term investment in competing networks. In contrast, a benefit of ex ante regulation is that all industry stakeholders are clear in advance on the regulation that will apply."

**See also:** European Parliament and Council (2018) 'Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code'. 2018/1972, L321/36. December 2018. Paragraph 78. Page 7. ([Link](#)). "It is necessary to give appropriate incentives for investment in new very high capacity networks that support innovation in content-rich internet services and strengthen the international competitiveness of the Union. Such networks have enormous potential to deliver benefits to consumers and businesses across the Union. It is therefore vital to promote sustainable investment in the development of those new networks, while safeguarding competition, as bottlenecks and barriers to entry remain at the infrastructure level, and boosting consumer choice through regulatory predictability and consistency."

- 3.12 Removing regulatory protections may leave emerging operators vulnerable to the entrenched advantages of BT's incumbency, as these new entrants may not yet have had the opportunity to scale to compete effectively. Once regulations are lifted, reintroducing them can be a complex and protracted process fraught with legal and political challenges and likely leads to irreversible damage to competition.<sup>15</sup> The market may perceive such reversals as indicative of regulatory instability, eroding confidence among investors and operators alike.
- 3.13 Equally, ineffectual remedies which fail to constrain BT's abuse of dominance or adequately address the harms which arise from its SMP have the effect of exacerbating the issues for consumers and the risk of wholesale and network competitors exiting the market.
- 3.14 The opportunity for fostering a diverse and dynamic market diminishes as financial backers become reluctant to fund ventures with uncertain regulatory support.<sup>16</sup> BT (Openreach) may then be handed the opportunity to consolidate its position, reducing competitive pressures and potentially leading to higher prices and fewer choices for consumers, which ultimately leads to the cycle of regulation having to repeat itself.
- 3.15 Therefore, care must be taken to ensure that the current regulatory framework, which safeguards wholesale competition and promotes investment, is maintained until the market reaches a sufficiently mature and stable state.

## Risk to retail competition and consumers

- 3.16 As competition developed and strengthened, aided by effective regulation in wholesale and access markets, fixed retail markets across most of the UK were deemed competitive by 2009.<sup>17</sup>
- 3.17 Wholesale access regulation has enabled retail providers to offer services, creating a competitive environment that challenges BT's downstream retail arm. However, the current transition from copper to gigabit-capable networks poses new challenges that threatens the sustainability of retail competition. The shift to gigabit-capable networks introduces substantial risks for retail providers, including the financial and operational pressures of upgrading infrastructure and retaining customers during this transition.<sup>18</sup>
- 3.18 The migration to gigabit-capable networks requires retail providers to routinely invest in upgrading their backhaul and core networks to meet increased capacity demands. Additionally, customer retention during the transition is critical, as providers must educate users about the benefits of these new networks while competing for market share. The ability of downstream retail providers to manage these pressures will significantly impact their competitive positioning in the market.

<sup>15</sup> Ofcom (2021) 'Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 Volume 2: Market analysis'. Statement. March 2021. Paragraph 4.82, 7.126, 7.227 and 7.246. ([Link](#)). Paragraph 4.82: "[...] ex ante regulation can facilitate more timely enforcement due to the greater certainty and specificity provided. Although, as Openreach notes, significant fines do have some reputational and commercial implications, cases often take considerable time, by which point the damage to competition may be irreversible."

<sup>16</sup> Ofcom (2021) 'Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26. Volume 3: Non-pricing remedies'. Volume 3. 18<sup>th</sup> March 2021. Paragraph 7.56. Page 177 ([Link](#)). "We have a relatively small window of opportunity to encourage new network build. If alternative operators are unable to secure sufficient access seekers/end users over a reasonable time period then it is unlikely they will be able to secure funds from investors for their FTTP rollout plans. Competition law cases can take years to reach resolution and new network builders may be unable to secure access seekers while a competition case is ongoing (e.g. because it is unclear whether commercial terms introduced by Openreach will be ultimately be deemed unlawful)."

<sup>17</sup> Plum Consulting (2024) 'Regulation in competitive electronic communications markets, and regulatory checks and balances: A report for UKCTA'. November 2024. Page 15. ([Link](#)).

<sup>18</sup> Ofcom (2021) 'Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 Volume 2: Market analysis'. Statement. March 2021. Paragraph 4.82 ([Link](#)). "[...] the competitive landscape has changed significantly over the last 15 years and will change further over the course of this review period. The near-universal availability of fibre-based services, combined with a nationwide transition from copper to fibre, means that providers will increasingly be willing and able to serve premises that are within Market A without the need to purchase WBA from Openreach."

- 3.19 In this context, the regulatory decisions Ofcom will make in the TAR will need to address two critical aspects to sustain current and promote further retail competition between downstream retail providers.
- 3.19.1 First, they must prevent BT from leveraging its market power at the wholesale level to the detriment of competition at the retail level, including ensuring that Openreach provides non-discriminatory access to its fibre network. Effective remedies are essential to maintain a level playing field and prevent harm to retail competition.
  - 3.19.2 Second, as covered above, regulation must promote effective and sustainable wholesale competition to ensure downstream retail providers have access to diverse and competitive supply options, and consumers have a choice of competitive options. The rise of altnets offers opportunities for retail providers to reduce reliance on BT's network and ensure retail providers can leverage a competitive wholesale ecosystem to enhance their offerings and remain competitive.

## 4. The question of deregulation going into the next market review

- 4.1 Ofcom is facing pressures for deregulation in the UK's telecoms sector.<sup>19</sup> The two primary factors underpinning this pressure are:
  - 4.1.1 the level of coverage and overbuild of gigabit-capable networks; and
  - 4.1.2 increasing use of services delivered over gigabit-capable networks and the copper retirement process in this context.
- 4.2 Ofcom faces the complex task of balancing these factors against the real risk of regulatory failure arising from deregulation as outlined above.
- 4.3 Assessing SMP and deregulation in the Wholesale Local Access ("**WLA**") market requires a nuanced and comprehensive approach.
- 4.4 As the telecoms landscape rapidly evolves with the expansion of gigabit-capable networks, it is imperative that regulatory decisions are not made in a mechanistic manner based solely on metrics like network coverage or the pure number of operators present.
- 4.5 Instead, a granular analysis of various factors to determine whether effective levels of competition have been achieved is essential to accurately determine the presence of SMP in different areas, which Ofcom is clearly alive to.
- 4.6 Understanding the complexities of the market involves considering the degrees of competitive pressure, the sustainability of new entrants, consumer switching behaviours, and other market dynamics.
- 4.7 The following sections delve into these factors, emphasising the importance of a holistic assessment to ensure that any consideration of deregulation takes into account whether competition is genuinely effective and protects business and consumer interests without inadvertently entrenching BT's dominance .

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<sup>19</sup> Jackson, Mark (2024) 'Openreach's Katie Milligan Talks Future FTTP Price Cuts and 3Gbps Broadband'. 2<sup>nd</sup> October 2024. ([Link](#)). Katie Milligan (Openreach) on Openreach and regulation: *"When you've got this level of competition, actually we [Openreach] think there could be even further deregulation ... There will be geographic areas where we will look for deregulation, very similar to what we've seen in the Ethernet market where there's a central London area etc. We have to be able to compete."* [emphasis added].  
**See also:** Openreach (2024) 'A blueprint for continuing success in the UK's telecoms market: Telecoms Access Review 2026'. 6<sup>th</sup> September 2024. Page 13. ([Link](#)).

## Coverage, overbuild and assessing competition

### Ofcom's approach to geographic markets in the WLA

4.8 In the WFTMR Ofcom originally considered whether to split the WLA market into three areas (i.e. sub-national markets) but ultimately identified two areas based on a forward-looking assessment of competition:

4.8.1 Area 2 (limited wholesale competition but prospectively competitive)<sup>20</sup>, and

4.8.2 Area 3 (Openreach only and with no prospect of wholesale competition)<sup>21</sup>.

#### The use of "material and sustainable" competition

4.9 What is particularly notable about Ofcom's approach to the WLA market is its focus on VMO2 and CityFibre's planned coverage as the primary metrics for assessing future competitive constraints on BT, in effect excluding the presence of other altnets.

4.10 This decision was based on Ofcom's assessment that these altnets potentially lacked the scale and reach to exert a "material and sustainable" competitive constraint on BT.<sup>22</sup>

4.11 Ofcom's criteria for deeming competition "material and sustainable" therefore included the scale, coverage, and capabilities of alternative networks, as well as the commercial viability of their deployment. The competition must be of a sufficient scale and durability to make a real impact on BT's market power.

4.12 In other words, the presence of rival infrastructure should meaningfully constrain BT's behaviour in those areas in the long run, even if BT might still hold a high market share.

### Assessing SMP in the WLA

4.13 The UK has witnessed remarkable growth in gigabit-capable network coverage since 2019 . The trajectory for build remains positive as Ofcom's latest planned build estimates show:<sup>23</sup>

4.13.1 31.2 million premises (98% of all UK premises) are expected to have gigabit-capable network coverage by May 2027;

4.13.2 30.8 million premises (96% of all UK premises) are expected to have full fibre network coverage by May 2027;

4.13.3 25.6 million premises (80% of all UK premises) will be covered by 2 or more gigabit-capable networks by May 2027; and

<sup>20</sup> This area included postcode sectors with existing or expected material competition. VMO2 and CityFibre's existing or planned networks covered at least 50% of premises within these sectors, providing "material and sustainable" competitive pressure.

<sup>21</sup> this area contained postcode sectors where competition from CityFibre and/or VMO2 was limited or unlikely, typically rural or less populated regions. Here, BT was expected to retain significant market power, warranting stronger regulatory oversight.

<sup>22</sup> Ofcom (2021) 'Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26

Volume 2: Market analysis'. Statement. March 2021. Paragraph 7.23. [\(Link\)](#). "We have decided to define different geographic markets according to our view of where there is likely to be potential for material and sustainable competition (Area 2) and where this is unlikely (Area 3). This seeks to differentiate areas where there is likely to be potential for competition on a sufficient scale to have a material and sustainable competitive impact on Openreach (though not necessarily to the degree that BT would no longer have SMP). For the reasons explained further below, we have determined the areas where there is likely to be potential for material and sustainable competition by reference to the areas planned to be covered by 2026 by Virgin Media or CityFibre. We recognise that there may be build by other competitors outside of Area 2, but we expect the competitive impact of these smaller expansions will be substantially less."

<sup>23</sup> Ofcom (2024) 'Planned network deployments 2024 UK and Nations table'. 4<sup>th</sup> September 2024 [\(Link\)](#)

4.13.4 13.2 million premises (41% of all UK premises) will be covered by 3 or more gigabit-capable networks by May 2027.

4.14 In this context, one pressure Ofcom will be facing going into its next market review is the use of coverage as a metric for determining whether effective competition in areas has been achieved, and therefore as justification to remove SMP.

#### Coverage from CityFibre and VMO2

4.15 As noted above, Ofcom currently defines geographic markets in the WLA and LLA Areas 2 and 3, based on the presence and coverage of VMO2 and CityFibre, on the assumption that they can provide “material and sustainable” competition to Openreach in these Areas.

4.16 Recent data shows the significant level of build between these three operators:

4.16.1 BT Openreach reports 15.9 million premises passed with fibre.<sup>24</sup>

4.16.2 VMO2 covers 18.3 million premises with its gigabit-capable networks.<sup>25</sup>

4.16.3 CityFibre reached 4.3 million premises passed with its fibre network.<sup>26</sup>

4.17 This creates a combined footprint of 38.5m premises out of a total of ~31.8m premises in the UK. As such we can reasonably assume that a significant number of postcode sectors may already have access to gigabit-capable networks from all three providers.

#### Coverage from other altnets

4.18 Another crucial consideration is the role played by altnets other than CityFibre and VMO2 in deploying their own gigabit-capable networks and providing a competitive constraint to Openreach’s incumbency.

4.19 It is reasonable to assume that these other altnets have also substantially contributed to the overall numbers we see in Ofcom’s data (above), increasing coverage and introducing competition in areas previously served by fewer operators (if any).

4.20 Their investments and planned builds are reflected in the May 2027 projections, where it is reasonable to assume a significant proportion of premises will be covered by multiple gigabit-capable networks (i.e. in the ~13.2 million).

4.21 Given the significant coverage provided by other sizeable altnets it brings into focus as to whether these operators could provide a “material and sustainable” constraint, whether the current definition should therefore include other providers.

#### Coverage triggering further regulatory consideration

4.22 The extensive level of coverage from both CityFibre and VMO2, as well as other altnets raises important questions about whether certain areas justify a change in regulatory approach.

4.23 In other words, this brings into focus:

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<sup>24</sup> BT H1 FY25 results, 7<sup>th</sup> November 2024. ([Link](#))

<sup>25</sup> Virgin Media O2 publishes 2024 Q4 results. 31<sup>st</sup> December 2024 ([Link](#))

<sup>26</sup> CityFibre (2025) Trading Update Report. 11<sup>th</sup> February 2025 ([Link](#))



- 4.23.1 whether the list of operators who can provide “material and sustainable” competition has expanded;
  - 4.23.2 whether Openreach still has SMP in areas now covered by these operators; and
  - 4.23.3 the extent of remedies required if SMP is still present.
- 4.24 The issue of “material and sustainable” competition remains at the forefront of Ofcom’s considerations going into the next market review:<sup>27</sup>
- “In our assessment of competition, we will not only consider the presence of rival networks to Openreach but, importantly, the level of competitive constraint they place on Openreach and their ability to compete sustainably.”*
- 4.25 Although high levels of network coverage by operators deemed by Ofcom to be capable of providing “material and sustainable” competition illustrate the success of competitive investment in infrastructure deployment, such coverage alone should not be the sole or overwhelming determinant for deregulation.
- 4.26 Focusing solely on coverage misses the broader intent behind Ofcom’s definition of “material and sustainable” competition, which encompasses more than mere physical network reach, and which aims to achieve a state of effective competition.
- 4.27 It is therefore important to distinguish material and sustainable competition from fully effective competition. Ofcom uses the former as a threshold for potential competition and defining markets, not as a guarantee that the market is already effectively competitive by virtue of network presence once achieved.
- 4.28 Furthermore, Ofcom is clear that the presence of operators capable of providing material and sustainable competition **does not automatically negate an SMP finding** and therefore does not automatically render an area as effectively competitive and subject to deregulation:<sup>28</sup>
- “We have decided to define different geographic markets according to our view of where there is likely to be potential for material and sustainable competition (Area 2) and where this is unlikely (Area 3).*
- This seeks to differentiate areas where there is likely to be potential for competition on a sufficient scale to have a material and sustainable competitive impact on Openreach (though not necessarily to the degree that BT would no longer have SMP).”*  
[emphasis added]
- 4.29 This underscores that SMP can persist even in the presence of operators who are capable of providing “material and sustainable” competition.

<sup>27</sup> Ofcom (2024) ‘Telecoms Access Review 2026: Starting work on the 2026 – 2031 review’. 26<sup>th</sup> March 2024. Paragraph 3.8, Page 12. [\(Link\)](#)

<sup>28</sup> Ofcom (2021) ‘Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 Volume 2: Market analysis’. Statement. March 2021. Paragraph 7.23. [\(Link\)](#).



### Why coverage alone cannot be an indicator of effective competition

- 4.30 Achieving effective levels of competition requires meaningful time for competitors to deploy their networks, win wholesale and/or retail customer take-up, and provide a material and sustainable competitive constraint on BT.
- 4.31 An often understated yet critical factor, without a wholesale platform, an altnet's competitive impact on the market can be severely constrained, as it limits the altnet to serving only its own retail customers rather than a broader ecosystem of retail providers. In practical terms, lack of wholesale can inhibit subscriber growth.
- 4.32 Furthermore, wholesale is closely tied to achieving meaningful scale. Retail providers typically look for networks with sufficient coverage and capacity before committing to a wholesale arrangement; without adequate scale, an altnet may struggle to attract third-party retail partners and the consistent revenue streams they bring. In some cases, that scale can only be reached through industry consolidation—merging or partnering with other networks to expand coverage, pool resources, and create more compelling wholesale propositions.
- 4.33 A further risk lies in the potential for leveraging dominant positions across both competitive and non - competitive sectors through price squeeze—and, where appropriate, margin squeeze—strategies. BT with its extensive coverage may set wholesale prices at levels that maintain its own profitability while effectively compressing the margin between wholesale and retail pricing. This margin squeeze leaves less ubiquitous competitors with insufficient profit margins, undermining their ability to invest in network expansion and compete effectively. In effect, even a network with wide coverage can be used as a tool to deter genuine competition, as emerging carriers find themselves squeezed out economically despite their potential to offer alternative services. Consequently, relying on coverage alone as an indicator of an effectively competitive market is misleading when such pricing distortions can restrict market entry and consumer choice.
- 4.34 Consumer behaviour also plays a critical role in this context. The effectiveness of competition is heavily dependent on consumers' ability and willingness to switch providers. The One Touch Switching (“**OTS**”) process, designed to simplify the switching experience, is still in its nascent stages.<sup>29</sup> Its limited current impact means it cannot yet serve as a robust mechanism to facilitate competition and challenge Openreach's incumbency effectively.
- 4.35 There is also an inherent lag between a new entrant covering an area and a downstream retail provider onboarding to provide services to that area, including the ramp-up of local marketing and consumer engagement, as well as the technical requirements and backhaul required to provide services from the new entrant's network.
- 4.36 Actual network coverage by operators that Ofcom considers capable of exerting “material and sustainable” competitive pressures should be downplayed in the SMP assessment in the next market review. While such coverage is an important indicator, it does not fully capture the competitive dynamics necessary to assess SMP accurately. A more holistic approach—one that incorporates a range of factors influencing market power and competitive constraints—is needed.

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<sup>29</sup> TOTSCO (2024) ‘OTS Hits 200,000 Completed Switches!’. 22<sup>nd</sup> November 2024. ([Link](#)).

## A holistic approach to assessing SMP

### The Competition Appeal Tribunal (CAT) and assessing SMP

- 4.37 The CAT has examined the issue of defining competition, providing valuable insights what should be considered in an SMP assessment.
- 4.38 In its *Hutchison 3G (UK) Limited v The Office of Communications*, [2005]<sup>30</sup> the CAT highlighted that while market share is a key factor in assessing SMP, it should not be the sole consideration. The existence of a large market share, such as H3G's 100% share in the relevant market, may suggest a dominant position but does not automatically establish SMP. The CAT stressed the importance of a thorough analysis of other factors, particularly countervailing buyer power, in determining whether an undertaking can behave independently of competitors and customers. In this case, Ofcom's reliance on market share alone was criticised by the CAT for failing to adequately assess the ability of buyers, like BT, to counterbalance H3G's market power. The CAT emphasised that SMP requires a comprehensive evaluation of market dynamics beyond just market share.
- 4.39 In *TalkTalk Telecom Group Plc and Vodafone Limited v Office of Communications* [2020]<sup>31</sup>, the CAT highlighted that while market share remains a key factor in assessing SMP, it must be analysed alongside other critical factors, such as competitive constraints and market dynamics.

### European Commission (EC) SMP Guidelines

- 4.40 As noted earlier the Act provides<sup>32</sup> that, in considering whether to make or revise a market power determination, Ofcom may have regard to EEC<sup>33</sup> materials relating to market analysis or the determination of what constitutes significant market power, such as the EC SMP Guidelines<sup>34</sup>.
- 4.41 As such the EC's SMP Guidelines provide further guidance on assessing SMP, directly relevant to the issue at hand. While market shares are a first indication of market structure and the relative importance of operators within a market, the Guidelines caution that market share alone should not be the sole determinant of SMP. However, it is commonly accepted that very large market share, particularly one significantly exceeding 50%, often serves as evidence of a dominant position.<sup>35</sup>
- 4.42 However, the assessment should also incorporate consideration of other critical market characteristics, including barriers to entry and expansion, control over infrastructure not easily replicated, technological and commercial advantages, and the absence of countervailing buying power. The Guidelines stress that even in cases where market shares suggest a strong position, the analysis must evaluate the ability of competitors to constrain behaviour effectively, underscoring the dynamic nature of market competition.<sup>36</sup>
- 4.43 The EC SMP Guidelines emphasise that market shares are a useful first indication of market structure and the relative importance of operators within a market.
- 4.44 Furthermore, the Guidelines acknowledge that even when regional differences exist but are not substantial enough to justify defining separate geographic markets or altering SMP

<sup>30</sup> *Hutchison 3G (UK) Limited v The Office of Communications*, [2005] CAT 39 ([Link](#))

<sup>31</sup> *TalkTalk Group PLC and Vodafone Limited v The Office of Communications*, [2020] CAT 8 ([Link](#))

<sup>32</sup> Section 78 and Section 79(2BA). Communications Act 2003 c.21.

<sup>33</sup> European Commission (2018) 'Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services'. C159/01. May 2018. ([Link](#)).

<sup>34</sup> *Ibid.* ([Link](#)).

<sup>35</sup> *Ibid.* Paragraph 55. ([Link](#)).

<sup>36</sup> *Ibid.* Paragraph 57. ([Link](#)).

determinations, NRAs may still implement geographically differentiated remedies.<sup>37</sup> Specifically, the guidelines state that "if regional differences are found, but not considered to be sufficient to warrant different geographic markets or SMP findings, NRAs may pursue geographically differentiated remedies." This provision allows regulators like Ofcom to tailor remedies to specific regional conditions, ensuring that regulatory interventions remain appropriate and proportionate to the competitive landscape in different areas.

### Profitability as a factor

- 4.45 Historically, Ofcom has used profitability as one of several indicators to assess SMP, though never as the sole determinant.
- 4.46 Reviews of BT's performance have shown that when its Return on Capital Employed (ROCE) consistently exceeds its weighted average cost of capital (WACC), it suggests the firm can maintain prices above competitive levels.
- 4.47 For example:
- 4.47.1 **ISDN30:** in the 2010 ISDN30 Statement Ofcom found that BT had SMP in the supply of wholesale ISDN30 exchange services in the UK (excluding the Hull area) and noted (amongst other things) BT's reported profitability was significantly in excess of its cost of capital and *prima facie* evidence that these charges were above the competitive level.<sup>38</sup>
  - 4.47.2 **Leased lines:** in Ofcom's 2016 Business Connectivity Market Review (BCMR) found that "evidence on pricing and profitability supports an SMP finding" in areas where BT faced limited competition.<sup>39</sup>
  - 4.47.3 **WLA:** Ofcom concluded that, absent regulation, BT's pricing would likely yield even higher returns, and that sustained returns "persistently and significantly above the competitive level" are an important indicator of market power.<sup>40</sup>
- 4.48 However, Ofcom has also cautioned against over-reliance on profitability figures due to factors such as regulatory distortions, cost allocation choices, and the backward-looking nature of these metrics. In situations like regulated price caps or during early stages of fibre investment—where high returns might simply reflect a "fair bet" on risky investment—profitability data are either downplayed or treated with caution.<sup>41</sup>

### SMP with varying remedies

- 4.49 Where SMP is identified, remedies may be tailored to reflect the specific requirements of each area; regulatory interventions are not necessarily a one-size-fits-all solution. Each remedy measure must be designed to be appropriate and proportionate, ensuring compliance with statutory obligations for objective justification, proportionality, non-discrimination and transparency.

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<sup>37</sup> Ibid. Paragraph 50. ([Link](#)).

<sup>38</sup> Ofcom (2010) 'Review of retail and wholesale ISDN30 markets. Statement on the markets, market power determinations and remedies'. 20<sup>th</sup> August 2010. Page 23. Paragraph 6.7 ([Link](#)).

<sup>39</sup> Ofcom (2016) 'Business Connectivity Market Review – Annexes 1 to 13'. 28<sup>th</sup> April 2016. Annex 9. Pages 132 – 134. Paragraphs A9.99 – A9.109. ([Link](#)).

<sup>40</sup> Ofcom (2018) 'Wholesale Local Access Market Review: Statement – Volume 1'. 28<sup>th</sup> March 2018. Page 78. Paragraph 4.45. ([Link](#)).

<sup>41</sup> Ofcom (2021) 'Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 Volume 2: Market analysis'. Statement. March 2021. Paragraph 8.30. ([Link](#)).

- 4.50 This tailored approach suggests that there may be a pathway for Ofcom to partially deregulate an area if the competitive conditions justify such action, ‘adjusting’ the scope of remedies as necessary (on the basis that SMP is determined in the same market, again). While we will address the need for effective remedies in the next section, it is important to emphasise that remedies should only be varied according to the varying degrees of SMP and not simply lifted in a binary fashion. Throughout this process, the protection of wholesale competition, retail competition, and consumers remains paramount in any regulatory decision.
- 4.51 This approach has been exemplified by Ofcom in the LLA market for HNR areas, where it has adopted a varied approach to remedy design compared to other SMP areas in this market, namely Area 2 and Area 3.

## International benchmarks on SMP analysis, identifiers for SMP and varying remedies

4.52 International precedents reinforce this multi-dimensional and holistic approach to assessing SMP and remedy design.

### Italy (2024)

4.53 In Italy, AgCom's 2024 market review<sup>42</sup> identified two distinct geographic markets for WLA: Market 1A, covering 14 municipalities with significant alternative infrastructure deployment, and Market 1B encompassing the rest of the country.<sup>43</sup>

4.54 In Market 1A, Open Fiber achieved over 99% coverage and exceeded a 50% market share. Whilst above 50%, AgCom reviewed the other factors listed in the EC SMP Guidelines and concluded that the factors assessed indicated strong competitive dynamics and constraints on a single provider and their market power.<sup>44</sup> AgCom therefore concluded that no operator had SMP in Market 1A, though it recommended monitoring due to the reliance on two main networks (Open Fiber and TIM).<sup>45</sup>

Table 4.1 – Italy (2024) AgCom, Market 1A market share

Period	2019	2020	2021	2022
TIM	45.06%	39.61%	35.60%	33.53%
Open Fiber	42.41%	49.12%	55.41%	63.10%
Fastweb	11.86%	10.48%	8.35%	2.86%
Others	0.68%	0.78%	0.64%	0.52%

Source: Documento V. Page 12. Table V.7. ([Link](#)).

4.55 Conversely, in Market 1B, TIM retained an 81.8% wholesale market share in 2022, far surpassing the 50% threshold outlined in the EU SMP Guidelines.<sup>46</sup> Furthermore TIM's vertical integration, control of essential infrastructure, and limited alternative coverage led AgCom to designate it as the operator with SMP, necessitating regulatory measures.<sup>47</sup>

Table 4.2 – Italy (2024) AgCom, Market 1B market share

<sup>42</sup> Autorità per le Garanzie nelle Comunicazioni (AgCom), (2024) 'Delibera N. 114/24/CONS, Analisi del Significativo Potere di Mercato nei Mercati Rilevanti dei Servizi di Accesso Locale all'Ingrosso alla Rete Fissa e dei Servizi a Capacità Dedicata all'Ingrosso'. 30<sup>th</sup> April 2024. ([Link](#)).

<sup>43</sup> Ibid. Documento III. Page 67, Paragraphs 154 – 155. ([Link](#)).

AgCom had previously identified Milan as a distinct market in 2019 (Delibera 348/19/CONS, [Link](#)) in recognition of its distinct competitive conditions compared to the rest of Italy and as a result deregulated this sub-national market. In this market review, AgCom assessed the competitive conditions of the other municipalities to determine whether they shared the following market conditions present in Milan, including:

- where TIM has a retail market share of less than 30%;
- where TIM has a self-serve market share of less than 50%;
- coverage of the municipality by an operator's wholesale only FTTH network is above 80%;
- take-up rate of FTTH services is above 40%.

<sup>44</sup> Ibid. Documento V. Pages 12-13, Paragraphs 35 - 40. ([Link](#)).

<sup>45</sup> Ibid. Documento V. Page 16, Paragraph 55. Page 28, Paragraph 114. ([Link](#)).

<sup>46</sup> Ibid. Documento V. Page 16, Paragraph 55. ([Link](#)).

<sup>47</sup> Ibid. Documento V. Pages 17-20, Paragraphs 55-76. ([Link](#)).

Period	2019	2020	2021	2022
TIM	90.45%	87.05%	84.49%	81.80%
Open Fiber	2.07%	3.88%	6.43%	8.82%
Fastweb	1.36%	2.23%	2.02%	2.56%
Others	6.12%	6.83%	7.06%	6.82%

Source: Documento V. Page 16. Table V.9. ([Link](#)).

- 4.56 AgCom defined a further sub-national market "Comuni contendibili" (contestable areas) in Market 1B with differentiated remedies to reflect the different competitive nature of these areas to the rest of the Market 1B as municipalities meeting the following cumulative criteria: (1) the presence of at least two alternative NGA operators (other than TIM) with "ready-to-serve" infrastructure, each covering at least 60% of premises, and combined coverage exceeding 75%; (2) TIM's retail market share for NGA services in the municipality must not exceed 40%; and (3) TIM's wholesale market share of active NGA lines must be below 80%.<sup>48</sup>
- 4.57 It's worth noting that AGCOM identified the "contestable" municipalities not as a separate SMP finding (they are effectively still part of TIM's SMP footprint), but as a transitional group. These are areas trending toward competition (due to recent network builds or ongoing fibre deployments) but where TIM isn't fully constrained yet.

Table 4.3 – Italy (2024) AgCom summary of WLA market regulation

Geographic market	Size of market	SMP	Remedies
Market 1A	14 municipalities	No SMP found	No remedies
Market 1B - contestable	95 municipalities	TIM	Access to civil infrastructure, access to network resources, transparency, non-discrimination, accounting separation, fair and reasonable price control, cost accounting
Market 1B – non-contestable	Rest of Italy	TIM	Access to civil infrastructure, access to network resources, transparency, non-discrimination, accounting separation, cost-orientated price control, cost accounting

- 4.58 These criteria reflect significant competition in infrastructure and market dynamics; however, the regulator has set a relatively high bar for differentiated remedies, and even in contestable areas, it does not remove TIM's designation as an operator with SMP.
- 4.59 AgCom's approach demonstrates the importance of a comprehensive and multi-dimensional assessment of SMP and the design of regulatory remedies, which aligns with the considerations outlined in the preceding sections regarding Ofcom's upcoming market review.

<sup>48</sup> Ibid. Documento III. Pages 64 - 65, Paragraphs 146 – 148. ([Link](#)).

- 4.60 By carefully analysing not just market shares and coverage but also infrastructure presence, competitive dynamics, and other market characteristics, AgCom sought to ensure that regulatory measures are proportionate and tailored to the specific conditions of each geographic area. This method acknowledges that high levels of network coverage alone do not necessarily equate to effective competition.

#### Portugal (2023)

- 4.61 ANACOM's 2023 market review identified two distinct geographic markets for WLA in Portugal: Area A, characterised by competitive dynamics with multiple high-speed networks, and Area B, encompassing less competitive regions with sub-segments defined by the dominant operators (e.g., Area B-MEO, Area B-NOS, Area B- Vodafone, and Area B-NOWO.).<sup>49</sup>
- 4.62 Area A is defined by ANACOM as including '*freguesias*' (parishes) that meet at least one of the following non-cumulative criteria: (1) at least three or four high-speed fixed networks are present; or (2) two operators cover more than 90% of premises; or (3) the area is predominantly urban (favourable business case/economics); or (4) the market leader's wholesale market share is below 40%, or between 40% and 50% but with a declining trend since 2019.
- 4.63 These areas were held to be competitive with no operator found to hold SMP. The data showed that the market shares of the main operators were no greater than ~40% (see table 4.4 below).<sup>50</sup>

Table 4.4 – Portugal (2023), Market A market share

Provider	2019	2020	2021	1 <sup>st</sup> Half 2022
Altice (incl. MEO)	37.3%	37.0%	37.6%	37.4%
US	34.5%	33.7%	33.9%	33.6%
Vodafone	21.8%	22.6%	21.0%	21.3%
NOW	3.7%	3.4%	3.2%	3.1%
DSTelecom	2.7%	3.3%	4.2%	4.7%

Source: ANACOM (2023). Page 216. Table 58 ([Link](#)).

- 4.64 Area B comprises *freguesias* that do not meet the criteria for Area A, ANACOM identified distinct sub-markets based on dominant operators:
- 4.64.1 Area B – MEO, for parishes where MEO (and/or the Altice Group which MEO is a subsidiary of) was the market share leader;
- 4.64.2 Area B – NOS, for parishes where NOS was the market share leader;
- 4.64.3 Area B – Vodafone, for parishes where Vodafone was the market share leader; and
- 4.64.4 Area B – NOWO, for parishes where NOWO was the market share leader.

Table 4.5 – Portugal (2023), Market B market share

Provider	2019	2020	2021	1 <sup>st</sup> Half 2022
Area B - MEO				

<sup>49</sup> ANACOM (2023), 'Decisão sobre a Análise dos Mercados de Acesso a Infraestruturas Físicas, Acesso Local Grossista num Local Fixo e Acesso Central Grossista num Local Fixo: Definição dos Mercados do Produto e Mercados Geográficos, Avaliação de PMS e Imposição, Manutenção, Alteração ou Supressão de Obrigações Regulamentares'. 27<sup>th</sup> December 2023. ([Link](#)).

<sup>50</sup> Ibid. Page 218, Paragraph 546. ([Link](#)).

<b>MEO</b>	<b>74.2%</b>	<b>74.5%</b>	<b>77.9%</b>	<b>78.2%</b>
NOS	17.4%	17.7%	18.0%	17.9%
Vodafone	6.9%	6.3%	2.7%	2.6%
NOWO	1.5%	1.4%	1.3%	1.3%
DSTelecom	0.1%	0.1%	0.1%	0.1%
<b>Area B - NOS</b>				
MEO	39.6%	35.4%	36.0%	35.8%
<b>NOS</b>	<b>53.2%</b>	<b>57.9%</b>	<b>61.5%</b>	<b>61.6%</b>
Vodafone	7.0%	6.5%	2.2%	2.2%
NOWO	0.0%	0.0%	0.0%	0.0%
DSTelecom	0.1%	0.2%	0.3%	0.3%
<b>Area B - Vodafone</b>				
MEO	32.1%	24.7%	33.8%	31.5%
NOS	14.8%	19.4%	21.6%	20.5%
<b>Vodafone</b>	<b>53.1%</b>	<b>55.9%</b>	<b>44.6%</b>	<b>47.9%</b>
NOWO	0.0%	0.0%	0.0%	0.0%
DSTelecom	0.0%	0.0%	0.0%	0.0%
<b>Area B - NOWO</b>				
MEO	20.6%	17.4%	17.4%	18.1%
NOS	8.0%	11.2%	13.7%	13.1%
Vodafone	5.6%	4.5%	2.4%	2.4%
<b>NOWO</b>	<b>65.8%</b>	<b>66.9%</b>	<b>66.6%</b>	<b>66.5%</b>
DSTelecom	0.0%	0.0%	0.0%	0.0%

Source: ANACOM (2023). Page 219. Table 60 ([Link](#)).

- 4.65 ANACOM only found SMP for Area B-MEO, covering 407 *freguesias*, where MEO was found to hold SMP with a wholesale market share of 79.4%.<sup>51</sup> This dominance stems from MEO's extensive fibre infrastructure, high barriers to entry for competitors, and limited alternative operator presence. Consequently, regulatory measures were deemed necessary to address MEO's dominance and ensure competitive access to its infrastructure.<sup>52</sup>

Table 4.6 – Portugal (2023), Market B market share in Area B-MEO

Provider	Altice Group (incl. MEO)	NOS	Vodafone	NOW	DST
Area A	37.4%	33.6%	21.3%	3.1%	4.7%
Area B – competitive	65.7%	30.5%	2.6%	1.0%	0.3%
Area B – MEO SMP	79.4%	16.6%	2.5%	1.4%	0.0%

Source: ANACOM (2023). Page 225. Table 63 ([Link](#)).

- 4.66 ANACOM's approach in Portugal underscores the importance of a nuanced and comprehensive assessment of SMP and the design of regulatory remedies, much like the considerations for Ofcom's upcoming market review. By defining distinct geographic markets and sub-markets based on detailed criteria—such as the number of high-speed networks present, coverage

<sup>51</sup> Ibid. Page 226, Paragraph 556. ([Link](#)).

<sup>52</sup> Ibid. Page 226, Paragraph 556. ([Link](#)).



percentages, urbanisation levels, and market share thresholds—ANACOM sought to ensure that regulatory measures are finely tuned to reflect the latest and prospective competitive conditions of each area.

#### Spain (2021)

4.67 In Spain, the National Commission on Markets and Competition's (CNMC) 2021 market review identified two geographic zones based on infrastructure competition and population density:<sup>53</sup>

4.67.1 Zone 1 (Market 1\_1) – consists of 696 municipalities, where there was a higher presence of competing NGA networks and/or the demographics meant that the area was more commercially attractive (e.g. urban); and

4.67.2 Zone 2 (Market 1\_2) – remaining municipalities.

4.68 Despite the presence of multiple operators in Zone 1, Telefónica's market share remained at ~63%, indicating continued dominance.<sup>54</sup>

Table 4.7 – Spain (2021), Telefonica WLA market share

Geographic market	Total lines	Market share
Zone 1	~9.9m	~63%
Zone 2	~3.5m	~88%
Total lines	~13.4m	~69%

Source: CNMC (2021). Page 81. Chart 17 ([Link](#))

4.69 The CNMC emphasised that Telefónica's market share in both zones far exceeds the 50% threshold outlined in the EC's SMP Guidelines, an indicator of potential market power and therefore an absence of “material and sustainable” competition.<sup>55</sup>

4.70 The CNMC also projected that Telefónica's share in Zone 1 may decline further as competition intensifies, but it is unlikely to drop below 50%, suggesting sustained SMP.<sup>56</sup>

4.71 The CNMC found that Telefonica had SMP in both geographic markets.

<sup>53</sup> Comisión Nacional de los Mercados y la Competencia, (2021) “Resolución por la que se aprueba la definición y análisis de los mercados de acceso local al por mayor facilitado en una ubicación fija y acceso central al por mayor facilitado en una ubicación fija para productos del mercado de masas, la designación del operador con poder significativo de mercado y la imposición de obligaciones específicas, y se acuerda su notificación a la Comisión Europea y al Organismo de Reguladores Europeos de Comunicaciones Electrónicas”. 6<sup>th</sup> October 2021. ([Link](#))

<sup>54</sup> Ibid. Page 81, Chart 17. ([Link](#))

<sup>55</sup> Ibid. Page 86. ([Link](#))

<sup>56</sup> Ibid. Page 84 ([Link](#))

## France (2023)

- 4.72 In France, the Regulatory Authority for Electronic Communications, Postal and Print Media Distribution (ARCEP) conducted a 2023 market review<sup>57</sup> and identified a single national market with Orange found to have SMP.
- 4.73 Importantly, even in sub-national areas where Orange's market share is below 50%, such as the Public Initiative Networks (RIP) zones where Orange holds 23% of the market, regulatory measures remain in place.<sup>58</sup> This approach reflects a nuanced understanding of Orange's aggregated dominance, infrastructure footprint, and the interdependence of markets.
- 4.74 Orange's infrastructure underpins competition in less dense zones, shaping market dynamics even where alternative operators deploy networks. The dependency of competitors on Orange's infrastructure for wholesale access sustains its influence, necessitating regulatory oversight.
- 4.75 An important feature of ARCEP's approach is in its remedy design across geographic areas, to reflect the varied levels of competitive pressure in said areas:<sup>59</sup>
- 4.75.1 **Very dense areas:** these zones exhibit multiple infrastructure operators, leading to stronger competition and reduced dominance by Orange. Here, regulatory obligations are lighter due to 'naturally' higher competitive pressures by virtue of the conditions available to enter the market (i.e. more attractive commercials and lower barriers to entry). Orange's deployments account for 80% of the premises made connectable in very dense zones, with this share increasing by 4% over the recent analysis period.
  - 4.75.2 **Less dense private investment areas (AMII):** privately funded deployments show significant dependency on Orange's infrastructure, requiring stricter regulatory obligations to prevent market abuse. Orange operates 78% of the eligible lines, representing approximately 11.9 million premises as of Q4 2022.
  - 4.75.3 **Less dense public initiative areas (RIP):** privately funded deployments show significant dependency on Orange's infrastructure, requiring stricter regulatory obligations to prevent market abuse. Orange manages 2.6 million FTTH lines, which corresponds to 23% of the infrastructure in these zones. The total share is expected to grow to 30% with an eventual operation of 4.6 million lines.
  - 4.75.4 **AMEL areas:** a hybrid model involving private and public cooperation, requiring distinct oversight due to differing investment conditions. Orange made 83,000 lines connectable (13% of the total) but is projected to eventually operate about one-third of the lines in these zones.
- 4.76 Market share is a critical factor in ARCEP's approach to regulation, as evidenced by the stringent measures applied to high-market-share areas. For instance, in dense urban zones or AMII areas, Orange's dominant market presence, such as holding 78% in AMII zones, results in direct regulatory interventions to mitigate its market power.<sup>60</sup> The reliance of competitors on

<sup>57</sup> Autorité de régulation des communications électroniques, des postes et de la distribution de la presse, (2023) "Décision n° 2023-2802 portant sur la définition du marché pertinent de fourniture en gros d'accès local en position déterminée, sur la désignation d'un opérateur exerçant une influence significative sur ce marché et sur les obligations imposées à cet opérateur à ce titre" (14 December 2023). [\(Link\)](#)

<sup>58</sup> Ibid. Pages 47 and 53. [\(Link\)](#)

<sup>59</sup> Ibid. Pages 47 – 48. [\(Link\)](#)

<sup>60</sup> Ibid. Pages 46 – 47. [\(Link\)](#)

Orange's extensive fibre and copper infrastructure further strengthens its influence in these regions and therefore requiring regulatory oversight.<sup>61</sup>

- 4.77 Notwithstanding the significance of market share, ARCEP maintains regulatory measures even in sub-national areas where Orange's share is below 50%, such as RIP (23%) and AMEL (13% projected to increase to one-third).<sup>62</sup> This approach reflects a nuanced understanding of Orange's aggregated dominance:
- 4.77.1 **aggregated dominance:** Orange's infrastructure footprint and scale grant it significant leverage at a national level, even where its market share in specific sub-national regions is relatively lower.
  - 4.77.2 **interdependence of markets:** Orange's infrastructure underpins competition in less dense zones, shaping market dynamics even where alternative operators deploy networks. The dependency of competitors on Orange's infrastructure for wholesale access sustains its influence.
  - 4.77.3 **market dynamics:** Orange's strategic role in providing wholesale access to alternative operators across regions underscores its critical role in market functioning. This influence persists irrespective of local market share variances.
- 4.78 ARCEP's SMP analysis reflects a holistic national perspective, rather than a localised or fragmented approach. The aggregated dominance, infrastructure reliance, and interdependence of markets necessitate assessing whether competition effectively constrains Orange's dominance at the national scale.
- 4.79 ARCEP's approach illustrates key principles in assessing SMP and designing regulatory remedies, principles that are particularly relevant for Ofcom's upcoming market review. By adopting a holistic national perspective, ARCEP considers factors such as aggregated dominance, infrastructure reliance, and the interdependence of markets. This means looking beyond mere market share figures to understand how an incumbent's extensive infrastructure can influence competition across different regions. ARCEP's method emphasises the importance of tailoring remedies to the specific competitive conditions of each area, taking into account factors like infrastructure dependence, barriers to entry, and varying market dynamics.

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<sup>61</sup> Ibid. Pages 47 – 48. ([Link](#))

<sup>62</sup> Ibid. Pages 47 and 53. ([Link](#))

### Croatia (2023)

- 4.80 The WLA market in Croatia<sup>63</sup> is divided into two main segments based on capacity: the small capacity market and the high-capacity market. The small capacity market is defined as a single national market due to homogeneous competitive conditions. This uniformity stems from the reliance on Hrvatski Telekom (“HT”)’s copper infrastructure, which is the sole provider of such services nationwide. With no alternative copper networks in operation, the competitive landscape in this segment is consistent across the country, justifying its national scope.<sup>64</sup>
- 4.81 The high-capacity market, on the other hand, is segmented into 572 geographic units, including municipalities, cities, and districts within Zagreb.<sup>65</sup> This segmentation reflects substantial variations in infrastructure deployment and competition. These units are further grouped into two sub-markets: competitive areas, where alternative Very High Capacity Networks (“VHCN”) are present, and non-competitive areas, where HT retains dominance due to the lack of sufficient competition from alternative providers.<sup>66</sup>
- 4.82 To assess competition in Croatia, three key metrics are applied.
- 4.82.1 First, the presence of infrastructure-based competition is determined by the availability of at least one alternative VHCN (fibre or DOCSIS 3.1) within the geographic unit. Additionally, the alternative network must cover at least 33% of premises in the area.
  - 4.82.2 Second, the retail market share of HT is considered, with units being classified as competitive only if HT’s share is below 50%.
  - 4.82.3 Finally, take-up levels and usage are analysed to assess the effectiveness of competition, ensuring that consumer reliance on alternative networks is evident.<sup>67</sup>
- 4.83 SMP is analysed based on these competitive dynamics. In the small capacity market, HT is designated as having SMP due to its monopoly on copper infrastructure, which remains critical for wholesale services. Alternative operators have not invested in competing copper networks, further entrenching HT’s dominant position.<sup>68</sup>
- 4.84 In the high-capacity market, competitive and non-competitive areas are treated differently. In competitive areas, no operator is identified as having SMP because of the presence of effective competition from alternative providers like A1 and Telemach. These areas exhibit sufficient VHCN deployment and lower market shares for HT, negating the need for ex ante regulation.<sup>69</sup>
- 4.85 However, in non-competitive areas, HT retains SMP due to its extensive infrastructure control and lack of significant competition from alternative networks. Here, HT’s market share is higher, and alternative providers are unable to exert competitive pressure, necessitating regulatory oversight.<sup>70</sup>

<sup>63</sup> Hrvatska regulatorna agencija za mrežne djelatnosti (HAKOM), ‘Analiza tržišta veleprodajnog lokalnog pristupa koji se pruža na fiksnoj lokaciji’ (July 2023) ([Link](#)).

<sup>64</sup> Ibid. Pages 4-5, 19-20. ([Link](#)).

<sup>65</sup> Ibid. Pages 5-6. ([Link](#)).

<sup>66</sup> Ibid. Pages 5-6. ([Link](#)).

<sup>67</sup> Ibid. Pages 5-6, 72-73. ([Link](#)).

<sup>68</sup> Ibid. Pages 6-7, 19-20, 90-100. ([Link](#)).

<sup>69</sup> Ibid. Pages 6-7, 90-100. ([Link](#)).

<sup>70</sup> Ibid. Pages 6-7, 72-73, 90-100. ([Link](#)).

### *Slovenia (2021)*

- 4.86 In Slovenia<sup>71</sup>, the WLA is defined as a single national market covering copper, fibre, and NGA networks, with Telekom Slovenije identified as the SMP operator. The decision is supported by a market share analysis showing Telekom Slovenije's dominance, holding approximately 62.4% of the WLA market, significantly outpacing its competitors.<sup>72</sup>
- 4.87 AKOS determined that the WLA market should remain defined on a national basis due to insufficient differentiation in competitive conditions across geographic regions. While some local areas, particularly urban centres, exhibit greater competition among operators, the overall conditions across Slovenia do not justify sub-national market segmentation.<sup>73</sup>
- 4.88 For example, in only 15 settlements with 36,424 households did competitive conditions significantly differ, with multiple operators achieving at least 65% coverage. However, these areas represent a small portion of the market, and the majority of Slovenia remains dominated by Telekom Slovenije with limited infrastructure-based competition.<sup>74</sup> AKOS did however remove pricing obligations on Telekom Slovenije for these 15 settlements to reflect the local competitive conditions.<sup>75</sup>
- 4.89 Publicly funded initiatives, like Open Broadband Networks (OŠO), have introduced limited competition in underserved areas but have not substantially disrupted Telekom Slovenije's dominance.<sup>76</sup>
- 4.90 Key factors contributing to the SMP designation include economies of scale, significant infrastructure barriers to entry, and Telekom Slovenije's vertical integration, allowing it to influence both wholesale and retail markets.<sup>77</sup>

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<sup>71</sup> Agencija za komunikacijska omrežja in storitve Republike Slovenije, Analiza upoštevne trga 1 (2021) 'Veleprodajni lokalni dostop na fiksni lokaciji' s predlaganimi obveznostmi s popravki po ponovnem javnem posvetovanju' (Ljubljana, september 2021). ([Link](#))

<sup>72</sup> Ibid. Page 120. ([Link](#))

<sup>73</sup> Ibid. Pages 108 - 109. ([Link](#))

<sup>74</sup> Ibid. Pages 107 - 109. ([Link](#))

<sup>75</sup> Ibid. Page 123 and Annex 1. ([Link](#))

<sup>76</sup> Ibid. Pages 74 - 77. ([Link](#))

<sup>77</sup> Ibid. Pages 111 - 123. ([Link](#))

## Estonia (2025)

- 4.91 In its latest review of the WLA market, the local regulator (TTJA) departed from a single nationwide market and instead defined separate geographic markets based on competition levels.<sup>78</sup>
- 4.92 TTJA ultimately split Estonia into two zones:<sup>79</sup>
- 4.92.1 “Region A” (areas with high competition) - comprises a set of cities/city districts meeting all the criteria the TTJA set for effective competition (see below); and
  - 4.92.2 “Region B” (the rest of the country with lower competition) - whereas Region B encompasses “the entire territory of Estonia minus the high-competition units in Region A.
- 4.93 By carving out Region A, TTJA treated it as outside the relevant market for regulation, focusing the WLA market definition only on the less competitive Region B.
- 4.94 It considered three main criteria for each local area, requiring all to be met for an area to be deemed effectively competitive:<sup>80</sup>
- 4.94.1 The first criterion was the presence of alternative infrastructures: at least 40% of households in the area must be covered by two or more independent fixed broadband networks (e.g. cable, fibre)
  - 4.94.2 The second criterion was market-share based: Telia’s retail broadband market share below 50% in that area, indicating no single provider has dominance
  - 4.94.3 The third criterion, implied by TTJA’s analysis of “prospective competition”, was that these conditions be sustainable – i.e. the area shows enduring competitive dynamics (such as continued presence/investment by alternate operators).
- 4.95 The TTJA concluded that Telia Eesti AS possessed SMP in the defined WLA market (i.e. in Region B). The analysis showed that in Region B, Telia faces minimal competitive constraints – competition “is not working” in those areas.<sup>81</sup>
- 4.96 Telia continues to enjoy a very large market share in the local access segment outside the competitive enclaves, and it controls key infrastructure (nationwide copper loops and extensive fibre deployments) that competitors cannot easily replicate.<sup>82</sup>
- 4.97 On that basis, TTJA proposed to formally designate Telia as the SMP operator in the wholesale local access market in Region B.

<sup>78</sup> Tarbijakaitse ja Tehnilise Järelevalve Amet, ‘Sidevõrgule kohaliku ja keskse juurdepääsu hulgiturgudel märkimisväärse turujõuga ettevõtja määramise ja määramata jätmise ning kohustuste kehtestamise otsus, Lisa 1’ (2025) ([Link](#)).

<sup>79</sup> Ibid. Pages 68 – 69. ([Link](#)).

<sup>80</sup> Ibid. Pages 59 – 60. ([Link](#)).

<sup>81</sup> Ibid. Page 108. ([Link](#)).

<sup>82</sup> Ibid. Pages 122 – 130. ([Link](#)).

### Concluding remarks on SMP analysis

- 4.98 These international examples illustrate that while market share is more significant than coverage in assessing SMP, even market share is but one dimension in a comprehensive analysis.
- 4.99 Until the market develops and provides for "material and sustainable" competitors capable of effectively constraining the SMP operator beyond a speculative potential constraint, regulation should remain in place to protect access seekers on BT's network and downstream consumers alike, and to protect wholesale competitors, allowing them to become material and sustainable.
- 4.100 In preparing for the next market review, Ofcom should recognise that network coverage alone does not equate to effective competition. While the expansion of gigabit-capable networks is significant, assessing SMP requires a multi-faceted approach that goes beyond coverage metrics.
- 4.101 Ofcom should adopt a comprehensive SMP assessment framework that evaluates market share dynamics alongside other factors such as barriers to entry, countervailing buyer power, and consumer switching behaviour. High market share, particularly above 50%, often indicates potential dominance, but must also be analysed in the context of overall market dynamics.
- 4.102 There is often a temporal lag between network deployment and the realisation of competitive impact. New entrants require time to acquire customers, optimise networks, and develop retail offerings. This lag must be considered when assessing the competitive constraints on the incumbent (i.e. BT).
- 4.103 Implementing geographically differentiated remedies can address the varying degrees of competition across different regions. Tailoring regulatory obligations to local market conditions ensures that interventions are appropriate and proportionate.
- 4.104 Remedies should be proportionate and targeted, being objective, justified, non-discriminatory, and transparent. This approach aligns regulatory measures with the specific levels of SMP and market challenges in each area.
- 4.105 Strengthening consumer empowerment initiatives is crucial. Enhancing switching processes and increasing consumer awareness can reduce barriers to switching, allowing consumers to make informed choices and facilitating effective competition.
- 4.106 Considering international best practices can provide valuable insights. Examples from Italy, Portugal, and France show the effectiveness of tailoring remedies based on regional competitive conditions and maintaining regulatory measures even where incumbents' market share is below 50%.
- 4.107 Ofcom's next market review should balance encouraging infrastructure investment with safeguarding competition and consumer interests. A nuanced approach that goes beyond surface-level metrics like coverage will ensure that the regulatory framework remains robust and responsive to market complexities, fostering an environment where competition thrives, and consumers benefit.

## Copper retirement

- 4.108 Ofcom has established clear requirements for Openreach to retire its copper network, as outlined in the WFTMR. Under these obligations, Openreach must first deploy fibre to an exchange and notify operators using its network one year in advance when it plans to achieve 75% fibre coverage in that area.<sup>83</sup>
- 4.109 This notice triggers a "stop-sell" of copper services, meaning that from that point forward, Openreach is no longer required to provide new copper-based services the area. Once Openreach reaches 100% fibre coverage, existing charge controls and other access obligations on both copper and fibre services continue to run in parallel for two more years.
- 4.110 Openreach has strong commercial incentives to seek modifications to this framework to expedite the retirement of copper networks and increase the scope of deregulation for these services. Such regulatory forbearance could allow Openreach to accelerate customer migration from copper to fibre, potentially reducing operational costs and increasing revenues.
- 4.111 However, granting Openreach greater regulatory leeway carries significant risks to downstream and wholesale competition, and consequently to consumers. There is a concern that Openreach could make it difficult, complex, or unattainable within practical timescales for downstream retail providers to effectively migrate their customers from copper to fibre. This could enable Openreach to leverage its wholesale incumbency to bulk-migrate customers to its own BT downstream arm, thereby entrenching its wholesale market dominance and threatening downstream competition.
- 4.112 Additionally, deregulation of copper services may lead to a deterioration in service quality for customers who remain on these networks.
- 4.113 For wholesale competitors, similar concerns arise. Openreach could tie up customers who might otherwise choose alternative wholesale services, limiting the ability of competing networks to gain market share. This could stifle competition and innovation in the wholesale market.
- 4.114 Consumers face the risk of receiving lower-quality services during the period they are consuming unregulated copper services. Moreover, there is a significant risk that vulnerable groups could be left behind in the migration to fibre, exacerbating the digital divide.
- 4.115 These risks are underscored by the substantial number of customers who remain on copper-based services. Despite a gradual decrease in market share, copper-based services such as ADSL and FTTC still represent the majority of fixed broadband lines in the UK as of 2023, with ADSL at 8% and FTTC at 51%.

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<sup>83</sup> Openreach (2020) 'Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021 – 2026'. 15<sup>th</sup> May 2020. ([Link](#)). Page 64



**Table 4.8 – Fixed broadband lines in the UK**

Technology	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
ADSL	70%	65%	58%	52%	44%	36%	27%	19%	13%	10%	8%
Cable	19%	19%	19%	19%	20%	20%	19%	19%	19%	19%	19%
FTTC	10%	16%	22%	28%	35%	42%	50%	57%	60%	57%	51%
Full fibre	0%	0%	0%	1%	1%	2%	4%	5%	7%	13%	20%
Other	0%	0%	0%	0%	0%	0%	0%	0%	0%	1%	2%

**Source:** Ofcom Communications Market Report 2024: Telecoms data (CSV) – ‘Fixed broadband connections by technology (millions)’  
[\(Link\)](#)

- 4.116 The fact that 59% of customers are still using copper-based network services (FTTC and ADSL) highlights the significant work required to transition to gigabit-capable networks and the size of the customer base at risk. This necessitates a carefully managed and coordinated approach to ensure a smooth transition that protects competition and consumer interests.
- 4.117 ISPs using Openreach's network may struggle with the operational challenges of rapid migration, requiring significant investment in new technologies and processes, such as backhaul upgrades and customer equipment migration. Without sufficient notice and support, these challenges could impede downstream retail provider's ability to compete effectively.
- 4.118 Therefore, any future copper retirement process should include safeguards against the risk of BT leveraging its dominant position to unilaterally shift large numbers of customers onto its own network, potentially undermining competition and consumer choice.

## International benchmarks on the copper retirement process

### *EECC (2018) – Article 81*

- 4.119 The EECC includes provisions regarding the retirement of copper networks.
- 4.120 Entities with SMP are mandated to notify the NRA in advance when planning to decommission or replace legacy infrastructure, such as copper networks, that are subject to regulatory obligations. This ensures transparency and facilitates oversight during the transition process.
- 4.121 The NRAs must ensure that the process of decommissioning or replacing infrastructure includes a clear and transparent timetable, along with appropriate notice periods. They must also ensure the availability of alternative products with at least comparable quality to maintain competition and protect end-user rights.
- 4.122 NRAs may consider withdrawing existing obligations on the decommissioned infrastructure, but only after verifying that adequate conditions for migration have been established. This includes making alternative products available to access seekers and ensuring compliance with the notified process.
- 4.123 The provisions emphasise that decommissioning legacy infrastructure should not compromise the availability of regulated products on the upgraded network. The goal is to maintain market competition and continuity in service offerings.

### *BEREC Reports (2021 - 2024)*

- 4.124 In 2021<sup>84</sup>, 2022<sup>85</sup> and 2024<sup>86</sup>, the Body of European Regulators for Electronic Communications (“**BEREC**”) conducted a thorough examination of the migration from copper-based legacy networks to Next Generation Access (“**NGA**”) networks, such as fibre, within its reports.
- 4.125 This analysis was driven by the increasing retirement of copper networks and services, the growing demand for high-capacity broadband, and the need for a harmonised regulatory approach across Europe.
- 4.126 BEREC aimed to establish a consistent framework NRA to manage copper switch-off processes while addressing key concerns related to competition, service continuity, and stakeholder inclusivity. The reports explored how NRAs could leverage their regulatory powers under the EECC to facilitate a fair and efficient transition. BEREC also sought to balance the interests of Significant Market Power Operators (“**SMPOs**”), Alternative Network Operators (“**ANOs**”), and end-users, ensuring that copper retirement processes did not unfairly disrupt markets or diminish service quality.
- 4.127 Through its initial report in 2021 and subsequent consultation process in 2022 and draft report in 2024, BEREC uncovered several important insights:
- 4.127.1 **diverse national approaches:** the regulatory frameworks governing copper retirement vary significantly across European countries, reflecting differing levels of NGA deployment and market conditions. NRAs have adopted measures such as

<sup>84</sup> Body of European Regulators for Electronic Communications (BEREC) (2021), “Draft Report on a Consistent Approach to Migration and Copper Switch-off”. BoR (21) 171. 9<sup>th</sup> December 2021. ([Link](#)).

<sup>85</sup> Body of European Regulators for Electronic Communications (BEREC) (2022), “Report on the Outcome of the Public Consultation on the Draft BEREC Report on a Consistent Approach to Migration and Copper Switch-Off”. BoR (22) 68. 9<sup>th</sup> June 2022. ([Link](#)).

<sup>86</sup> Body of European Regulators for Electronic Communications (BEREC) (2022), “Draft BEREC Progress Report on managing copper network switch-off”. BoR (24) 181. 5<sup>th</sup> December 2024. ([Link](#)).

notice periods, technical migration requirements, and conditions for NGA availability to manage this transition.

- 4.127.2 **market dynamics and competition risks:** stakeholders raised concerns about potential strategic behaviour by SMPOs, such as using copper switch-offs to gain competitive advantage in regions where ANOs have deployed fibre networks. The reports emphasised the importance of NRAs conducting comprehensive market analyses to ensure fair competition during the transition.
  - 4.127.3 **stakeholder involvement:** effective stakeholder engagement was identified as a cornerstone of successful copper migration. BEREC highlighted the need for public consultations, technical forums, and collaborative planning to address the concerns of all market participants, including those competing at wholesale and retail levels.
  - 4.127.4 **cost and service implications:** the financial burden of migration emerged as a critical issue. Stakeholders advocated for measures to prevent unfair cost allocation, such as ensuring SMPOs bear migration-related expenses and prohibiting excessive fees for access seekers and consumers. BEREC also underscored the importance of non-discriminatory practices in service migration.
  - 4.127.5 **environmental and social considerations:** BEREC acknowledged the broader implications of copper retirement, including environmental benefits from transitioning to energy-efficient fibre networks and the need to address the impact on vulnerable consumers reliant on legacy services for critical functions like alarms.
- 4.128 In response to extensive consultation feedback, BEREC refined its guidance to emphasise flexibility and national specificity while preserving key principles of transparency and fairness. The final report adopted the following key recommendations:
- 4.128.1 NRAs should tailor notice periods and migration conditions to local circumstances, considering factors such as NGA coverage and the competitive landscape.
  - 4.128.2 migration rules should prioritise non-discrimination, ensuring SMPOs and ANOs face equitable conditions during copper switch-offs.
  - 4.128.3 stakeholders, including ANOs deploying competing networks, must be actively involved in decision-making processes.
  - 4.128.4 NRAs should monitor migration closely to prevent strategic closures by SMPOs that could distort competition or delay NGA adoption.
- 4.129 While BEREC resisted calls to codify uniform best practices, it provided illustrative examples of successful approaches from various member states. The final reports highlighted the need for NRAs to remain adaptive, leveraging market analysis to navigate the complexities of copper retirement and safeguard consumer and market interests.

Table 4.9 – BEREC (2024), consolidated table of reported copper retirement process in EU jurisdictions where copper retirement is regulated process and actively taking place (20 jurisdictions in total)

Country	Type of Procedure	Coverage Threshold to Permit Switch-off	Notice Period	Non-Discrimination Control	Migration Issues Reported
Belgium	Market analysis	None	~ 1-2 years	No explicit constraints	No issues
Croatia	Market analysis + new law	None	Not detailed	Not specified	No data
Cyprus	Market analysis	None	Depends on wholesale but can be done immediately	Yes	Not reported
Czech Republic	Market analysis	None	1 year if wholesale	No	No issues
Denmark	SMP commitments	None	1 month for commercial closure	No	No issues
Estonia	Market analysis	None	6 months if copper-based ULL	No	No issues
Finland	Not under market analysis	None	1 month	No	Service downtime
France	Market analysis	100% FTTH	18-36 months	Yes	User confusion
Greece	Market analysis	60% FTTC or FTTH	6-24 months	Yes	Not detailed
Hungary	Market analysis	100% NGA	6-24 months	No	No issues
Ireland	Separate NRA decision	100% of 'in-scope' premises	6 months	No	No issues

Country	Type of Procedure	Coverage Threshold to Permit Switch-off	Notice Period	Non-Discrimination Control	Migration Issues Reported
Italy	Market analysis	100% NGA (FTTC/FTTH/FWA)	6-24 months	Yes	No major issues
Luxembourg	Market analysis	100% FTTH	6-60 months	No	No issues
Malta	Separate NRA process	None	Not applicable, there are no ANOs using SMP operator's copper-based wholesale access products	No	Delays from forced migrations
Norway	Separate NRA process	None	Not detailed	No	Not specified
Poland	Market analysis	None	6-24 months	No	Not specified
Portugal	Market analysis	None	Up to 5 years	No	Minor interruptions
Slovakia	Market analysis	None	6-24 months	No	Interruptions reported
Slovenia	Market analysis	None	6-24 months	Yes	Occasional delays
Spain	Market analysis	None	6-24 months	No	Forced migrations

## Concluding remarks on copper retirement process

- 4.130 The transition from copper to fibre networks represents a pivotal shift in telecoms infrastructure, driven by the need for faster, more reliable, and energy-efficient broadband services. The regulatory frameworks outlined in the UK and other jurisdictions highlight the complex balance required between facilitating network evolution and safeguarding competition, business and consumer interests, and market fairness.
- 4.131 The UK's current approach underscores the necessity of careful planning and communication to ensure a smooth migration process. While Openreach has strong commercial incentives to accelerate copper retirement, regulatory oversight remains critical to mitigate risks such as market dominance, consumer vulnerability, and reduced competition.
- 4.132 International experiences, from the EU's EECC and provided for in BEREC's latest report, provide valuable insights into managing this transition effectively. These examples highlight the importance of notice periods, stakeholder engagement, ensuring access to alternative high-quality networks.
- 4.133 As copper networks continue to decline in usage, the imperative to transition to full fibre becomes increasingly more significant. However, this process must be inclusive and equitable, addressing the needs of vulnerable consumers and ensuring that market competition thrives. Policymakers and regulators must continue to refine their approaches, leveraging lessons from international benchmarks and ongoing market analyses.

## 5. The risk around ineffective regulation

### Ensuring the service quality regime for fibre products

- 5.1 Ofcom's current regulatory framework lacks a substantial Quality of Service (“**QoS**”) regime for fibre products, particularly on Openreach's fibre services, unlike the relatively more developed regimes for Fibre to the Cabinet (“**FTTC**”) and Ethernet services.

**Table 4.2 – Summary of QoS Requirements in the WFTMR**

Aspect	Copper-Based Products (including FTTC)	Fibre-Based Products (FTTP, Leased Lines, and IEC)
Fault Repairs (QoS Standards)	<p><b>Year 1 (2021/22):</b> Repair within 2 working days (SML1): 83% Repair within 1 working day (SML2): 83% Repair within SLA + 5 days: 96%</p> <p><b>Years 2–5:</b> Repair within 2 working days (SML1): 85% Repair within 1 working day (SML2): 85% Repair within SLA + 5 days: 97%</p>	<p>No specific standards imposed for FTTP yet due to differing fault profiles (Paragraphs 3.102–3.105, Pages 23–24).</p> <p><b>Leased Lines/IEC:</b> Fault repairs within SLA: 94%.</p>
Installations (QoS Standards)	<p><b>Year 1 (2021/22):</b> 91% completed by the committed date.</p> <p><b>Years 2–5:</b> 94% completed by the committed date.</p>	<p><b>Leased Lines/IEC:</b> 86% completed by initial Contractual Delivery Date (iCDD).</p>
First Available Date (FAD)	<p><b>Year 1:</b> 12 working days for installation appointments, 89% frequency.</p> <p><b>Years 2–5:</b> 10 working days, 89% frequency.</p>	<p>Applies to transition areas (fibre replacing copper) and installations requiring monitoring.</p>
Mean Time to Provide (MTTP)	Not applicable.	<p><b>Leased Lines/IEC:</b> no more than 38 working days for orders (Table 1.2, Page 2).</p>
Upper Percentile Limit	Not applicable.	<p><b>Leased Lines/IEC:</b> No more than 4.5% of orders older than 133 working days.</p>

Aspect	Copper-Based Products (including FTTC)	Fibre-Based Products (FTTP, Leased Lines, and IEC)
Transparency Requirements	<p><b>Performance reporting:</b> fault repair timelines and installation performance.</p> <p><b>Tail order reporting:</b> Six-monthly reports for unresolved installations.</p> <p><b>Data submission:</b> monthly snapshot</p> <p><b>Reports:</b> within 15 working days.</p> <p><b>Quarterly public reports:</b> within 15 working days.</p> <p><b>FAD reporting:</b> KPIs on first installation appointments.</p> <p><b>Disaggregation of data:</b> KPIs by product and geography.</p> <p><b>Publication of data:</b> some KPIs published online.</p>	<p><b>FTTP monitoring:</b> transparency to monitor installation/fault performance.</p> <p><b>Leased Lines/IEC:</b> detailed performance metrics, including order timelines and fault repair adherence. Reporting on fibre-based KPIs (Table 1.2).</p>

- 5.2 This omission was initially justified on the basis that the fibre market was nascent, and heavy regulation could stifle innovation and investment. However, as fibre networks mature and become more prevalent, this lack of a robust QoS framework presents significant challenges.
- 5.3 Firstly, without specific QoS metrics and benchmarks, it becomes difficult to assess Openreach's performance in delivering fibre services. This opacity hampers the ability to determine whether Openreach is providing services in a manner that promotes competition and meets the needs of downstream retail providers and consumers. The absence of clear performance indicators allows for potential inconsistencies in service delivery, which can negatively impact the market.
- 5.4 Secondly, there is a risk that Openreach could differentiate between its own downstream arm, BT Consumer, and other competing downstream retail provider. Without a stringent QoS regime, Openreach may prioritise its resources and service quality to favour BT Consumer, thereby leveraging its vertical integration to the detriment of competition. This could manifest in faster repair times, better service reliability, or preferential access to network upgrades for BT Consumer, leaving competitors at a disadvantage.
- 5.5 Thirdly, as the fibre market continues to grow and providers compete more aggressively on service quality, the lack of minimum service levels risks undermining the competitive landscape. Enforceable QoS obligations, including financial penalties for missed targets, would help ensure that Openreach invests appropriately in the network and treats all downstream providers fairly, thereby safeguarding consumer interests and promoting healthy competition.



## International benchmarks on FTTP QoS

### *Ireland (2024)*

- 5.6 ComReg mandates<sup>87</sup> legally binding service levels for all services in the Commercial Next Generation Wholesale Local Access (“**NG WLA**”) market, including key products such as Virtual Unbundled Access (“**VUA**”), migrations, and ancillary facilities. This ensures Access Seekers receive reliable, predictable service levels, safeguarding competition and end-user benefits. By contrast, and as noted above Ofcom does not impose comprehensive minimum service levels (“**MSLs**”) for FTTP services, focusing primarily on copper-based products like FTTC and Ethernet.
- 5.7 A standout feature of ComReg’s regime is its automatic compensation mechanism. Service credits are applied automatically when service levels targets are missed, covering both direct and indirect costs.<sup>88</sup> This process incentivises compliance and removes administrative burdens from Access Seekers. In Ofcom’s framework, automatic compensation for failing to achieve an MSL on FTTP services is absent, as there is no equivalent regime currently in place.
- 5.8 ComReg requires service levels to include measurable performance targets, such as fault repair and installation timelines.<sup>89</sup> Service level suspensions must adhere to objective, pre-defined criteria, ensuring Access Seekers are protected against arbitrary decisions.
- 5.9 Negotiation timelines are a critical component of ComReg’s service level framework. Service level must be finalised within six months, and unresolved issues require Eircom to submit a Best and Final Offer (“**BAFO**”). This structured process ensures timely outcomes and prevents stalling.<sup>90</sup>
- 5.10 Transparency under ComReg is bolstered by rigorous reporting obligations. Eircom must publish quarterly reports detailing service level compliance, fault repairs, and installation performance.<sup>91</sup> ComReg’s KPI framework provides granular oversight. Eircom must publish comprehensive KPI reports that include performance against service level targets and ensure data sources and methodologies are transparent. These KPIs are a key tool for monitoring compliance and benchmarking service quality. While Ofcom requires detailed performance metrics for copper products (e.g., tail order reporting and fault resolution adherence), its monitoring of fibre services lacks equivalent depth.<sup>92</sup> This creates a regulatory gap as fibre networks become more prevalent.

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<sup>87</sup> ComReg (2024) ‘Commission for Communications Regulation (ComReg), Decision D05/24, Wholesale Local Access (WLA) and Wholesale Central Access (WCA) Market Review: Response to Consultation and Final Decision’ ComReg 24/07, 18 January 2024. Pages 739 – 740. ([Link](#)).

<sup>88</sup> Ibid. Page 484, Paragraph 9.180. Page 740, Paragraph 11.2.2(c). ([Link](#)).

<sup>89</sup> Ibid. Pages 480 - 486, Paragraphs 9.164 – 9.187. ([Link](#)).

<sup>90</sup> Ibid. Pages 480 - 481, Paragraphs 9.168 – 9.170. Pages 740 - 741, Paragraphs 11.3 – 11.6 ([Link](#)).

<sup>91</sup> Ibid. Pages 509 - 510, Paragraphs 9.280 – 9.283. Page 741, Paragraphs 12.1 – 12.2 ([Link](#)).

<sup>92</sup> Ibid. Pages 509 - 510, Paragraphs 9.280 – 9.283. Page 741, Paragraphs 12.1 – 12.2 ([Link](#)).

### Italy (2024)

- 5.11 The latest AgCom decision<sup>93</sup> covers a wide range of wholesale access services, including local access provisioning, VULA, fibre termination segments, and associated infrastructure services. The scope includes both active and inactive lines, with differentiated SLAs tailored to specific service categories
- 5.12 The regime explicitly applies to fibre services and VULA, setting comprehensive SLAs for these technologies. Provisioning for fibre termination segments, for example, is mandated within 15 days for 95% of cases and 19 days for 100% of cases. These SLAs are supported by assurance targets, such as fault repair times and limits on repeated degradation issues. For VULA, installation timelines are strictly defined, with fault resolution SLAs requiring 95% of cases to be addressed within 24 hours.
- 5.13 SLGs are integral to AgCom's approach, ensuring that penalties are automatically applied for missed SLA targets. These SLGs apply to both fibre and VULA services, enforcing strict financial penalties for delays. For instance, provisioning delays for VULA incur fines ranging from €5 to €15 per day based on the duration of the delay. Assurance penalties, including those for repeated service disruptions, are similarly enforced, with fixed rates applied for each incident outside SLA terms.

### Slovenia (2022)

- 5.14 The Slovenian regulator introduced<sup>94</sup> SLAs which require strict adherence to provisioning and assurance timelines, such as the obligation to complete fibre installations within 15 working days under normal circumstances. Access to VULA is designed to include specific technical parameters, such as Layer 2 transparency and active equipment functionality, ensuring service quality parity with Telekom Slovenije's retail offerings. Operators are also entitled to utilise existing fibre connections for multicast services and QoS prioritisation, matching the standards set for the incumbent's retail operations.
- 5.15 SLGs are embedded in the regulatory obligations, setting financial penalties for non-compliance with SLA targets. For provisioning delays, the fines escalate based on the duration of the breach, with penalties as high as 150% of the monthly wholesale fee after ten days of delay. Assurance failures also attract financial penalties, calibrated to the severity and impact of the disruption.
- 5.16 Metrics for wholesale local access services are comprehensive and include provisioning timelines, fault repair rates, and capacity utilisation thresholds. For instance, fibre faults are expected to be repaired within two working days in most cases, while provisioning and installation must meet predefined efficiency standards.
- 5.17 The reporting requirements are detailed and focus on transparency. Telekom Slovenije must submit monthly reports to AKOS, detailing SLA compliance, fault resolution statistics, provisioning timelines, and network capacity data. These reports must include disaggregated data for each access type and are shared both with the regulator and other operators, ensuring that performance is benchmarked and visible to all stakeholders.

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<sup>93</sup> Autorità per le Garanzie nelle Comunicazioni (AgCom), (2024) 'Delibera N. 114/24/CONS, Analisi del Significativo Potere di Mercato nei Mercati Rilevanti dei Servizi di Accesso Locale all'Ingrosso alla Rete Fissa e dei Servizi a Capacità Dedicata all'Ingrosso'. 30<sup>th</sup> April 2024. ([Link](#)).

<sup>93</sup> Ibid. Documento III. 'Annesso 2 del Documento VI' ([Link](#))

<sup>94</sup> AKOS (2022) Izrek odločbe ([Link](#)).

### Concluding remarks:

- 5.18 Ofcom should develop and implement a comprehensive QoS framework with effective MSLs for fibre products, including specific KPIs such as installation times, fault repair times, network availability, and customer satisfaction metrics. These KPIs should be aligned with those already established for FTTC and Ethernet services to ensure consistency and fairness across different technologies.
- 5.19 Openreach should be required to regularly report on these KPIs, with the data being made publicly available. This transparency would enable stakeholders to monitor Openreach's performance and ensure accountability.
- 5.20 Ofcom should reinforce non-discrimination obligations to prevent Openreach from favouring its downstream operations. Clear guidelines and enforcement mechanisms should be established to address any instances of preferential treatment.

## Ensuring no degradation in the service quality regime for copper-based products

- 5.21 As the industry transitions from copper to fibre networks, there is a legitimate concern that Ofcom gives Openreach the freedom to shift resources away from maintaining copper-based services, through deregulation. Such a reallocation could lead to a degradation of service quality for copper lines, adversely affecting consumers and competing downstream retail providers who still rely heavily on these legacy networks.
- 5.22 Given that a significant portion of the UK population continues to use copper-based services, any deterioration in service quality could have widespread implications. Consumers may experience increased faults, slower repair times, and overall reduced reliability. For downstream competing downstream retail providers, this degradation could result in customer dissatisfaction and churn, negatively impacting their business operations and competitiveness.
- 5.23 Moreover, there is a risk that Openreach could tactically deploy resources to prioritise areas where it seeks to maintain its competitive advantage, such as regions with a higher concentration of BT Consumer fibre customers and/or where it is in the process of being overbuilt by a competitor. This self-preferential behaviour could exacerbate the competitive imbalance, with downstream retail providers losing customers due to inferior service quality on copper networks.

### International benchmarks

#### *Italy (2024)*

- 5.24 AgCom has established clear obligations<sup>95</sup> to regulate copper networks during the transition to fibre and the copper retirement process. These obligations ensure that service quality for copper-based products does not deteriorate as fibre becomes more prominent. AgCom requires that copper-based services continue to adhere to specific quality standards, including reliability, fault repair, and maintenance. These obligations are particularly critical in maintaining a level playing field for consumers and alternative service providers still dependent on copper infrastructure.<sup>96</sup>
- 5.25 Additionally, SLAs for copper products must be upheld during this transition period, with operators such as TIM/FiberCop obligated to provide services that meet predefined technical and performance benchmarks. AgCom's measures reflect the necessity of maintaining service quality for copper networks until they are fully phased out.
- 5.26 AgCom has implemented a structured approach to the transition from copper to fibre, designed to minimise disruption for consumers and operators. A transition period has been defined, during which copper-based services such as Wholesale Line Rental (WLR) will remain available. AgCom mandates that these services be maintained for 12 months after the implementation of the new regulatory framework, providing sufficient time for operators and consumers to adapt. During this period, the pricing and technical standards applicable to these services must comply with previously approved conditions.<sup>97</sup>

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<sup>95</sup> Autorità per le Garanzie nelle Comunicazioni (AgCom), (2024) 'Delibera N. 114/24/CONS, Analisi del Significativo Potere di Mercato nei Mercati Rilevanti dei Servizi di Accesso Locale all'Ingrosso alla Rete Fissa e dei Servizi a Capacità Dedicata all'Ingrosso'. 30<sup>th</sup> April 2024. ([Link](#)).

'Documento VI' ([Link](#)) and Annesso 2 del Documento VI' ([Link](#)).

<sup>96</sup> Ibid. Documento VI Page 28, Paragraphs 93 - 94 ([Link](#)).

Annesso 2 del Documento VI ([Link](#)).

<sup>97</sup> Ibid. Documento VI Page 18, Paragraph 70. Page 28, Paragraphs 93 - 94 ([Link](#)).

5.27 The authority’s approach emphasises the need for gradual withdrawal of copper services while maintaining robust oversight to prevent service quality degradation. Particular attention is given to less competitive areas, where reliance on copper remains significant. AgCom has also reinforced the importance of non-discriminatory practices to ensure that operators like TIM/FiberCop do not use their dominant position to disadvantage competitors in the market.

#### *Ireland (2024)*

5.28 The ComReg decision<sup>98</sup> provides valuable insights into the regulatory approach towards copper networks and the transition to fibre-based services. ComReg has recognised the importance of ensuring continuity and maintaining quality standards during this shift, adopting measures to address service quality concerns and safeguard stakeholders during the transitional phase.

5.29 , ComReg has integrated service quality requirements into network management practices, mandating the maintenance of a Copper Loop Frequency Management Plan and an approval process for network changes that could affect service quality.<sup>99</sup>

5.30 In terms of the transition period, ComReg has set out a clear framework to manage the move from copper to fibre networks. Copper services will remain regulated during a 12-month sunset period following the decision to deregulate the copper wholesale local access market (CG WLA). This sunset period allows time for access seekers and end users to adjust to the new regulatory landscape.<sup>100</sup>

5.31 Beyond this, ComReg decided that Eircom must provide an emulated FTTC-like service on its FTTP network. This measure ensures that users transitioning from copper products can access an equivalent service at regulated prices, safeguarding continuity.<sup>101</sup>

5.32 Transparency is another cornerstone of ComReg’s transition strategy. The decision mandates that Eircom maintain a publicly available product development roadmap and provide advanced notice of any changes to copper-based services. These requirements aim to minimise disruption for access seekers and ensure all stakeholders are adequately informed throughout the transition.<sup>102</sup>

5.33 ComReg also recognised the legitimate concern that the shift to fibre could lead to a degradation of copper service quality if resources were disproportionately reallocated. To address this risk, ComReg included monitoring mechanisms to oversee service quality on copper networks during the transition. This aligns with the regulatory goal of preventing adverse impacts on consumers and businesses that continue to rely on copper services.<sup>103</sup>

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<sup>98</sup> ComReg (2024) ‘Commission for Communications Regulation (ComReg), Decision D05/24, Wholesale Local Access (WLA) and Wholesale Central Access (WCA) Market Review: Response to Consultation and Final Decision’ ComReg 24/07, 18 January 2024. Pages 739 – 740. ([Link](#)).

<sup>99</sup> Ibid. Pages 446 – 447, Paragraphs 9.124 – 9.125. Pages 456 – 457, paragraphs 9.157 – 9.159.

<sup>100</sup> Ibid. Pages 691 – 692. Paragraphs 10.3 – 10.8.

<sup>101</sup> Ibid. Pages 522 – 526. Paragraphs 9.322 – 9.325.

<sup>102</sup> Ibid. Pages 478 – 488, Paragraphs 9.222 – 9.245.

<sup>103</sup> Ibid. Pages 600 – 603, Paragraphs 9.476 – 9.479. Pages 691 – 693, Paragraphs 10.3 – 10.10.

## Portugal (2023)

- 5.34 The Portuguese regulator established a framework<sup>104</sup> to manage the transition from copper to fibre networks, ensuring that obligations regarding the quality of service for copper-based services would be upheld in the short term. However, these obligations were designed to gradually diminish as reliance on copper networks decreased and fibre adoption increased. The regulator prioritised maintaining minimum service standards during this transitional phase to protect consumers and ensure stability in the market.
- 5.35 The regulator required operators to adhere to obligations ensuring continued service quality for copper-based networks during the transition. This included commitments to uphold MSLs for fault repairs, maintenance, and customer support, preventing any significant degradation in quality as resources shifted towards fibre networks.
- 5.36 The regulator established specific timeframes to govern the transitional obligations. Operators were required to maintain copper-based wholesale services under existing quality standards for a defined period of 24 months following the decision.<sup>105</sup> This ensured that existing contracts could be honoured and allowed a reasonable timeframe for stakeholders to adapt to the infrastructure changes. Beyond this transition period, obligations to provide new copper-based services would cease, reflecting the regulator's strategic focus on promoting fibre adoption.<sup>106</sup>
- 5.37 To address concerns over potential degradation in copper service quality, the regulator implemented a series of measures. These included the enforcement of non-discrimination clauses, which prevented operators from prioritising fibre services over copper networks in areas where both coexisted. Such provisions were essential to ensure fairness for consumers and maintain competitive parity among downstream retail providers reliant on copper infrastructure.

## Spain (2021)

- 5.38 The CNMC built in a transition period to allow for the gradual deregulation in previously regulated areas. The removal of fibre access obligations in the 696 competitive municipalities did not take effect immediately upon the decision. Instead, a 6-month transition period was established, counted from the publication of the CNMC's resolution in the official state gazette.<sup>107</sup>
- 5.39 During this interim period, the existing regulated wholesale arrangements remained in force, giving operators time to adjust their strategies and commercial agreements before the new deregulated regime for fibre in zone 1 kicked in.
- 5.40 This approach was meant to prevent sudden disruption for alternative ISPs that had been relying on regulated fibre access in those areas. Aside from this six-month moratorium on deregulation, the CNMC's 2021 measure also grandfathered certain older remedies until they could be reviewed in the next cycle.<sup>108</sup> For example, some legacy wholesale products (like regional ADSL bitstream) continued to be offered under regulation in zone 2, and the replicability test and price control rules from the previous decision remained applicable until

<sup>104</sup> ANACOM (2023), 'Decisão sobre a Análise dos Mercados de Acesso a Infraestruturas Físicas, Acesso Local Grossista num Local Fixo e Acesso Central Grossista num Local Fixo: Definição dos Mercados do Produto e Mercados Geográficos, Avaliação de PMS e Imposição, Manutenção, Alteração ou Supressão de Obrigações Regulamentares'. 27<sup>th</sup> December 2023. ([Link](#)).

<sup>105</sup> Ibid. Page 235, Paragraph 599.

<sup>106</sup> Ibid. Page 235, Paragraph 600.

<sup>107</sup> Comisión Nacional de los Mercados y la Competencia, (2021) "Resolución por la que se aprueba la definición y análisis de los mercados de acceso local al por mayor facilitado en una ubicación fija y acceso central al por mayor facilitado en una ubicación fija para productos del mercado de masas, la designación del operador con poder significativo de mercado y la imposición de obligaciones específicas, y se acuerda su notificación a la Comisión Europea y al Organismo de Reguladores Europeos de Comunicaciones Electrónicas". 6<sup>th</sup> October 2021. ([Link](#))

<sup>108</sup>

updated. But the most explicit transitional safeguard was the six-month delay for withdrawing fibre obligations in competitive areas.

### Concluding remarks on enduring copper-regulation

- 5.41 Ofcom should ensure that existing QoS obligations for copper-based services remain enforced until the migration to fibre is substantially complete. This includes setting MSLs for fault repairs, maintenance, and customer support.
- 5.42 Regulatory oversight should include monitoring how Openreach allocates its operational resources between copper and fibre networks. Any significant shift that negatively impacts copper service quality should be addressed promptly.
- 5.43 Strengthening non-discrimination clauses can prevent Openreach from favouring its own fibre customers over those of competing downstream retail providers on copper networks. Enforcement mechanisms should be in place to address any violations.
- 5.44 Openreach should be required provide support to downstream retail providers and consumers during the transition period, including clear communication about service expectations and timelines for network upgrades. This support can mitigate the risks associated with service degradation.
- 5.45 The risks associated with ineffective regulation in the transition from copper to fibre networks are multifaceted and significant. Ensuring a robust QoS regime for fibre products is essential to promote transparency, fair competition, and consumer protection. Maintaining service quality on copper networks during the transition period is equally important to safeguard the interests of consumers and competing downstream retail providers.
- 5.46 The successful migration to fibre networks depends not only on technological advancements but also on a regulatory framework that adapts to evolving market dynamics. Through these recommended measures, Ofcom can enhance its oversight and foster a telecoms market that benefits all stakeholders.



## 6. Regulatory accountability and effective regulation

- 6.1 Section 192 of the Act establishes the right to appeal decisions made by Ofcom during market reviews.<sup>109</sup> This allows individuals or entities affected by Ofcom's decisions to appeal to the Competition Appeal Tribunal (the “CAT”). The CAT is empowered to review these appeals and has the authority to refer specific price control matters to the Competition and Markets Authority (“CMA”) for determination.<sup>110</sup>
- 6.2 Under the Digital Economy Act 2017 (DEA)<sup>111</sup>, the standard of review for appeals moved away from a pure full merits review, where the appellate body could re-evaluate all aspects of the original decision, including factual findings, legal interpretations, and discretionary judgments. Section 194A of the Act now stipulates that the CAT must apply judicial review principles when assessing appeals against Ofcom's decisions.<sup>112</sup>
- 6.3 However, it is settled law that this is not a pure traditional judicial review, as it also incorporates the requirement that the “merits of the case are duly taken into account”.<sup>113</sup> This results in what has sometimes been referred to as ‘enhanced judicial review’ standard or ‘judicial review plus’.<sup>114</sup>
- 6.4 This shift in the standard of review has however led to a marked reduction in the number of appeals. The Government's 2023 paper on ‘Smarter Regulation’<sup>115</sup> notes “between 2010 – 2017, there were 42 appeals submitted [...], 7 appeals submitted since the move in 2017 [- 2023]”. Where once parties might have challenged Ofcom's decisions on substantive grounds under a full merits review, the enhanced judicial review's narrower focus has effectively dissuaded appeals. Appeals since the DEA have decreased to a handful, a stark contrast to the higher number of cases before this amendment.
- 6.5 The high threshold for mounting a successful appeal restricts stakeholders' ability to effectively both challenge and clarify Ofcom's decisions. Moreover, the significant costs associated with pursuing appeals further limit who can feasibly engage in this process. This is particularly impactful today when the reduced ability to influence regulatory decisions via the appeal process dissuades many from incurring such costs. Consequently, those with substantial engagements with the regulator and greater economic and political weight may have a potentially disproportionate influence. They are better positioned to absorb the costs and navigate the complexities of the appeal process, leading to an imbalance where certain market players wield more influence over regulatory outcomes.
- 6.6 While it is critical to maintain a degree of certainty in regulatory decisions to ensure stability and predictability in the market, there is a clear need for a balanced approach. The appellate process must be both accessible and sufficiently robust to address disputes in a timely manner, ensuring that errors or ambiguities can be resolved without undermining confidence in the regulatory framework or entrenching suboptimal outcomes for the market and consumers.
- 6.7 There is therefore a risk that accountability and transparency in decision-making are compromised, creating concerns about the regulator's unchecked discretion and the limited avenues available to address substantive regulatory grievances. The disparity in influence

<sup>109</sup> Section 192. Communications Act c.21. ([Link](#)).

<sup>110</sup> Section 193. Communications Act c.21. ([Link](#)).

<sup>111</sup> Section 87. Digital Economy Act c.30. ([Link](#)).

<sup>112</sup> Section 194A. Communications Act 2003 c.21. ([Link](#)).

<sup>113</sup> TalkTalk Telecom Group PLC and Vodafone Limited v Ofcom (BCMR 2019) [2020] CAT 8 (5 March 2020). Paragraph 120. ([Link](#)).

**See also:** Virgin Media Limited v Ofcom [2020] CAT 5. Paragraphs 58 – 59. ([Link](#)).

<sup>114</sup> Department for Business & Trade (2023) “Smarter Regulation: Strengthening the economic regulation of the energy, water and telecoms sectors: as regulated by Ofgem, Ofwat and Ofcom”. 22 November 2023. Pages 64 – 65. ([Link](#)).

<sup>115</sup> Ibid. Page 65. ([Link](#)).



among market players can lead to regulatory decisions that do not fully reflect the interests of all stakeholders, potentially undermining fair competition and consumer welfare.

## Accountability

- 6.8 To address these concerns, it is essential to explore other ways in which Ofcom can enhance its accountability through rigorous impact assessments, retrospective analyses of its decisions, and by learning from international examples of regulatory best practices.

## Impact assessments

- 6.9 Impact assessments are vital tools for regulators to evaluate the potential effects of their decisions on stakeholders and the market at large. We note that up until a few years ago, it was Ofcom's practice to include a detailed impact assessment in its consultation or decision documents to weigh up potential effects of its proposals in a measured and transparent way.
- 6.10 This aimed to be consistent with best practice and guidelines issued by government (then BIS) on developing regulatory impact statements.<sup>116</sup> Nowadays this has been reduced to single and/or cursory statements by Ofcom such as "This consultation represents our impact assessment". The difference between these two approaches is difficult to reconcile and also with Ofcom's duty to carry out impact assessments<sup>117</sup> in a way that "represent the best regulatory practice",<sup>118</sup> as required by under the Act.
- 6.11 Ofcom's current approach to impact assessments is set out in its "Impact assessment guidance" of 19 July 2023, where it states:

*"2.11 We will start thinking about the potential impact of a policy intervention in the early stages of a project. This will help us formulate a policy proposal in terms of whether and how we may want to intervene, taking into account the relevant legal framework. **We will continually consider and review potential impacts throughout a project and, where appropriate, revise our impact assessment as our thinking progresses.** All this work is consolidated in the consultation and statement. This ensures we are making the best decisions to further the interests of citizens and consumers.*

*2.12 Our policy-making and consultation documents will make it clear why we are considering or proposing to make certain choices. **An impact assessment forms an important part of this consultation process by identifying the impacts (in terms of any costs and benefits) we anticipate a proposal will have on different stakeholders and, where appropriate, how a market functions.** Our consultation will also give stakeholders sufficient detail so that they can respond. By doing this we ensure that the impact assessment can be scrutinised and adjusted as appropriate."* [emphasis added]

<sup>116</sup> See Section 8 Regulatory remedies and impact assessment – 128 pages. ([Link](#)).

<sup>117</sup> Section 7 Communications Act 2003 c.21.

<sup>118</sup> Section 3(3(b)) Communications Act 2003 c.21.

6.12 This approach was reflected in the WFTMR where Ofcom stated:<sup>119</sup>

*“3.5 The January 2020 Consultation and subsequent consultations set out in Table 3.1 above taken together constitute our impact assessment for the purposes of section 7 of the Act.”*

- 6.13 But this approach suffers from a fundamental flaw that fails to recognise the difference between policy development, achieved through assessing feedback received through consultation with an impact assessment which has the purpose of evaluating the potential effects of a final decision in a way that is taken in the round and includes an attempt to quantify those impacts.
- 6.14 Ofcom’s current approach is minimal and lacks transparency, often comprising brief considerations without substantial evidence to support their conclusions. This approach falls short of the expected standard for regulators and government departments, which typically require detailed analyses that justify decisions based on robust data and methodological soundness.
- 6.15 A thorough and robust attempt at quantification of costs and benefits that stakeholders may incur due to a regulatory decision is critical to a robust impact assessment. This includes direct financial impacts, such as compliance expenses for operators, as well as indirect effects like potential market distortions or reduced innovation incentives. Most importantly, Ofcom must assess the impact of its decisions (where it chooses to act or to refrain from intervening) on the effect it has ultimately on businesses and consumers.
- 6.16 By evaluating these costs, Ofcom can better understand how its regulations might affect different parties, from large telecoms firms to small businesses and consumers. This detailed analysis ensures that unintended negative consequences are identified and mitigated wherever possible.
- 6.17 Equally important is the clear articulation and quantification of the anticipated benefits of a regulatory decision. This involves demonstrating how the regulation will achieve specific objectives, such as enhancing consumer protection, promoting competition, or fostering technological advancement.
- 6.18 A comprehensive impact assessment should also explore various regulatory options, including the option of taking no action or different levels of price indexation. For each alternative, the costs and benefits should be quantified and compared. This approach allows for a transparent evaluation of which option offers the greatest net benefit or the most effective means of achieving policy goals.
- 6.19 Transparency in how decisions are made is crucial for building trust and accountability. Instead of providing brief explanations that merely acknowledge stakeholder input before dismissing it without substantial justification, Ofcom should offer detailed reasoning for its decisions. This means clearly explaining why certain stakeholder opinions or alternative proposals were not adopted, supported by evidence and analysis. By moving beyond simplistic rejections to in-depth discussions of differing viewpoints, Ofcom can show that it values stakeholder engagement and is committed to fair and open decision-making processes.
- 6.20 Overall, it seems that Ofcom’s current approach conflates consultations with impact assessments, which serve different purposes. We recognise that section 7 of the Act provides Ofcom with discretion to carry out an impact assessment in a form and on such matters that it considers appropriate, however this does not relieve Ofcom of its general duties to carry out its

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<sup>119</sup> Ofcom (2021) ‘Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021 – 2026. Volume 1: Overview, summary and structure’. 18<sup>th</sup> March 2021.Paragraphs 3.5 – 3.6, Pages 22 – 23. ([Link](#)).

regulatory functions in a way that is appropriate, proportionate, transparent and accountable or similar public law obligations.

#### *Ireland (2024)*

- 6.21 The Regulatory Impact Assessment (“**RIA**”) is a structured tool employed by ComReg to evaluate the potential implications of regulatory measures in the telecoms sector. ComReg applied this in its latest decision in the WLA market review<sup>120</sup>, where its primary purpose was to ensure that any regulatory intervention is necessary, proportionate, and aligned with market needs. Through the RIA, ComReg assesses the potential effects of regulation on competition, investment, and consumer welfare, ensuring that any measures-imposed address SMP without imposing unnecessary burdens on stakeholders.
- 6.22 The RIA included a comprehensive analysis of the effects of proposed regulatory measures on various stakeholders. It examined the impact on Service Providers (“**SPs**”), including the dominant operator Eircom and smaller competitors that depend on wholesale access to compete in the retail market.
- 6.23 The analysis also considered the perspectives of investors, evaluating how regulatory interventions might influence incentives to invest in broadband infrastructure. Additionally, the RIA assessed the effects on consumers, focusing on retail pricing, service quality, and the availability of advanced broadband services. ComReg also engaged with regulatory bodies, including the European Commission, to ensure alignment with EU regulatory standards and address concerns raised during stakeholder consultations.
- 6.24 The RIA was thorough and detailed, addressing both the current state and future evolution of the WLA market. It incorporated a granular analysis of market trends, such as the shift from copper to fibre networks, and accounted for geographic and technological differences in market conditions. The assessment evaluated the need for specific regulatory remedies, including access, pricing, and transparency obligations. Additionally, it explored potential competitive issues, such as exclusionary practices and margin squeezes.

### **Retrospective analysis of decisions**

- 6.25 Periodic retrospective analyses, or ex post evaluations, are common practices among regulators to assess the effectiveness of their decisions over time. Such evaluations help determine whether regulatory interventions have achieved their intended outcomes and allow for adjustments based on observed market developments. While Ofcom occasionally conducts ex post evaluations of its decisions, these instances are few and far between.<sup>121</sup> The infrequency of such comprehensive reviews limits the regulator's ability to fully understand the long-term impacts of its policies and to learn from past experiences.
- 6.26 While Ofcom publishes reports like the Connected Nations and Communications Market Reports, these tend to be fragmented and do not directly address the efficacy of specific regulations. They focus on market trends and statistics rather than evaluating whether regulatory interventions have met their strategic objectives. The lack of systematic ex post evaluations means that Ofcom may miss opportunities to refine its regulatory approach based on empirical evidence.
- 6.27 Ofcom should be encouraged to implement systematic ex post evaluations of its regulatory decisions. This would involve setting clear objectives for each regulation, establishing

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<sup>120</sup> ComReg (2024) ‘Commission for Communications Regulation (ComReg), Decision D05/24, Wholesale Local Access (WLA) and Wholesale Central Access (WCA) Market Review: Response to Consultation and Final Decision’ ComReg 24/07, 18 January 2024. Pages 696 – 715. [\(Link\)](#).

<sup>121</sup> Ofcom (2023) “Ex-post evaluation of our mobile switching reforms (2023). 10<sup>th</sup> May 2023. [\(Link\)](#) and Ofcom (2024) “An ex-post evaluation of mobile annual best tariff notifications and end-of-contract notifications”. 10<sup>th</sup> May 2024. [\(Link\)](#).

measurable indicators of success, and regularly reviewing outcomes against these benchmarks. By openly assessing the impact of its regulations, Ofcom can identify areas for improvement, enhance policy effectiveness, and build greater trust with stakeholders through demonstrated accountability.

#### *OECD ex post evaluations of regulation*

- 6.28 The Organisation for Economic Co-operation and Development (“**OECD**”) highlights<sup>122</sup> the crucial role of ex post evaluation in the regulatory policy cycle. This process involves assessing existing regulations to determine whether they are achieving their intended objectives and to identify any unintended consequences. Ex post evaluations are essential for ensuring that regulations remain effective, efficient, and relevant over time.
- 6.29 According to the OECD, ex post evaluations serve several key purposes. First, they assess the effectiveness of regulations, determining whether the original policy goals have been met. Second, they identify unintended consequences, including both positive and negative effects that may have arisen from implementation. Third, they inform future policymaking by providing valuable feedback for designing and implementing new regulations, fostering a continuous improvement cycle in regulatory governance.
- 6.30 To enhance the practice of ex post evaluation, the OECD recommends several measures. These include developing standardised methodologies to ensure the comparability and reliability of results, engaging stakeholders such as businesses, citizens, and other groups to gather diverse perspectives, and implementing oversight mechanisms to monitor the quality and effectiveness of evaluations. Such practices can promote accountability and transparency, ultimately improving the quality of regulatory frameworks.
- 6.31 By embracing these recommendations, governments can ensure that regulations remain effective and responsive to evolving societal needs. Ex post evaluations, when systematically conducted, serve as a vital tool for refining regulatory systems and achieving better policy outcomes.

#### *EU ex post evaluations of competition policy*

- 6.32 The EU places significant emphasis on ex post evaluations in competition policy to assess the effectiveness of interventions and guide future decisions. These evaluations analyse the actual outcomes of competition actions, such as merger controls, antitrust rulings, and state aid cases, to determine their impact on market dynamics and consumer welfare.
- 6.33 The European Commission's publication, Ex Post Economic Evaluation of Competition Policy<sup>123</sup>, outlines key aspects such as objectives, methodologies, and conditions for effective evaluations. It highlights the benefits of competition interventions, including consumer advantages, deterrent effects, and broader macroeconomic impacts like job creation and productivity growth.
- 6.34 Ex post evaluations aim to verify whether the market structures resulting from Commission decisions align with the economic goals of EU competition policy. They assess the accuracy and completeness of the underlying analyses and examine case studies across diverse sectors.

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<sup>122</sup> Organisation for Economic Co-operation and Development (2020) “Ex post evaluation of regulation: A tool for improving regulatory quality (OECD Publishing 2020)” ([Link](#)).  
 Organisation for Economic Co-operation and Development (2012) “Recommendation of the Council on Regulatory Policy and Governance” (OECD Publishing 2012) ([Link](#)).

<sup>123</sup> Link to reports. ([Link](#))

- 6.35 Methodologies for reviewing merger control decisions, for example, involve defining relevant markets, assessing competitive concerns, and evaluating the long-term impacts on market dynamics.
- 6.36 By employing these structured approaches, the EU ensures that competition policies remain effective, transparent, and beneficial for both markets and consumers. These evaluations enhance accountability and inform the continuous improvement of regulatory frameworks.

#### Concluding remarks on accountability

- 6.37 In the evolving regulatory environment, it is imperative for Ofcom to bolster its accountability frameworks. Enhancing impact assessments and embracing ex post evaluations are critical steps toward greater transparency and effectiveness.
- 6.38 While Ofcom does conduct ex post evaluations, the rarity of these assessments limits their potential benefits. By increasing the frequency and depth of such evaluations and learning from international examples, Ofcom can ensure its decisions are subject to rigorous scrutiny, ultimately fostering a more competitive and equitable telecoms market.

## 7. Annex 1 - Ofcom's approach to *ex ante* SMP regulation

### The SMP framework

- 7.1 The *ex ante* SMP framework in the UK, as administered by Ofcom under the Communications Act (the “**Act**”)<sup>124</sup>, establishes the regulatory principles and processes to identify, prevent and remedy the harms which arise from an operators position of SMP within the telecoms market.
- 7.2 SMP is defined similarly to dominance under competition law, indicating a position where an entity can operate independently of competitors and customers.<sup>125</sup>
- 7.3 As part of its application of the SMP framework, Ofcom conducts a forward-looking five-year ‘market review’ (a) to assess whether certain telecoms operators possess SMP in a relevant market and (b) where SMP is identified to introduce obligations on SMP operators (“**remedies**”) requiring them to address the potential harms their SMP creates.
- 7.4 At a high-level the market review process is split into three key stages:
  - 7.4.1 **stage 1:** defining product and geographic markets, which are then assessed as to whether they are susceptible to and require *ex ante* intervention;
  - 7.4.2 **stage 2:** identifying whether an operator has SMP in the relevant defined market; and
  - 7.4.3 **stage 3:** where an entity is found to have SMP, designing and implementing remedies to address the harms this may create for competition in the wider market.

### Ofcom's strategy in the WFTMR

- 7.5 In its Strategic Review of Digital Communications (DCR) in 2016 Ofcom set out how it intended to exercise its functions to regulate communications markets. This was framed in accordance with its duties, where it detailed its intention to regulate to encourage large-scale deployment of new full-fibre networks both to homes and businesses, drive widespread availability of competing ultrafast broadband services and support the roll out of 5G networks.<sup>126</sup>
- 7.6 Guided by the Government's policy as provided in its Future Telecoms Infrastructure Review and subsequently affirmed in its Statement of Strategic Priorities (“**SSP**”)<sup>127</sup>, Ofcom's strategic policy focus in this market review was to (a) incentivise Openreach and altnets to invest in gigabit-capable networks, thereby fostering competition in wholesale telecom markets', and (b) pursuant to its general duties, promote and protect consumer welfare.
- 7.7 To achieve these objectives, Ofcom tailored its approach by setting differential regulatory obligations in markets where competition varied significantly. Specifically, it aimed to encourage infrastructure-based wholesale competition in areas with existing or potential competition while ensuring Openreach continued to support downstream providers in less competitive areas.
- 7.8 Ofcom's last major market review in the wholesale fixed line market was its Wholesale Fixed Telecoms Market Review (“**WFTMR**”). The WFTMR was a major step-change in the way Ofcom

<sup>124</sup> Communications Act 2003 c.21.

<sup>125</sup> Section 78. Communications Act 2003 c.21.

<sup>126</sup> Ofcom (2015) ‘Digital Communications Review’. 11<sup>th</sup> March 2015 ([Link](#)) and Ofcom (2016) ‘Initial conclusions from the Strategic Review of Digital Communications’. 25<sup>th</sup> February 2016 ([Link](#)).

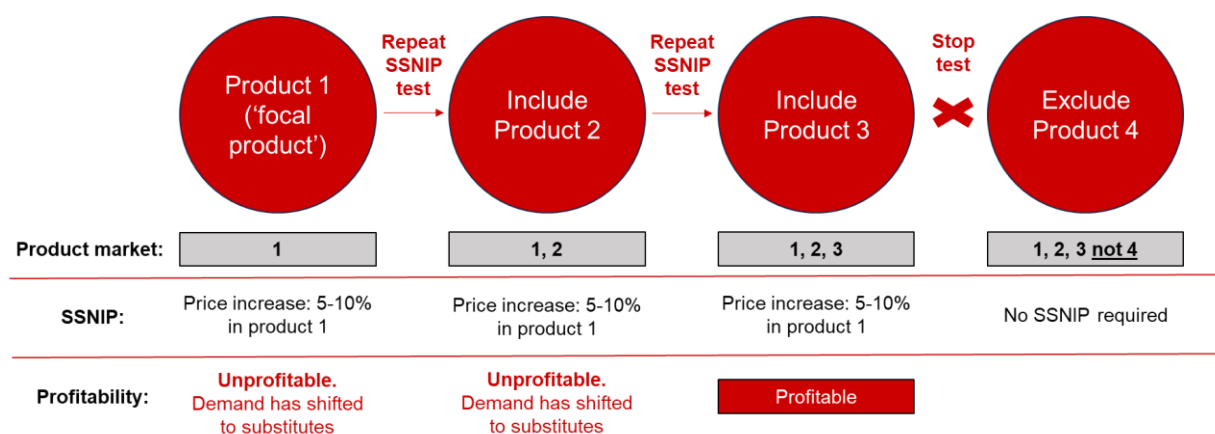
<sup>127</sup> DCMS (2018) ‘Future Telecoms Infrastructure Review’. 23<sup>rd</sup> July 2018 ([Link](#)), DCMS (2019) ‘Statement of Strategic Priorities (SSP)’. 18<sup>th</sup> July 2019 ([Link](#)).

had previously conducted its market reviews, bringing together previously siloed applications of the SMP framework<sup>128</sup> so to as create a more holistic approach to regulation and one which was reflective of the multi-service networks which were being built to address different verticals and customer groups.

## Product market definition

- 7.9 The product market is typically determined by analysing demand- and supply-side substitution, using a hypothetical monopolist test to assess whether a small but significant non-transitory price increase (“SSNIP”) would lead to customers switching or new suppliers entering the market.
- 7.10 The test identifies a “focal product”<sup>129</sup> from which the SSNIP is applied and assessed for substitution and is used to define the product market, grouping products or services used for similar purposes, characteristics, pricing or end-use.

Figure 3.1 – simplified and linear stylised example of demand-side substitution



Source: Wiggin

- 7.11 As noted above, Ofcom undertook a holistic review of fixed line telecom markets in the WFTMR, consolidating its approach across various sectors traditionally reviewed separately. Key markets reviewed included the Physical Infrastructure Market (“PIM”) for ducts and poles, the Wholesale Local Access (“WLA”) market for broadband services, and the Leased Line Access (“LLA”) market for high-capacity business connectivity. Ofcom also examined the Inter-exchange Connectivity (“IEC”) market for backhaul services and distinct markets for analogue (“WFAEL”) and ISDN-based telephony, and the Wholesale Broadband Access (“WBA”) market.

## Geographic market definition

- 7.12 Geographic markets are then defined by areas with similar or homogenous competitive conditions, accounting for variations in infrastructure, such as urban versus rural markets.

<sup>128</sup> In the ‘Fixed Access’ or ‘Wholesale Local Access’ market reviews which focused on network services, including broadband, in the residential markets; the ‘Business Connectivity’ market which focused on higher grade enterprise network services; and the ‘Physical Infrastructure’ market which focused on passive and physical telecoms infrastructure.

<sup>129</sup> OFT (2004) ‘Market Definition’. OFT403. December 2004. ([Link](#)).

See also: European Commission (2018) ‘Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services’. C159/01. May 2018. ([Link](#)).



- 7.13 In the WFTMR Ofcom considered whether to split the WLA market into three areas (i.e. sub-national markets) but ultimately identified two areas based on a forward-looking assessment of competition levels: Area 2 (limited wholesale competition but prospectively competitive)<sup>130</sup>, and Area 3 (Openreach only and with no prospect of wholesale competition)<sup>131</sup>.
- 7.14 “Area 1” was initially identified as comprising postcode sectors with VMO2 and CityFibre existing networks besides Openreach’s, suggesting the highest level of competition. These were very limited in number, covering only about 0.2% of UK premises (15 postcode sectors initially, rising to 34 by 2020). Although competitive conditions in these sectors were distinct, Ofcom decided not to maintain Area 1 as a separate regulatory category. The competitive characteristics of these sectors were considered close enough to Area 2 that they could be folded into it. As a result, these competitive postcode sectors were included under Area 2 in the WFTMR.
- 7.15 What is particularly notable about Ofcom’s approach to the WLA market is its focus on VMO2 and CityFibre’s coverage as primary metrics for assessing competitive constraints on BT, in effect excluding the presence of other altnets. This decision was based on Ofcom’s assessment that these altnets lacked the scale and reach to exert a “material and sustainable” competitive constraint on BT.<sup>132</sup>
- 7.16 For the LLA market, Ofcom split the geographic markets further: the Central London Area (“CLA”), marked by strong competition among multiple leased line providers; High Network Reach (“HNR”)<sup>133</sup> areas, urban districts with at least two competitors besides BT, using a “BT+2” threshold; and Areas 2 and 3 mirroring the WLA market segmentation above<sup>134</sup> and therefore based on the expected presence of VMO2 and CityFibre in that area.

### Three criteria test

- 7.17 In assessing the relevant markets, Ofcom must apply the cumulative ‘three-criteria’ test<sup>135</sup> to identify markets suitable for *ex ante* regulation, evaluating high and non-transitory barriers to entry, the likelihood of natural competition emerging based on market structures, and the adequacy of general competition law to address market failures. Ofcom may<sup>136</sup> also choose to refer to the list of markets susceptible to *ex ante* regulation in the European Commission’s 2020 Recommendation<sup>137</sup>.

<sup>130</sup> This area included postcode sectors with existing or expected material competition. VMO2 and CityFibre’s existing or planned networks covered at least 50% of premises within these sectors, providing “material and sustainable” competitive pressure.

<sup>131</sup> this area contained postcode sectors where competition from CityFibre and/or VMO2 was limited or unlikely, typically rural or less populated regions. Here, BT was expected to retain significant market power, warranting stronger regulatory oversight.

<sup>132</sup> Ofcom (2021) ‘Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 Volume 2: Market analysis’. Statement. March 2021. Paragraph 7.23. [\(Link\)](#). “We have decided to define different geographic markets according to our view of where there is likely to be potential for material and sustainable competition (Area 2) and where this is unlikely (Area 3). This seeks to differentiate areas where there is likely to be potential for competition on a sufficient scale to have a material and sustainable competitive impact on Openreach (though not necessarily to the degree that BT would no longer have SMP). For the reasons explained further below, we have determined the areas where there is likely to be potential for material and sustainable competition by reference to the areas planned to be covered by 2026 by Virgin Media or CityFibre. We recognise that there may be build by other competitors outside of Area 2, but we expect the competitive impact of these smaller expansions will be substantially less.”

<sup>133</sup> this category included business districts in large cities outside the CLA where at least two competing leased line networks were present. Ofcom’s boundary for the HNR Area was based on a “BT+2” model, ensuring that 65% of businesses in a postcode sector were within 50 meters of at least two competitors.

<sup>134</sup> Ofcom (2021) ‘Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 Volume 2: Market analysis’. Statement. March 2021. Paragraph 7.24. [\(Link\)](#). “In previous market reviews we have defined the geographic markets for WLA and leased lines independently. However, as noted, in the period covered by this review we expect the potential for new network build to be much more dynamic than in the past. We expect Virgin Media and CityFibre to provide material and sustainable competition to BT in both the WLA and LL Access markets, and have therefore set the boundary for Area 2 in both product markets by reference to the expected presence of these networks.”

<sup>135</sup> Section 79(2B). Communications 2003 c.21.

<sup>136</sup> Section 79(2ZA) and (6A). Communications 2003 c.21.

<sup>137</sup> European Commission (2020) “Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code”. L439/23. December 2020. [\(Link\)](#).



- 7.18 In the WFTMR, Ofcom determined that the WFAEL, ISDN Exchange Lines, and WBA markets no longer satisfied the three-criteria test, primarily due to technological evolution and increased competition meant that there was no justification for ex ante regulation. For WFAEL and ISDN Exchange Line markets, the transition to IP-based systems and widespread deployment of fibre networks significantly reduced reliance on legacy narrowband technologies, eroding traditional barriers to entry. Substitutes like VoIP and FTTP-based services now provided effective alternatives, diminishing Openreach's market power.
- 7.19 Similarly, in the WBA market, fibre rollouts and advancements in virtual unbundling (VULA) eliminated the high sunk costs previously associated with accessing smaller exchanges, enabling new entrants to compete more effectively. With growing competition and no persistent barriers, Ofcom concluded that regulation in these markets was no longer necessary and removed all obligations.

## Assessing competitive conditions and identifying SMP

- 7.20 The Act provides<sup>138</sup> that, in considering whether to make or revise a market power determination, Ofcom may have regard to European Electronic Communications Code (“EECC”)<sup>139</sup> materials relating to market analysis or the determination of what constitutes significant market power, such as the European Commissions (“EC”) SMP Guidelines<sup>140</sup>.
- 7.21 These factors include market shares<sup>141</sup>, barriers to entry and expansion, size and scale advantages, control over unique infrastructure, technological and commercial superiority, limited countervailing buyer power, access to capital, service diversification, network effects, vertical integration, distribution networks, and long-term contracts that may foreclose competition.<sup>142</sup>
- 7.22 Ofcom found BT to have SMP in the PIM, WLA and LLA markets in Areas 2 and 3, and HNR areas, and IEC market in BT-only and BT+1 exchanges. These findings were driven by BT's extensive network reach, high barriers to entry, and limited competition from altnets.
- 7.23 However, SMP was not found in the CLA in LLA market or at BT+2 exchanges in the IEC market. In the CLA, 94% of demand sites had access to two or more providers, reflecting in Ofcom's determination evidence of robust competition from multiple leased line networks, which therefore constrained BT's market power. Similarly, at BT+2 exchanges, the presence of multiple competing providers provided sufficient competitive pressure to mitigate BT's influence, leading Ofcom to conclude that regulation was unnecessary in these areas.

## Designing remedies

- 7.24 Ofcom can impose regulatory obligations or remedies on entities found to hold SMP in a specific market. These remedies address competition issues identified during market analysis and may include transparency, non-discrimination, accounting separation, access obligations, and pricing controls. Each measure is designed to be appropriate and proportionate, meeting statutory requirements for objective justification, proportionality, non-discrimination, and transparency.<sup>143</sup>
- 7.25 Ofcom imposed general remedies across all SMP markets to ensure fair competition and transparency. These included obligations for Openreach to provide network access on

<sup>138</sup> Section 78 and Section 79(2BA). Communications Act 2003 c.21.

<sup>139</sup> European Parliament and Council (2018) 'Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code'. 2018/1972, L321/36. December 2018. ([Link](#)).

<sup>140</sup> European Commission (2018) 'Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services'. C159/01. May 2018. ([Link](#)).

<sup>141</sup> Ibid. Paragraph 55. ([Link](#)).

<sup>142</sup> Ibid. Paragraph 58. ([Link](#)).

<sup>143</sup> Section 47(2). Communications Act 2003 c.21.

reasonable terms, publish reference offers (“**ROs**”), maintain transparent pricing and service terms, and adhere to quality-of-service (“**QoS**”) standards. Additional measures like Equivalence of Inputs (“**EOI**”) and No Undue Discrimination (“**NUD**”) seeks to ensure equal treatment for all providers, while regulatory financial reporting promoted accountability and oversight.

- 7.26 In the PIM, Openreach was required to grant access to ducts and poles via its PIA product, clear blockages, and provide ancillary services like infrastructure maps, supported by cost-based charge controls. In the WLA market, Openreach had to offer access to MPF, SLU, and VULA services with price caps on copper-based and entry-level fibre products. A “stop sell” policy for copper services was introduced in areas with high fibre coverage, paving the way for deregulation. For the LLA market, remedies included access to Ethernet and WDM leased lines, a regulated Dark Fibre Access (“**DFA**”) product in Area 3, and charge controls in Areas 2 and 3, with fair pricing obligations in HNR areas.
- 7.27 In the IEC market, Openreach was mandated to provide access to leased lines and a regulated Dark Fibre Inter-Exchange (“**DFX**”) product for backhaul between BT exchanges, with price caps in BT+1 and BT Only areas to address BT’s dominance.

## Copper retirement

- 7.28 Ofcom’s copper retirement policy, gradually reduces regulatory obligations on copper services, shifting focus to fibre as deployment expands. The transition is structured in three stages. First, a “stop sell” policy is implemented in areas with 75% fibre coverage, with Openreach required to give 12 months’ notice. Second, charge controls on copper services are removed once a BT exchange area is considered complete, with fibre available to all premises (except those with legitimate constraints) and a two-year migration period following the “stop sell”. Finally, all copper service regulations are removed in areas with full fibre availability.

## Regulation of special terms

- 7.29 Ofcom introduced measures to regulate the terms Openreach can offer in the market to prevent anti-competitive practices and promote fair competition. These include a prohibition on geographic discounts for VULA and MPF rental prices in WLA Areas 2 and 3, as well as Ethernet and WDM services in LLA Area 2. However, geographic discounts are permitted in LLA Area 3 and HNR areas.
- 7.30 Openreach is required to notify Ofcom of any commercial terms tied to volume or service range conditions and must provide 90 days’ notice of changes. Openreach may also apply for Ofcom’s consent to use geographic pricing where otherwise prohibited, enabling case-by-case assessments. Ofcom may engage stakeholders and consult the market on the potential effects of such terms, as demonstrated in its recent review of Openreach’s FTTP ‘Equinox 2’ pricing offer.<sup>144</sup>
- 7.31 Ofcom also issued guidance against commercial practices likely to hinder altnet expansion, such as exclusivity discounts, retroactive rebates, and tying arrangements across geographies or between regulated and unregulated areas and services.

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<sup>144</sup> Ofcom (2023) ‘Openreach proposed FTTP offer starting 1 April 2023 (Equinox 2)’. 24<sup>th</sup> May 2023. [\(Link\)](#).

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