



Open Fiber's answer to the public consultation on the "BEREC -Draft Report on a consistent approach to migration and copper switch-off"

Introduction

We welcome the opportunity to express our views on the Draft Report on a consistent approach to migration and copper switch-off.

In this document Open Fiber ("OF") presents in the following sections its manifesto on switch-off programs regulation and our specific comments on the BEREC report.

1. OF manifesto

In this section, we would like to share a general observation concerning the role of migration and copper switch-off for the implementation of **art 3 EECC**, pursuant to which the Commission, BEREC, the Member States and their NRAs should *"promote connectivity and access to, and take up of, very high-capacity networks including fixed, mobile and wireless network, by all citizens and businesses of the Union"*. Such an ambitious goal will accordingly be addressed within the BEREC work programme 2022, specifically under the "Strategic priority 1: Promoting full connectivity".

The migration from legacy infrastructures to VHCNs represents the most relevant competitive process of the next decade in the telecom sector and a necessary step to achieving the European connectivity goals as stated in the EECC.

The urge to foster investment in VHC networks to achieve the objectives of the **Digital Compass 2030** requires to pay specific attention to both i) the promotion of deployment and adoption of



new VHCNs and ii) the definition of fast and effective copper switch-off plans that can evolve in a fairly competitive market.

Concerning the latter issue, OF believes that the migration process should be driven by an overall perspective, which considers the actual competitive structure of the market and therefore involves all market players in its definition.

As known, in the recent years almost all European countries faced up significant market developments due to the entry of new operators that started to build their own full fibre networks, utilising both private and public funds. Some of these new entrants have already gained a considerable weight. For example, in Italy Open Fiber boasts the most extensive FTTH network, with a connection speed of up to 1 Gigabit, in all Italian regions with both proprietary investments and public funds¹. Thanks to such investments, Open Fiber is currently the third largest FTTH operator in Europe, despite being established only in December 2015.

This structural development, that is proving very effective to foster both VHC networks rollout and network competition, represents a major challenge to existing network monopolies. These are strongly reacting to such an unprecedented competitive challenge, which undermines their ability to maintain their dominant position that is strictly based on their control of the network and of its evolution.

Despite such important changes, the switch-off and consequent **migration status quo process and consisted approach suggested in the Draft is still the one where customers migrate from the incumbent's copper network to the incumbent's fibre network.** So far, the switch-off program has been considered as an exclusive issue for SMP operators and their wholesale clients and the impact of these processes on network competition at wholesale level has not

¹ Open Fiber was the winner of the three tenders called by Infratel Italia S.p.A., the in-house company of the Ministry of Economic Development, for the development of an optical fiber infrastructure in over 7600 small municipalities in 20 Regions (the so-called white areas).



been considered at all. Alternative operators are considered only as the ones that use wholesale access services of the SMP.

Conversely, **OF considers this as a “outdated” approach, which is strongly unsuitable in the light of the main goals of the EECC and of the new market structures for the promotion of infrastructure competition.**

The design of the switch-off and the following migration process should indeed guarantee the migration of end customers from the legacy incumbent’s copper network to any VHC network, whether of the incumbent or of any alternative new infrastructural operator. The migration process should indeed ensure some form of “equality of treatment” between the migration towards the NGA incumbent’s network and the migration towards the NGA networks of any new entrant, in order to allow the effective achievement of the European connectivity objectives by 2030.

Moreover, OF believes that the switch-off programme should not be considered as a need for the incumbent to replace out of date technologies and cannot be even more driven by the minimization of SMP operators’ costs. SMP operators’ cost reduction could be a desirable result but should not be exclusive or central.

In this new context, regulation should address two main side effects of switch-off programs: i) the disincentive of incumbents to phase out copper assets that are still able to allow significant gains and ii) the incentive of incumbents to target switch-off programs in the areas where competition is eroding or will erode their market power. To address the issue of incumbents’ resistance, a new approach based on the compensation of stranded costs should be used (see below).

In addition, it is important to bear in mind that migration processes led by incumbents may often reveal to be designed to allow the incumbents take advantage of the migration process

and to maintain/strengthen their dominant position in the market. Such is the case of specific migration offers promoted by incumbents, which are aimed at lock-in customers on their own networks, avoiding the migration to alternative infrastructures, even if the latter are at the same time more efficient and more performing, or worse, they are already deployed and available for the end-customers.

To address the issue of unfair competition risks by SMP operators', NRAs should define key criteria to trigger the switch-off of specific areas on the basis of the take up rate of VHCN services already achieved in such areas, and the presence of NGA networks for end-customers, irrespective of the ownership of such networks (SMP and /or ANO).

Finally, migration programs should not be imposed to end-customers by SMP operators. Areas where the market has revealed a higher interest (as shown by higher take up rates) towards digital and VHCN services shall be preferred. After verifying the availability of VHCNs, an alternative network shall be treated as the SMP VHC network. To compensate the damages of the switch-off process for the SMP operator in areas where an alternative network is present and the SMP operator has not rolled out, fully or in part, its own VHC network, the use of stranded costs shall be considered.

Following criteria to be set by NRAs, SMP operators should provide a proposal of switch-off target areas based on a national analysis of the market (i.e. costs and competitive conditions). A rational choice of selected areas, to be compliant with the NRA's criteria should emerge from the SMP operator's proposal. Such an approach would reduce the arbitrariness of the SMP operator and its ability to target areas with the aim to trigger anticompetitive effects.

OF believes that the role of the NRA should be even more effective than compelling the migration from copper networks to any fibre network that has been already deployed, whether of the incumbent or of another operator, under the same conditions.

A striking example of how the regulation adopted so far has not led to the desired results is the Italian case in which, although the switch-off process has been widely regulated, it is struggling to take off and this is slowing down the take up of VHCNs significantly.

In particular, in Italy the process failed on the following elements: i) the incentives by the incumbent to carry out the switch-off programs as indicated, for approval, to the NRA on the occasion of the latest market analysis; ii) the (non) consideration of the competitive landscape and, in particular, the presence of an alternative infrastructure (FTTH) in some areas of the country where the retail operators may be interested to migrate their customer base; iii) the role of the NRA in monitoring the compliance of the decommissioning initiatives with the regulatory conditions indicated within the market analysis, especially with reference to the necessary requirements to announce the decommissioning of a main station ; iv) the low take up rate (and relative growth prospects) of VHCN services.

Please see the Annex 1 to our contribution, in which we provide a brief description of the Italian experience on the decommissioning process.

Furthermore, we would like to raise some issues concerning the new tenders for the public funding of Gigabit networks in grey areas published in 2021 by Infratel Italia. Among other things, the tenders provide that no bidder can be the recipient of State aid in more than approx. 50% (maximum of 8 lots out of 15) of the regional areas and, as a result, there is a strong risk that in the areas where the incumbent will not win the tenders (and therefore deploy the VHCN networks), the switch-off initiatives would be used in an anti-competitive way to reduce the market penetration of the winner (OF or any other local operator). The risk is even more critical if we consider that, as confirmed by the BEREC in the Draft Report (see table 12, page 48), Italy is the only Member State where the migration is mainly towards FTTC solutions. Therefore, the migration initiatives taken by the incumbent in the above areas, besides having an anti-competitive purpose, would also involve the adoption of a sub-optimal

technology (i.e. the FTTC, compared to the FTTH owned by the winner), entail a distorted use of public funds as a result and seriously damage the whole community. It is an issue that the BEREC and the NRA should take into account.

All the above shows that **a consistent European approach is needed and it should insist both on a procompetitive design of the process and on the necessity to carefully monitor the ways in which incumbents work out the migration processes, in order to i) safeguard the alternative operators' network/investments, ii) maximise consumers' welfare and iii) increase the take up of VHCNs; iv) minimise the costs for the industry, allowing the SMP operator to decommission legacy services, by taking into account the needs of ANOs that buy such services at wholesale level and the needs of end-customers to adapt to the new/more performing technologies.**

Moreover, in order to overcome incumbents' resistance towards switch-off programs that prioritise social welfare, without allowing them to pursue their own interests, **we believe that the granting of public subsidies to the incumbents would represent an effective solution to incentivise the copper switch-off. Subsidies would cover the stranded costs, thus they would consist of grants able to compensate the loss of copper assets caused by the switch-off, where and when available. The amount of stranded costs should be decided based on the residual value of copper assets and the related cost of maintenance.** This topic could be further considered in the review of the *"Guidelines on State aid for broadband networks"* among the other measures aimed at increasing the take up of VHC services (i.e. voucher schemes) Finally, a more effective policy initiative should be carried out to raise awareness among citizens and encourage the purchase of ultra-broadband services. The NRAs should have an active role in driving the regulatory action in line with the EU and national objectives. OF suggests, for instance, the following measures, which could be put in place by the NRAs to encourage a natural switch-off path:

- immediately define a hard deadline for its completion (for example, 2030, in line with the EU connectivity targets);
- provide (and control) that, starting from the date the decommissioning of a main station is announced, i) new activations on copper lines will not be possible and ii) the costs of termination of copper lines will be eliminated;
- provide a cost model which, on the basis of the gradual decrease of traffic volumes, results in the increase of the prices linked to the copper lines (rents);
- provide an *una tantum* contribution for each line migrated to VHCN networks (if done after “X” years”) owned by ANOs;
- provide incentives to increase the efficiency of main station (such as CO2 certificates).

2. Specific comments on the BEREC Draft report

Our following comments focus on the main issues on which we suggest some more in-depth reflection and, hopefully, significant changes.

1. The Draft provides an exhaustive description of ANOs positions. However, OF would like to underline that the ANOs positions reported are only related to cases of ANOs hosted within the incumbent’s main stations that are subject to switch-off. The positions of ANOs that compete at wholesale level with the incumbent are not reported and considered by BEREC.

On the contrary, we deem the impact assessment of switch-off projects on ANOs that compete at wholesale level crucial, since with switch-off projects, incumbents can pursue predatory conducts, such as crowding out investments by alternative operators, discouraging investments in selected areas and/or diminishing the investment profitability even below the hurdle rate.

2. The Draft Report does not report any case of switch-off projects that are entirely unexecuted or delayed. In particular, BEREC did not investigate the actual progress of the switch-off plans declared by the incumbents.

On the contrary, any delays in the migration process should be taken into account (i.e. in Italy, Telecom Italia announced a plan that still has to be implemented) due to the relevant external impact that they may have on the market (buyers, competitors and end users).

Please note that OF has often reported to the NRA the importance and urgency of a concrete commitment by the incumbent to ensure the correct application of the decommissioning process approved in the market analysis and highlighted the need to involve the operators through a public consultation for the definition and the review of the general principles (and the technical specifications) for the migration of a plant. We have also underlined the importance to operate within a framework of certain, stable and shared rules, but our requests have not been considered at all., On the contrary, with Resolution no. 99/21/CONS, the Italian Regulatory Authority proposed the modification of the criterion envisaged for the determination of the notice periods for shutting down a main station, moreover in a final phase of the regulatory period to which the market analysis resolution refers. So far, AGCom has just authorised the decommissioning of the first 62 main stations subject to the switch-off plan by TIM (without taking into account the verifications previously carried out by the same Authority on the compliance with the regulatory provisions).

3. BEREC Draft Report assesses the impact of switch-off plans exclusively mentioning the change of CPE as the main impact of switch-off on end-customers.

We believe that there are other significant impacts on end-customers besides the change of CPE, that need to be better investigated. In the stakeholders' involvement,

we believe that associations of end-customers should play a significant role, which has not happened so far.

4. Finally, the Draft Report has not addressed the issues of criteria and public processes used to select the areas of switch-off plans. As mentioned in the report for the case of Spain and underlined by Open Fiber, switch-off plans can distort competition. To avoid this, the criteria used to select the areas need to be transparent and public. This would reduce the incumbent's arbitrariness and thus the chance to execute or only announce a switch-off plan with the aim to distort competition.

Annex 1 –Italian experience concerning decommissioning process

In Italy the process failed on the following elements: i) the incentives by the incumbent to carry out the switch-off programs as indicated to the NRA during the latest market analysis; ii) the (non) consideration of the competitive landscape and, in particular, the presence of an alternative infrastructure (wholly FTTH); iii) the role of the NRA in monitoring the compliance of the decommissioning initiatives with the regulatory conditions indicated within the market analysis, especially with reference to the necessary requirements so that decommissioning of a plant can be announced; iv) the low take up rate (and relative growth prospects) of VHCN services.

First of all, the only notice made by the incumbent (TIM) on its decommissioning plan is related to 62 main stations, an extremely limited number compared to the 6.128 that the SMP operator had originally indicated it would decommission by 2021².

Moreover, the execution of the plans has not taken into account the presence of an already available alternative FTTH infrastructure (not owned by the incumbent), in many areas of the

² It seems necessary to underline that these main stations are mainly located in areas of the country with a low percentage of commercially migrated customers.



country. Those are the areas where the migration process should be targeted first. Where an FTTH network have been rolled out and sold to a significant amount of end-customers *ceteris paribus*, the unit cost per active line of the SMP operator's copper service will increase significantly and the switch-off is more desirable from a social point of view.

As said, OF believes the incumbent should adequately communicate to its clients the best connectivity solutions available on the market (including FTTH not owned by the incumbent itself).

On the monitoring activity, the NRA did not carry out the appropriate verifications of the compliance with the thresholds set for the notification period and decided to update the regulatory conditions at the end of a regulatory period, due to the changed competitive context in which the decommissioning plan would take place.

Finally, on the take up rate, the penetration rate in the so-called "white areas" is extremely low: possibly, one of the main reasons, is that the incumbent (which serves almost all the customers in these areas) has not adopted the publicly subsidised network, does not intend to adopt it and is putting in place all the tools to avoid doing so in the future.