

INCA response to:

Ofcom's  
Copper Retirement  
consultation

November 2020

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## 1 Introduction background

### 1.1 Introduction

1. INCA welcomes the opportunity to respond to Ofcom's copper retirement consultation. Many of our members build competing fibre networks and the processes and controls for how Openreach can withdraw its copper-based services, the migration arrangements it sets up with its wholesale customers and how end-customer informed about the changes to their existing and potential alternative products.
2. INCA is extremely concerned that Ofcom appears to consider that by limiting Openreach's ability to do tactical part-builds in locations to deter competitive entry, they have addressed all relevant issues relating to the impact on competitive fibre deployment from the Openreach copper retirement programme. We hope that the points raised in this response will result in more active engagement by Ofcom in the issues described and perhaps industry-wide fora to develop solutions.

### 1.2 About INCA

3. INCA is a trade association. Its members are supporting, planning, building and operating sustainable, independent and interconnected full fibre and wireless networks that advance the economic and social development of the communities they serve and permit the provision of applications and services through open competition, innovation and diversity.
4. INCA's aims are to:
  - support the development of sustainable independent networks through collaboration on the provision and procurement of products and services and adoption of common standards.
  - support collaboration between members to create new, independent digital infrastructure that can be shared by operators and suppliers.
  - support mutual trading between members.
  - represent the interests of independent networks.
  - promote the advantages and successes of independent networks.
5. INCA has more than 150 members, including: network owners, operators and managers; access and middle mile networks; public sector organisations actively promoting the development of 21st century digital infrastructure; vendors, equipment suppliers, and providers of services that support the sector.
6. Although this response focuses primarily on the conditions for building competing fibre networks, many of INCA's members build both fibre and wireless networks or wireless networks only. It is important that Ofcom does not focus only on the benefits of fibre networks and effectively ignore the benefits of very high speed and high quality fixed wireless networks.

### 1.3 Background

7. INCA is pleased to present its response to the Copper Retirement – conditions under which copper regulation could be completely withdrawn in ultrafast exchanges consultation (the Copper Retirement Consultation), which is a follow-on consultation to the wholesale fixed telecoms market review (WFTMR) issued in January 2020, and to the “Copper Retirement - process for determining when copper regulation can be removed Consultation”, which closed on September 3<sup>rd</sup> 2020.
8. The WFTMR and its associated consultations are of critical importance to INCA’s members and the conditions on which Openreach could retire its copper network and the communications to support that process are of particular concern.
9. In the January WFTMR consultation (and the subsequent first copper retirement consultation launched in July this year), Ofcom’s working assumption was that Openreach would not commence the actual withdrawal of copper services (and the physical copper network) until during the next market review period, starting April 2021.
10. Since then, Openreach has stated that it believes it could start the copper retirement process earlier and has proposed amendments to the previously proposed copper retirement schedule and process to enable it to give 2 years notice of copper withdrawal at the time price regulation is removed from copper-based products and services.
11. Ofcom now proposes to partially accommodate Openreach’s request, with the addition of some safeguards to ensure that Openreach cannot issue the notice to withdraw copper-based services in an exchange area unless only 10% or less of customers in that exchange area remain on copper-based services.
12. INCA understands the need for a transparent process for Openreach to retire its copper services and physical assets, and, on the face of it, it seems that Ofcom’s proposed processes and timeframes are reasonable. INCA has no intention to in any way obstruct the efficient migration to fibre for Openreach.
13. INCA’s main concern, however, is that almost all of Ofcom’s measures to prevent Openreach from using the copper retirement process to harm competition or end users is focused on the protection of downstream operators that use the Openreach platform to deliver their services to customers, and on protecting vulnerable customers, to the exclusion of protecting Openreach’s infrastructure-based competitors from harm caused by Openreach behaviour (and actions by operators using the Openreach platform) during the copper retirement process.
14. This response therefore focuses on issues that may be faced by investors in and operators of competing fibre networks.

## 2 Ofcom’s concerns relating to infrastructure competition

15. Ofcom has stated that it considers that only allowing Openreach to issue a stop sell notice for locations where it intends to have 75% FTTP coverage by the expiry of the 12-month notice period, this should deter Openreach from tactical part-deployment in locations

where it thinks competing operators may deploy new fibre networks in advance of Openreach's plans to do so.

16. INCA appreciates that the 75% coverage threshold would mean that Openreach would not be able to issue stop sell notices in locations where it achieves that level of coverage, it is, however, by no means certain that this will deter Openreach from undertaking small tactical fibre deployments to deter competitive entry. We certainly do not believe that Ofcom can consider that it has addressed all relevant and valid concerns in relation to the impact of copper retirement on competitive fibre investment in the UK.

### 3 Additional concerns from infrastructure builders

17. In this section we will explain the severe concerns our members have in relation to how the Openreach copper retirement process will impact the viability of their existing and planned operations. Our concerns fall into four main categories:

- Qualifying FTTP coverage;
- End customer communications;
- Openreach incentive programmes; and
- Potential customer lock-in via fibre migration

18. We discuss each of those below.

#### 3.1 Qualifying FTTP coverage

19. The entire copper retirement process as designed by Ofcom is based on Openreach FTTP deployment and does not discuss the scenario where an altnet deploys FTTP in an exchange area either as the only fibre network in that location or in advance of the Openreach deployment.
20. We understand that, in a large number of exchange areas, it will be Openreach deployment that will trigger the stop sells and retirement notices, but it is important that Ofcom understands that there will be situations and locations in which Openreach will not deploy fibre – whether for entire or parts of exchange areas.
21. Unless the process caters for the possibility that an altnet may be the only FTTP network operator in an exchange area (or part of an exchange area), this would leave Openreach in a state of limbo, in which it would have a perpetual obligation to operate its copper network, despite the exchange potentially being 100% covered by FTTP.
22. INCA, has in the past argued that there needs to be a provision in the copper retirement process that allows Openreach to issue a stop sell notice for a time when it believes 75% of an exchange area is covered by FTTP, even if that FTTP deployment is undertaken by a provider other than Openreach. There would be no obligation on Openreach to do so, but Openreach should have the option of doing so.

23. Not enabling altnet FTTP coverage to trigger a stop sell notice would be to deny the possibility that an altnet may be the only FTTP provider in an exchange area, and Ofcom has assured INCA that it understands that this will most likely be what happens in some locations. For Ofcom to not accommodate that scenario in the copper retirement process suggests that Ofcom wishes to see an outcome where Openreach has full national FTTP coverage, with no possibility that some locations will be served by altnets only.
24. Not enabling the altnet FTTP coverage stop sell trigger would effectively force Openreach to overbuild altnet infrastructure in locations that clearly cannot support more than one physical infrastructure and would constitute Ofcom intervention against altnet investment in rural locations. INCA is extremely concerned that Ofcom is contemplating this course of action and believes this to be in direct contravention of its duties including its duty to further the interests of consumers (and where appropriate by promoting competition).<sup>1</sup>
25. INCA also believes that only allowing Openreach to retire its copper services (and assets) in exchanges areas where it has deployed FTTP/H (and not where another operator has made such deployment) would be in direct conflict with the Government's Outside-In programme, which will be issuing lots for operators to bid for to deploy ultrafast infrastructure, covering locations where it is unlikely that even a single fibre infrastructure would be commercially viable.
26. It should also be noted that Openreach and BT Group have made public statements to the effect that they do not expect to cover the entire country with fibre networks: Clive Selley (Openreach CEO), in response to a question on the government target for 1G broadband, said *"That is a very significant challenge, I think we will make a massive contribution in getting the nation to that milestone, but we can't do it alone. I expect others to help."*<sup>2</sup> Philip Jansen (CEO of BT) has also suggested that rivals must be allowed to co-operate in building networks in sparsely populated regions, and proposed a "single rural network" scheme to allow companies to avoid overlapping each other in the 20-30% of the country which cannot support multiple networks.<sup>3</sup>
27. It is unlikely that Openreach will overbuild the majority of Outside-In lots won by altnets, as that is extremely unlikely to be commercially viable. At the extreme, Ofcom's proposed approach would force Openreach to operate its copper services and assets in perpetuity in some parts of the country, or to make unviable investments in overbuilding altnet networks, likely causing those altnets to cease trading as they do not have the national business to cross-subsidise such loss-making locations.

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<sup>1</sup> Section 3.1 through 3.4; section 4.3 (a); and 4.6 of the Communications Act 2003. CBL also believes that Ofcom's approach would be in conflict with several provisions found in the European Electronic Communications Code, due to be transposed into UK legislation later this year.

<sup>2</sup> <https://www.telegraph.co.uk/technology/2020/01/26/openreach-boss-clive-selley-one-home-every-23-seconds-gets-full/>

<sup>3</sup> <https://www.telegraph.co.uk/business/2020/01/16/bt-chief-warns-boris-johnson-rural-threat-broadband-pledge/>

28. Several INCA members intend to participate in the Outside-In programme, to build new fibre infrastructure in non-commercially viable locations, but now have real fears that Openreach will ultimately be forced to overbuild those networks, simply because Ofcom would otherwise force it to continue operating a redundant copper network in those locations.
29. A number of INCA members are developing a common wholesale platform, in order that smaller network operators can attract large retail service providers to use their new FTTP networks. They are, however very concerned that those ISPs inherently find it easier to only use the Openreach platform and it would seem that the proposed copper retirement process will give them certainty that Openreach will have to deploy fibre nationwide and therefore they have even less incentive to engage with a competitive wholesale aggregator. The copper retirement process could therefore risks to cause the foreclosure of the wholesale market for smaller altnets, despite their efforts to present their interfaces through an aggregator that would make it easier and thus lower the barriers for retail ISPs to use the altnet fibre networks for delivering their retail service bundles.
30. We understand that it would be complex to determine what level of altnet coverage could justify stop sell and withdrawal notices, but Ofcom should have identified and presented this issue in its several consultations and sought industry input. Instead, Ofcom has ignored repeated calls for this, proposing to recognise only Openreach fibre deployment to justify copper retirement.
31. We urge Ofcom to urgently consult on these matters in order that the overall WFTMR regulatory package is pro-competitive and will not have significant unintended adverse consequences, nor lead to the WFTMR Statement being challenged.
32. Like for the stop sell notice, the triggers for any additional notices that Openreach may have to give in order to proceed to withdraw copper-based services and copper assets should be designed to accommodate Openreach giving such notice based on the FTTP coverage by an altnet.

### 3.2 End-customer communications

33. Openreach has strong incentives to accelerate the migration of end customers from copper to fibre as much as possible. The need to operate copper and fibre networks in parallel is evidently not efficient and INCA understands why Openreach will wish to facilitate as speedy a migration as possible.
34. To facilitate that migration, Openreach and its customers (several of which are very large national and international organisations) will most likely want to communicate with end customers through awareness campaigns and direct contact with individual end customers to explain the changes and encourage customers to migrate to fibre-based services.
35. INCA understands that it will be necessary and important that consumers are informed about the changes to their services resulting from fibre deployment and by the subsequent retirement of copper, our concerns relate to ensuring that such communications are undertaken within clear parameters to ensure that they are not used

in a manner that could have an unduly negative impact on the business case for competitive fibre deployment, by causing effective market foreclosure.

36. We believe that Ofcom should oversee the development of a code of conduct to govern consumer communications relating to copper retirement and copper to fibre migration. This could, for example, include the specification of terminology to describe the new services and the number and type of communications that can be issued.
37. INCA considers it essential that there is oversight of the customer communications throughout the migration period. The harm resulting from inappropriate communications would not be reversible and could significantly impact the viability of otherwise well run and well-funded alternative fibre network providers, potentially resulting default and a reversion to Openreach monopoly infrastructure provision in locations where the economics could support competing infrastructures.
38. We do not believe it is appropriate to make specific proposals here in terms of what rules and restrictions should be applied to migration-related customer communications, such rules would be best developed in industry fora with the oversight of Ofcom or perhaps the OTA2 to ensure that outcomes are produced within a timeframe to be useful from the onset of migration communications programmes by Openreach and its downstream customers.

### 3.3 Openreach incentive programmes

39. The WFTMR consultation (in particular Annex 15) addressed the potential risks to competition and competitive investment incentives arising from Openreach engaging in commercial and/or contractual arrangements that could result in market foreclosure for competing network operators.
40. We note that Openreach in its response to the previous copper retirement consultation stated that it looks to *“agree appropriate commercial constructs with our customers to drive migration from copper to fibre-based services”*.<sup>4</sup>
41. It is important that the WFTMR and/or the copper retirement regulations set appropriate frameworks to prevent the above mentioned from having an anticompetitive impact on the market, potentially incentivising downstream retail providers to use the Openreach fibre connections in favour of those offered by competing network providers and tying them in to such use through incentive structures that make it impossible or very difficult for alternative network operators to compete for those connections.
42. INCA and other altnets have commented previously on Ofcom’s proposals to reduce the risk of anticompetitive pricing, commercial and contractual practices by Openreach,

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<sup>4</sup> Openreach, 7 September 2020. Response to Copper retirement – process for determining when copper regulation can be removed, – paragraph 4. [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0024/204567/openreach.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0024/204567/openreach.pdf).



explaining why we consider that those proposals are too weak and that the risk of over-regulation in this instance is substantially lower than the risk of under-regulation.

43. We therefore urge Ofcom to reconsider (and further strengthen) its proposals to limit BT's ability to enter into commercial and contractual arrangement and set pricing, locally or nationally, that have the effect of deterring competitive fibre deployment.

### 3.4 Customer lock-in

44. The time of moving from copper to fibre is a significant opportunity for customers to change supplier, providing they are well informed and are aware of all their options.
45. INCA is concerned that retail providers on the Openreach platform could use the migration to offer existing customers the possibility to migrate mid-contract, and entering the customers into new contracts and thus locking their existing customers in for a full contract term regardless where those customers were in their existing contract period prior to the migration
46. Even migration of customers from copper to fibre during the contract period, which simply replace the existing contract for copper services with a contract for fibre services (with the expiry date unchanged) would amount to market foreclosure. Once a customer is migrated over to fibre, it will become harder for alternative providers to sell to that customer, and the alternative provider of fibre services would be denied the opportunity to compete for that customer, due to the customer being in mid-contract.
47. Customers that are in the fixed contract period cannot (without financial consequences) switch supplier, so it is important that their existing supplier cannot use the migration process to extend that period during which alternative providers cannot compete for those customers.
48. INCA urges Ofcom to engage proactively on preventing the customer migration journey from becoming a tool to lock out competition for an extended period by migrating customers over to new contracts without the option to move to alternative providers at that time.