

# Ofcom Draft Workplan 2023/24 Consultation response

Prepared for  
INCA

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## 1 Introduction

1. INCA welcomes the opportunity to respond to Ofcom's proposed work plan for 2023/24.
2. INCA has previously responded to Ofcom's draft work plans but have not seen Ofcom subsequently issue a revised workplan which summarised responses received and explained why suggestions by the respondents were not incorporated into the final work plan. We would welcome the opportunity to understand Ofcom's rationale if it decides to not adopt the proposals set out in this document as well as those made by other respondents. Not doing so does not seem to be in line with Ofcom's general consultation practice.

### 1.1 About INCA

3. The Independent Networks Cooperative Association (INCA) is the leading UK trade association representing organisations deploying independent digital infrastructure. Founded in 2010, INCA aims to foster a new approach to digital infrastructure, focusing on full fibre (FTTP) and high-quality wireless broadband whilst campaigning for the policy and regulatory support needed to maintain a healthy, competitive market. INCA has over 200 members and represents most of the full fibre infrastructure builders commonly referred to as the altnets. Members include network owners, operators and managers as well as access networks, middle mile networks, network hubs and exchanges and organisations (including public sector) that are developing or promoting independent networks.
  - The total number of live connections provided by altnets rose above 1 million for the first time in 2021, as well as 5.5 million homes and businesses being able to connect to an independent fibre broadband network and we anticipate this number will have reached approximately 11m at the end of 2022.
  - It is now estimated that investors have committed in excess of £20bn to the sector.

4. As INCA does not represent mobile network operators, this document will focus on fixed telecoms-related activities and issues.

## 2 Ofcom's duties and priorities

5. Ofcom's duties in the telecoms sector are governed by the Government's Statement of Strategic Priorities<sup>1</sup> (SSP) – to which Ofcom must have regard when exercising its regulatory functions - and Ofcom's general duties with a focus on furthering the interests of citizens and consumers, where appropriate by promoting competition.
6. The SSP further strengthens Ofcom's duty to promote competition beyond the level that could perhaps be understood from Ofcom's formal duties, and in particular network competition. For example, paragraph 19 of the SSP says:

“We regard competition where possible as a key driver of network roll-out. It is essential that competition is fair and effective between existing network operators and new entrants, and we expect Ofcom to adopt an engaged, proactive approach to monitoring any anti-competitive behaviour. Ofcom has powers at its disposal - including information gathering, audit enforcement and penalty powers - to perform this role.”
7. The SSP further requires that Ofcom ensures that there is clarity around the application of the 'fair bet' principle. Stating that “*an effective 'fair bet' regime would be one that allows firms making large and risky investments to have confidence that any regulation will reflect a fair return on investment*”. [emphasis added].
8. These elements of the SSP show how Government wants Ofcom to interpret its duties in order to achieve Government's targets of achieving 85% availability of gigabit-

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<sup>1</sup> <https://www.gov.uk/government/publications/statement-of-strategic-priorities>

capable broadband connections by 2025, moving to nationwide availability (at least 99%) by 2030.

### 3 Ofcom's proposed priorities for 2023/24

9. Ofcom's proposed priorities in telecoms for the coming year are summarised below:

- 1) World-class digital infrastructure
- 2) Furthering interests of telecoms consumers
- 3) Secure and resilient telecoms infrastructure

10. Ofcom states that the policy of promoting infrastructure competition as set out in its WFTMR Statement in 2021 remains the basis for its priorities and plans for the coming year.

11. In terms of specific activities in fixed telecoms, Ofcom lists the following:

- Cloud market survey
- Net neutrality
- Telecoms security regime
- Network resilience
- Switching implementation, and
- Scams.

12. We note that, whilst the activities listed are all likely to contribute towards points 2 and 3 in Ofcom's list of priorities, none appear to target the development of a world-class digital infrastructure, and none focus on the promotion and safeguarding of infrastructure competition as specifically required in the SSP and as identified in Ofcom's own policies for delivering long-term consumer benefits.

13. A further inspection of Ofcom’s list of projects for 2023/24 confirms this position. INCA support’s Ofcom’s activities to protect and further consumer interests, although it is our view that there are occasions where Ofcom appears to wish to duplicate or replace existing general consumer protection legislation.
14. Our core concern with Ofcom’s proposed work plan is that it contains no activities to ensure that the fixed telecoms markets is functioning as intended under the SSP and Ofcom’s policies as set out in the WFTMR. Significant changes are taking place in the 5-year interval between fixed telecoms market reviews and it is essential that Ofcom engages proactively in the market to ensure that ‘real life’ is not taking the sector off course and causing harm to the important investment incentives and competition framework intended by Government in the Future Telecoms Investment Review (FTIR), the resulting SSP and Ofcom’s WFTMR.
15. In the five years between the March 2021 WFTMR and the next WFTMR due in March 2026, the UK fixed telecoms market is undergoing significant changes across multiple planes:
- Network design (Openreach planning and designing the closure of more than 80% of its exchanges, on which many of Openreach’s competitors rely directly or indirectly and on which many regulated access products are designed)
  - Copper withdrawal and all-IP migration (migrating consumers (residential and business) from legacy- coper-based services and PSTN-based voice services)
  - Market structure (deployment of new gigabit-capable network by a large number of providers across the country in urban and rural locations)
16. Despite these significant changes, Ofcom is not proposing to engage proactively with their possible (or even likely) effect on infrastructure competition and the long-term interests of consumers of fixed telecommunications service in the UK.

## 4 Matters requiring Ofcom's engagement over the next 12 months

17. We outline below matters in which we believe Ofcom must engage over the next 12 months. These are matters for which we consider Ofcom would be negligent in its duties, were they not to be added to its 2023/24 work programme and we explain why that is the case.

### 4.1.1 Openreach exchange closures

18. Openreach plans to close more than 80% of its exchange sites in the next 10 years and the design of the new network and any replacement of or changes to regulatory interfaces is being completed in the next few years.

19. The exchange closures are part of a network upgrade and move to a full-fibre network. INCA does not wish to in any way obstruct Openreach's ability to improve its network and implement new technologies, our concerns are around the impact on existing regulated interfaces which Openreach's competitors have been encouraged to use in their own network designs and deployments.

20. Whilst the Office of the Telecommunications Adjudicator (OTA) hosts an exchange exit steering group (EESG), that group is focused on the impact of exchange closures on Openreach's downstream customers rather than its horizontal competitors. INCA has joined the group but found Openreach unwilling to engage with the matters we have put on the agenda.

21. One prime example (but which should not be considered the only significant impact on altnets of the planned closures) is that Ofcom mandated in the WFTMR that Openreach provide a regulated product called inter-exchange dark fibre (known as DFX). That product links 'BT-only' exchanges with other BT exchanges from which the altnet can purchase competitive backhaul services. The DFX product provides an essential backhaul facility for altnets building network in locations where there is not competitive backhaul supply.

22. The Openreach response, when asked how it proposes to continue supplying this product after exchange closures, states that as there will no longer be exchanges in the relevant locations there can be by definition be no ‘inter-exchange’ product.
23. The removal of the regulated product (for any other reason than Ofcom considering that it is no longer required due to the existence of competitive backhaul supply) would almost certainly render some rural fibre deployments unviable and is not consistent with the principle of offering a transparent and consistent long-term regulatory environment that supports long-term risky investments and a ‘fair bet’ for all such investors.
24. The DFX problem is further exacerbated by the fact that some commercial backhaul suppliers are withdrawing from exchanges due for closure, long in advance of the actual closures. This therefore recreates ‘BT-only’ exchanges that did not exist at the time of the WFTMR decision, and which can again result in some rural fibre deployments becoming unviable.
25. It is INCA’s view that Ofcom needs to engage now in an assessment of the possible competition impact of the exchange closure programme. Doing so would help identify issues as the one explained above and enable Ofcom to tell stakeholders (including BT/Openreach) what it considers to be the appropriate principles that should be adopted in order that Openreach’s own commercial and technical designs and decisions cannot result in a lessening of competition and increased risk for investors in competitive fibre networks.
26. Altnets building new fibre networks make long-term investment decisions, so it is not sufficient for Ofcom to say that it will address these matters in the next WFTMR. Two years of uncertainty will almost certainly result in reduced altnet investment in locations that are at risk of the consequences of the exchange closure programme (noting that the DFX example is just that – one example among several).

#### 4.1.2 PIA products, processes, and pricing

27. Access to Openreach's physical infrastructure (PI) (ducts, chambers and poles) was identified in the FTIR and the SSP as essential to the timely and cost-effective deployment of fibre by competing providers across the country. Ofcom's subsequent decisions and most recently the WFTMR made significant progress towards creating a framework for the development of products, processes and (to some extent) prices that put altnets on a similar footing to Openreach when deploying their fibre networks using the Openreach PI.
28. There are, however, still real differences between how Openreach can use its own PI and how PIA customers can use it. The WFTMR foresaw a gradual move towards equivalence and that all new processes and systems should be Equivalence of Input (Eol) compliant. This has not transpired and INCA is unaware of whether and, if so, how these principles have been implemented.
29. Now two years into the 5-year review period, it is the right time to instigate a review of how PIA is working and what remains to be done in order to completely level the playing field between Openreach and PIA customers.
30. With regards to PIA pricing, Ofcom introduced a new pricing principle for duct access at the 11th hour of the WFTMR process. INCA believes this principle needs to be reviewed and potentially be replaced with the outcome of a more open and complete consultation process in which Ofcom has the time to engage with the arguments and analyses presented by stakeholders.
31. Now is the time for Ofcom to proactively investigate and consider the PIA products, processes and pricing. This would create invaluable insights for the forthcoming WFTMR process.

#### 4.1.3 Copper withdrawal and All-IP migration

32. The WFTMR set out the copper withdrawal framework, including the implementation of stop sell at 75% FTTP coverage of an exchange area.

33. INCA is aware that significant communication is happening with consumers in these areas, but there is no inclusion of the fact that the consumer has a choice other than simply switching to the Openreach digital voice and/or FTTP network/service.
34. INCA is also aware that Openreach waves early termination charges (ETCs) to CPs on its network if that CP switches the customer to the Openreach FTTP service but not if the CP switches the customer to an altnet FTTP network. ETCs are material concerns that the awareness communications associated with the All-IP and/or copper withdrawal combined with the absence of ETCs risks increasing barriers to switching between the Openreach network and altnet networks.
35. INCA believes it is essential that Ofcom launch a public consultation on the potential competition impact of communication and commercial pricing initiatives associated with the All-IP and copper withdrawal programmes. Not doing so risks lasting harm to infrastructure competition and, as Ofcom has itself concluded in the WFTMR, infrastructure competition is in the long-term interest of citizens and consumers.

#### **4.1.4 Openreach pricing behaviour**

36. Further to the current Equinox 2 review process and the behaviours engaged in by Openreach in the run up to both Equinox 1 and 2, INCA urges Ofcom to engage in an investigation and public consultation process that will collect both evidence and stakeholder inputs with regards to the rules for such processes and whether Openreach has breached competition law in doing so. Ofcom should also consider whether an ex-ante framework should be established to prevent any potentially anticompetitive behaviour in the future.

#### **4.1.5 Transparency of build plans**

37. In the FTIR the Government concluded that increased transparency of Openreach build plans would be important to encourage commercial investment in competing fibre networks. Whilst some improvements have been made, there is still uncertainty and surprises associated with the Openreach FTTP deployment for altnets.

38. INCA encourages Ofcom to engage stakeholders in a process to determine how that transparency can be improved.

#### **4.1.6 Consumer information**

39. For several years now, it has been clear that consumers are struggling to understand what fibre broadband is and the benefits it offers. This is largely due to hybrid copper-fibre broadband services being marketed as 'fibre' broadband and many consumers believe they already have a fibre connection.

40. Despite altnets stressing the importance of this problem, no progress has been made on setting an industry-standard terminology for all broadband providers to use consistently in all customer communications and advertising. There has been a strong focus in the altnet community in recent years on network roll-out, but now the focus is shifting strongly towards driving take-up on this new network and it is imperative that Ofcom resolves the matter swiftly. Ofcom's attempt at facilitating a voluntary code has failed and Ofcom must now take decisive action to remove the substantial barrier to fibre adoption.

41. For this activity to not feature on Ofcom's workplan suggests a fundamental underestimation of its importance and INCA urges Ofcom to add it to the workplan.

#### **4.1.7 WFTMR 2026 kick-off**

42. We understand from conversations with Ofcom that it intends to start the WFTMR 2026 work programme in 2024/25. That understanding is confirmed by the complete absence of references to the WFTMR process in the draft 2023/24 workplan.

43. INCA is deeply concerned that it is imprudent to allow only 24 months for the WFTMR process. It was very clear from the first WFTMR process that many issues were consulted on at the 11<sup>th</sup> hour and several stakeholders were deeply unhappy and frustrated with what was felt to be an unsatisfactory process in which views and analysis presented were not given due consideration, nor were stakeholders given sufficient

time to develop their views and analysis on important issues including, for example, the significant revision to PIA duct rental charging principles.

44. Ofcom should commence the 2026 WFTMR process in the next six months and set out a work programme for stakeholders to engage with on a transparent basis and allowing for quality analysis and engagement throughout the process. Amongst topics which INCA believes Ofcom should include in the 2026 WFTMR process are:

- Revisiting product and geographic market definition of the 2021 WFTMR. In particular, INCA has concerns that the geographic markets defined by Ofcom in the 2021 WFTMR were flawed, and evidence has proven this to be the case. This is particularly the case for Ofcom's assumption that there would be no material and sustainable competition to Openreach in the locations included in Area 3. Whilst INCA believes that market distortion has already resulted from those market definitions, INCA urges Ofcom to revisit its assumptions and embrace a truly pro-competitive approach rather than assuming ubiquity by Openreach and limited dispensable altnet coverage.
- PIA products, processes and pricing. As per the 2023/24 activity outlined above.
- Rules for preventing anticompetitive pricing and discounting initiatives. Evidence suggests that the rules introduced in the 2021 WFTMR are either unduly restricted or need further analysis and clarification to ensure that they enable Ofcom to prevent behaviour by BT/Openreach that has the clear object of reducing infrastructure competition. In this context we believe Ofcom should consult on the possible benefits of either setting a price floor or setting a framework for the assessment of whether prices may have an anticompetitive effect and should be prohibited. This being alongside the existing rules around pricing structures.
- Review of Ofcom's Fibre Costing Model. In the 2021 WFTMR, Ofcom produced a fibre costing model, based on Openreach costs. It also produced a slightly modified version of the model, in which it changed a limited number of parameters, and used

that to estimate what it considered might be the unit costs of an efficient market entrant.

Ofcom will be aware that INCA considers that model to be inappropriate for the assessment for entrant costs and Ofcom should develop a separate model and use that in its competition and ex- ante pricing assessments and deliberations.