

Response to Ofcom's consultation on its 2022/23 workplan

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INCA

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1 Introduction

1. 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.
2. INCA's aims are to:
 - To support the development of the competitive digital infrastructure sector through collaborative activities
 - To facilitate networking and knowledge sharing between members, other organisations and public bodies
 - To encourage and facilitate joint projects between members that can benefit the sector as a whole
 - To represent the interests of members to government, Ofcom and other bodies
 - To support the development and adoption of common standards by INCA members to deliver the highest possible quality of services
 - To promote the advantages of competitive digital infrastructure provision and consumer choice
 - To promote the need for increased labour and skills capacity in the sector
3. 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.
4. INCA's members are active in the fixed telecoms market, so that is the natural focus of this document. Although we focus on the subjects that are of most immediate and direct

relevance to our members, we do recognise and respect Ofcom's needs to focus on other areas such as online harm and broadcasting. We are, nevertheless, disappointed at the lack of focus on fixed telecoms issues.

2 Executive Summary

5. Ofcom's completion of the wholesale fixed telecoms market review (WFTMR) in March 2021, should be the start of process of constant engagement by Ofcom with the market and its stakeholders, with the overriding objective of promoting competition and investment in new fibre networks across as much of the UK as possible, as fast as possible.
6. Ofcom, however, appears to consider the completion of the WFTMR as the end of that journey until the next WFTMR process (which we understand from Ofcom is not planned to start until 2024). The draft 2022/23 work plan contains no specific activities or workstreams to ensure that the WFTMR remedies are working as intended, nor does it envision any other pro-competitive engagements other than those already under way in the form of the One Touch Switching platform, for which we consider that Ofcom should take a more active role.
7. INCA believes that Ofcom should introduce a number of new activities into the proposed 22/23 work plan, under the following headings:
 - Monitoring of WFTMR implementation
 - Openreach network and technology changes
 - Deep market engagement
8. INCA is concerned that Ofcom is not proactively monitoring whether its remedies are effective, it is not proactively engaging with the inevitable changes to network access products resulting from planned changes to Openreach's network, and it is not engaging with stakeholders to ensure that it understands the markets and its players sufficiently

to be able to make informed and balanced judgements and decisions to the long term benefit of consumers.

9. INCA agrees that consumer protection is an important duty for Ofcom but believes that Ofcom's focus should be on the achievement of consumer choice through the promotion of competition.

3 The context for the 22/23 work plan

10. 2021 saw the completion of the WFTMR, a first for Ofcom where it combined the reviews of all the relevant fixed telecoms markets to ensure that incentives were consistent across all markets and with the primary purpose of incentivising investment in new fibre networks (always in the context of Ofcom's primary duties to protect the interests of consumers and citizens).
11. The WFTMR process was complex and required not just the review of several markets in parallel, but also the alignment of previously less coordinated policy decisions in the different markets.
12. Although INCA fully supports Ofcom's move to coordinate and align regulatory policies across the fixed telecoms sector around the policy to incentivise investment in new fibre networks, Ofcom will be aware that INCA and its members believe that Ofcom erroneously and unduly focused on the need to incentivise investment by BT/Openreach at the expense of encouraging competitive investment from altnets. This is particularly the case for locations in Ofcom's Area 3 geographic market but also applies in Area 2.
13. It is important that Ofcom keeps a keen eye on market developments in order that it can take any corrective action necessary, should its assumptions prove to be materially wrong. It is also important that Ofcom uses post-WFTMR market data to start its early considerations for the next WFTMR process.

14. In addition to reviewing and understanding the appropriateness and effectiveness of the WFTMR framework, the significant network and technology changes planned by Openreach over the next decade present threats to the sustainability of competition at all levels of that market. It is both necessary and appropriate for Ofcom create as much certainty as possible about the effects of those changes on the nature and availability of regulated wholesale access products on which much of the current competition in the fixed telecoms market relies.
15. Finally, but by no means least, Ofcom has a duty to promote competition for the benefit of consumers. That should not be limited to the performance of regular market reviews but should be a significant component of Ofcom's focus and activities between those reviews as well.

4 Ofcom's priorities for 2022/23

16. In paragraph 2.2 of the consultation document, Ofcom refers to having designed its work plan to focus on the enablement of a "*world-class digital infrastructure*". However, the work plan includes very little activity directly aimed at furthering that objective.
17. In fact, apart from the implementation of legislation on telecoms security and vendor diversification and the implementation of One Touch Switch (in which Ofcom is not planning to take an active role), there are no significant pro-competitive fixed telecoms workstreams in Ofcom's 22/23 plan.
18. The plan includes no activities relevant to furtherance of investment and facilitation of competition in the fixed telecoms market. Whilst we understand that the WFTMR was completed in 2021 and the remedies applied are applicable until end of March 2026, the markets are constantly evolving and Openreach is planning material changes to its network (and consequently the nature and availability of regulated network access services) that start during this review period and accelerate during the review period starting 2026.

19. Ofcom should be monitoring the effectiveness of its WFTMR decisions, considering where additional interventions may be appropriate, and learning about how competition and competitors develop with (or, in some cases, in spite of) the remedies implemented in the preceding market review.
20. It would be appropriate for Ofcom to start engaging with those subjects now and INCA is disappointed that there are no items for these matters in the draft work plan.

5 Suggested additions to the work plan

21. In this section we set out specific activities which we believe Ofcom should undertake this year. Some would be the start of longer activities running beyond this period, others could be concluded this year and form the basis for informed and transparent analyses for the next WFTMR. We group the proposed activities under the following headings:

- Monitoring of WFTMR implementation
- Openreach network and technology changes
- Deep market engagement

5.1 Monitoring WFTMR implementation

22. Ofcom has suggested that the Openreach Monitoring Unit (OMU) should expand its scope. INCA welcomes that initiative and looks forward to engaging with the OMU. It is, however, important to do more than simply monitor Openreach and report on its general behaviour once a year. The impact of increased OMU scope will depend on what it does with the information collected. If the OMU becomes an integral part of how the competition unit in Ofcom assesses ongoing market behaviour, then that could be extremely helpful, for example. INCA would welcome a consultation on how the OMU could be used to best effect in the market.

23. However, in addition to the general OMU activities, INCA believes that there are a number of areas where Ofcom should be formally monitoring the impact of its WFTMR decisions. They include:

5.1.1 Level of competitive deployment in Area 3

24. Ofcom stated in the WFTMR that it considered that there would not be material competition to Openreach in the locations included in its Area 3 geographic market and, therefore, Ofcom needed to design specific incentive structures to get Openreach to deploy fibre in those locations.

25. Altnets have consistently stated to Ofcom during the WFTMR process that (collectively) they had material deployment plans for Area 3 as defined by Ofcom. INCA believes it is important that Ofcom monitor the level of fibre deployment for Areas 2 and 3, identifying where altnets invest first, where Openreach deploys first and who overbuilds (if at all).

26. Although some might say that there would be no benefits from monitoring the deployment activities after the WFTMR framework has been implemented, but we believe there is considerable benefit to Ofcom and industry in general from a better understanding of the actual market behaviour and it can inform future Ofcom decisions.

27. Ofcom collecting this data itself would be far preferable to a situation where it is left to the altnets to make submissions on this matter later in the process when Ofcom may have already shaped its thinking based on potential misconceptions of the real market conditions.

5.1.2 Openreach stop sell implementation

28. The WFTMR formalised the framework for Openreach to stop provider copper-based services in locations where it has at least 75% FTTP coverage (known as stop sell). Whilst Ofcom may be collecting some information on how that process is working, INCA believes it would be beneficial if Ofcom were to engage in a transparent review of the copper retirement process in light of real-life experience.

29. Particular aspects we believe that project should cover include:

- 1) The time (average and distribution) between Openreach starting to deploy FTTP in exchange areas and it reaching stop-sell (Ofcom's stated objective with the 75% coverage threshold for stop sell was to deter Openreach from entering locations simply to spoil the market. It is important to understand whether that measure is effective);
- 2) FTTP penetration at the time of stop sell; and
- 3) Time between stop sell and 100% FTTP coverage by Openreach.

30. These aspects (and others – we suggest that Ofcom may wish to consult on the scope of the monitoring programme and how results are shared), will help inform Ofcom of the effectiveness of its remedies and it will also help altnets identify potential patterns of behaviour they believe Ofcom needs to investigate. It would add critically to market transparency and help reduce regulatory risk by creating confidence that Ofcom is monitoring the effects of its current remedies and is committed to taking any additional remedial action that may be required.

5.1.3 Improvements to PIA KPIs and No Undue Discrimination implementation

31. Whilst issues remain and there is certainly still room for improvement, the PIA product has evolved substantially over the past few years and is becoming increasingly fit for purpose for altnets to rely on for their network deployment. Altnets have put a lot of work in to working with Openreach in the various working groups, under the overall guidance and oversight of the OTA, and are committed to continuing that work.

32. We are, however concerned at the lack of performance transparency. This is primarily due to the fact that Openreach does not have to consume the PIA product, and therefore it is difficult to find direct comparators to create meaningful KPIs. This arises from Ofcom's choice to not apply an equivalence of inputs (EoI) non-discrimination obligation on Openreach for the provision of the PIA product, but only the lesser no undue discrimination (NUD) obligation.

33. We understand the issues associated with the imposition EoI on a product like PIA but believe that the product can be progressively moved closer to EoI. This will only happen if Openreach is under a clear obligation to ensure that any new systems or processes developed are developed under the EoI principle. Only if the burden of proof is on Openreach to prove when it is not feasible to do so is it likely that real progress in reducing discrepancies (and discrimination) between how Openreach itself and PIA customers use the Openreach duct and pole infrastructure.
34. The WFTMR give Ofcom the discretion to impose that obligation, but instead the burden of proof is on PIA customers to prove when discrimination happens. a virtually impossible task as PIA customers do not know exactly how Openreach uses its own infrastructure.
35. The Internal Reference Offer (IRO) was intended to overcome the information asymmetry between Openreach and PIA customers, to allow PIA customers to identify where discrepancies (and consequent discrimination) may exist – and ask Ofcom to investigate those cases. The IRO has not lived up to that expectation. PIA customers, including INCA members, have highlighted repeatedly to Ofcom that the IRO is not fit for purpose.
36. Ofcom now has a team looking into PIA quality and discrimination matters, but without a change in emphasis (putting the burden of on Openreach and/or making the IRO a true, complete, and transparent description of how Openreach uses its own network), the issues remain obscure and impenetrable.
37. INCA suggests that Ofcom engage in an open consultation (or other form of open engagement, perhaps workshops) with PIA customers to create a work programme that can develop real and transparent improvements in the performance reporting and non-discrimination enforcement for the PIA product. As the vast majority of altnets depend on PIA for their network build and compete directly with Openreach in the provision of wholesale services and with BT in the retail market, this is a matter at the top of altnet priorities.

5.1.4 Assessment of new discount schemes

38. The introduction of the Equinox discount offer has caused significant disruption for altnets, especially those offering wholesale services in competition with Openreach but also vertically integrated retail-only operators.
39. INCA and its members are concerned that new offers or incremental add-ons may be introduced over the coming year and it is important that a transparent assessment process takes place. The equinox assessment process undertaken in summer 2021, was the first time Ofcom had to apply the new framework introduced in the WFTMR and Ofcom should learn from that and engage with stakeholders on what can be improved and provide certainty regarding how any future offers or add-ons will be assessed.
40. INCA is concerned that Ofcom has not committed to always consult on discount offers proposed by Openreach. If a discount offer falls into the 'Other Commercial Terms' category as defined in the WFTMR, then it must be subject to a transparent assessment process, including engagement with relevant stakeholders through an open consultation process.
41. INCA urges Ofcom to make proposals for how it will assess and consult on any new discount schemes proposed by Openreach.

5.2 Openreach network and technology changes

42. Although (in most cases) perfectly legitimate, the significant changes Openreach is planning for its network and the technologies it will be using in the future will impact materially on the nature and availability of regulated wholesale access products available to its competitors (and to downstream competitors of BT's commercial wholesale and retail businesses). Although the majority of changes will take effect after 2026 (with the exception of stop-sell as covered above), the technological and topology changes Openreach will be making over the next 10 years will need to be designed and planned during the period of this WFTMR.

5.2.1 Removal of copper from ducts and poles

43. Very near the conclusion of the WFTMR process, Ofcom consulted on a change to the principles for setting regulated charges for using Openreach's ducts and poles. In particular, they consulted on the impact of the removal of copper cables from Openreach's ducts.
44. The consultation assumed that Openreach will in fact physically remove redundant copper from its ducts and, as a consequence, create a lot of vacant duct space. That is by no means certain but there was no discussion of what should happen if that did not happen. The consultation also did not consider what impact the proposals would have on Openreach's incentives to remove copper where feasible to create more space to facilitate cost-effective fibre networks.
45. The consultation was extremely short, with little analysis presented other than a proposal to move from the charging principle of paying for proportion of duct usage to a 'fair' cost distribution basis. Ofcom's proposals met with universal concern from CPs using the Openreach Physical Infrastructure Access (PIA) product and some significant issues were identified relating to the way Openreach's costs were calculated.
46. INCA urges Ofcom to engage in a full and transparent consultation process for developing a transparent and reasonable approach to PIA duct access charging. This should include a review of the costs Openreach should legitimately be able to recover, the costing methodology to be applied, and the distribution of risk between Openreach and PIA customers.
47. INCA strongly recommends that Ofcom designs a consultation process to cover these points, starting during 22/23 in order that it can be concluded in time to feed into the next WFTMR process.

5.2.2 Openreach exchange closures

48. Approximately 10 years from now, more than 80% of Openreach's current exchanges will no longer exist. Instead Openreach will rely on only approximately 1000 'parent' exchanges, with approximately 4500 'child' exchanging having been closed down.

49. These changes are fundamental to Openreach's network design and topology and include a move to All IP technology as well. The changes will require detailed design and planning now, for the planned exchange closures in the late 2020s and early 2030s, so it is important that there is clarity for Openreach about what network access products and solutions it will need to provide after the changes have been implemented.

50. At this time, it is not possible to anticipate all network access products that will be affected by the exchange closures, but we know that it will affect the follow:

- PIA,
- Ethernet Access Direct (EADS),
- Inter-exchange dark fibre (DFX), and
- Co-location.

All of which are products that form fundamental building blocks for altnets and also for some downstream CPs.

51. Not only may the availability of these products become reduced to the 1000 exchange locations, but the actual products may no longer be viable in the new network architecture and topology. Charges for the products may also be significantly affected as average distances (for example for EADs) will invariably change.

52. Discussions with Ofcom suggest that it plans to address these issues as part of the next WFTMR, which it plans to start work on in 2024. Discussions with Openreach suggest that it will design its new network in a manner that suits it best, absent any specific regulatory requirements. It is also clear that it would be in Openreach's interests to

design their network in a manner that reduces the scope for the ongoing provision of network access services that will assist their direct or downstream competitors.

53. In order to prevent the new Openreach network design becoming a fait accompli, with the potential consequences of stranded altnet investment and loss of choice to consumers, we urge Ofcom to start engaging actively with this process and developing principles for future network access product design and availability that Openreach has to accommodate in its plans and designs.

5.2.3 Deep market engagement

54. It was the experience of INCA and its members prior to and during the WFTMR process, that Ofcom was not well informed about altnet plans and activities. Ofcom significantly underestimated the ability of altnets to attract funding and deploy new FTTP network at pace and consequently designed a regulatory framework that was unduly focused on ensuring coverage by Openreach - with altnet coverage being seen as a nice to have bonus. This was particularly the case for location in Area 3.

55. It is generally known that Ofcom meets with BT/Openreach at least once a week on average on one matter or another, whilst the engagement with other stakeholders is much more limited. Even the larger stakeholders do not have that kind of access to Ofcom and, importantly, Ofcom does not have the opportunity to gain the same level of understanding of those stakeholders as it does of BT/Openreach.

56. Ofcom's focus on BT/Openreach is, to an extent, a consequence of BT/Openreach being the designated SMP operator in most markets, and Ofcom needs to make sure that the remedies it designs are appropriate and proportionate, etc. It is, however, not in our view justifiable to the extent that it exists, and we believe that Ofcom needs to invest substantially in a much deeper and broader market involvement programme. Only when Ofcom has a good understanding of all the stakeholders can it make balanced and informed judgements and decisions in the interest of long term consumer welfare.

57. INCA has recently set up regular meetings with Ofcom in order to start remedying this situation, but INCA believes that Ofcom should add a workstream to its 22/23 plan that specifically involves active engagement with all stakeholders to general a balanced and comprehensive understanding of the whole sector.

58. INCA believes that Ofcom should consult on the shape and scope of that work stream, and we would be very happy to provide suggestions as part of that process. Alternatively, INCA would be pleased to provide ideas for how Ofcom can improve its market engagement, in whichever format Ofcom finds most helpful.