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Fall

Prepared for

INCA

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Openreach Independence

Consultation response

# Introduction

1. The Openreach Monitoring Unit (OMU)[[1]](#footnote-1) conducts regular reviews of Openreach’s independence and performance against commitments and associated governance protocols.
2. INCA welcomes the opportunity to contribute to this review and encourages Ofcom to ensure that the OMU’s role is sufficiently broad and flexible to address issues as they arise. INCA does not believe that the role of the OMU should be solely the review of compliance against commitments and associated governance protocols, but should encompass a duty to identify, review, monitor and report any and all potential concerns in relation to how Openreach operates and serves the rest of the BT group, its own wholesale businesses and third parties purchasing services at different levels of the network and product value chains.
3. INCA believes that the role of the OMU will become increasingly important and that Ofcom should review the powers of the OMU or create appropriate escalation paths between the OMU and other parts of Ofcom to ensure that the OMU’s observations and comments are treated with the necessary level of importance within Openreach and BT Group.

# INCA members’ interactions with Openreach

1. Ofcom is already aware of INCA’s concerns that Openreach is a vertically integrated wholesale business and is subject to the same conflicts of interest as were identified in BT during the Telecoms Review in 2004 and which led to the functional (and subsequently legal) separation of Openreach from the rest of BT.
2. Although INCA’s members use a number of different Openreach services, the nature of their businesses – as network operators – means that they primarily consume the Physical Infrastructure Access (PIA) product. Other products that INCA members consume include Ethernet Access Direct (EADs) for FTTP backhaul purposes and for inter-exchange transmission links[[2]](#footnote-2).
3. INCA members, however, compete with Openreach as well as with BT group (retail and wholesale) and, as they are dependent on Openreach for certain inputs to their services, it is essential that Openreach treats its third-party customers in the same manner as it treats both its customers in BT Group and its own downstream customers within Openreach.

# Key concerns for INCA members

1. INCA is aware that issues and tensions still exist resulting from the fact that BT Group still determines the Openreach budget and business focus, despite these being prepared separately within Openreach. There are, however, other communications providers (CPs) with more insight into the relationship between BT Group and Openreach than the alternative network operators (altnets) that form the INCA operator membership. This response does not attempt to address those issues in further detail.

## EoI for PIA and cumulative materiality

1. The key concerns for altnets focus on the relationships between different parts of Openreach. For example, the part of Openreach that provides PIA services and the part that is planning and deploying new fibre networks in competition with altnets using PIA services.
2. The absence of Equality of Inputs (EoI) for PIA is a long-term source of concern for altnets. INCA does not believe that it is possible to assess the extent to which Openreach may be favouring its own downstream business unless Openreach has to consume the same service as external Openreach customers. INCA and its members have submitted detailed justification for why EoI needs to be introduced (gradually) for PIA and we will not repeat them here other than to note that comparison of KPI measures for different services with different dynamics does not allow for a robust assessment of whether any undue discrimination is taking place.
3. We remind Ofcom that, in the Strategic Review in 2005, it identified the principle of ‘cumulative materiality’ also popularly known as ‘death by a thousand cuts’. It is our view that multiple small advantages afforded Openreach’s own network deployment business is causing material harm to the ability of altnets to compete when using the PIA product.

## Discrimination based on use cases

1. Ofcom will be aware that Openreach announced new surcharges for specific use cases of EADs and OSAs in November 2020 and introduced the surcharges in 2021.
2. Those surcharges apply only to FTTP traffic aggregation and even then only to use cases where Openreach would face no competition in the provision of the connection. Openreach has stated that it wants to participate in commercial markets for FTTC traffic aggregation links, but where it is the only option, it imposes a surcharge.
3. Whilst this issue is linked to Ofcom’s market definition in the recent business connectivity market review (BCMR)[[3]](#footnote-3), its relevance to this consultation is that Openreach is clearly favouring its own downstream fibre network deployment business, which can use Openreach’s existing infrastructure on a cost+ basis, whereas competing altnets cannot. If the Openreach Fibre First deployment business unit was separate from the unit selling downstream EAD and OSA services, then this is unlikely to have happened, as any type of use of the existing network would be equal for the EAD/OSA business unit.

## Confidentiality concerns

1. Of particular concern to altnets is how the data they provide to Openreach, as part of the PIA consumption, process is treated within Openreach. On numerous occasions, altnets have observed that Openreach has started deployment very soon after they have started doing so themselves. On other occasions, altnets have found that, having submitted a PIA Notice of Intent (NoI) and surveyed the relevant duct, they arrive a very short time later to find that Openreach has now occupied the previously available space. On some occasions this has happened where there was no discernible Openreach deployment in the relevant location.
2. Ofcom observed in its last compliance report that it had been made aware of such (or similar) concerns by altnets but had not at the time found that any abuse of altnet data had taken place. The challenge here is complex, as it may be that Openreach did have the relevant location as part of its deployment schedule, but the sudden appearance of Openreach when it was not expected still could be the result of opportunistic scheduling resulting from access to altnet PIA NoI information.
3. INCA urges Ofcom to change the way it assesses concerns reported to it by altnets. At present, the process appears to be ‘innocent until proven guilty’, but as Ofcom fully understands the strong incentives on Openreach to favour its associated businesses the emphasis should be shifted to one where it needs to demonstrate that it was in fact planning to deploy in that particular location at that particular time.
4. We understand that Ofcom does not want to create an undue burden on Openreach to deal with potentially frivolous claims, so we also encourage Ofcom to create a process for altnets to register concerns in a manner that does require the altnet to substantiate its claims to a reasonable level, given the data available to altnets.

## Transparency

1. With regards to transparency, INCA notes that the Openreach publishes its deployment plans with reference to its existing legacy exchange area boundaries but does not provide information of where those boundaries are. On the Openreach website it may be possible to enter individual postcodes to ascertain in which exchange areas they are located, but that cannot be used as a tool for altnets to understand where Openreach plans to deploy.
2. Ofcom requires altnets to submit all deployment data to it using postcodes and/or UPRN[[4]](#footnote-4) references, but Openreach is allowed to publish its Fibre First transparency announcements using a metric that only Openreach has the ability to interpret with accuracy.
3. We further understand that the fact that an exchange is listed in the Openreach Fibre First announcements, does not mean that Openreach commits to deploy to the entire exchange area. It may therefore be that the Fibre First announcements are unduly deterring altnets from building in certain locations despite Openreach having no current plans to do so either.
4. It would also seem that the Fibre First announcements are not currently covering a sufficient number of locations to deliver on Openreach’s announcement to deploy to 25m premises by 2016.
5. It is very important to altnets that they understand where Openreach intends to deploy. The majority of altnet deployment is targeted at where Openreach is not going to deploy, at least in the short term. This therefore speeds up the reach of FTTP infrastructure across the country instead of overbuilding and also gives the altnets the opportunity to benefit from first mover advantage where they deploy. That first mover advantage is important, given that Openreach (and BT) benefit from significant economies of scale and existing retail and wholesale customer relationships, not available to altnets.
6. In addition to the Fibre First programme, Openreach also deploys fibre in locations categorised by Openreach as “Retro Newsites”. We have asked Openreach for a definition of which premises/locations fall into this category but have been told that there is no firm definition:
7. “*There is no strict definition for what we deem Retro Newsites, but I believe it refers to areas where we have built copper services for new premises built within last few years and look to overlay with FTTP*”.[[5]](#footnote-5)
8. In May 2020, Openreach presented to the PIA Working Group its plans to improve its voluntary transparency measures, including that it would start including Retro Newsites in its announcements. This improvement was welcomed by altnets but has unfortunately not been implemented. When asked for an explanation recently, we received the following response:
9. “*In relation to your specific query about transparency and Retro New Sites Build, I confirm that due to the disruption caused by the COVID pandemic Openreach were forced to make changes to the Retro New Sites programme. Because of the changing nature of ‘flexible’ build programmes like Retro New Sites a decision was made that announcing build footprint was not in the best interests of the public, as it was subject to significant fluctuation and change at short notice*.”[[6]](#footnote-6)
10. Some concerns registered with Ofcom about Openreach potentially reacting to altnet PIA NoIs and changing its deployment schedule has related to Retro Newsites. We understand that Retro Newsites may amount to around 400,000 – 500,000 premises per annum and are therefore concerned that they are not made part of transparency notifications.
11. The Retro Newsites also raises a potential undue discrimination issue. This is because, as explained verbally on several occasions by Openreach, the Retro Newsites have relatively new physical infrastructure and is therefore likely to be in good condition for fibre deployment. By not sharing the details of the Retro Newsites with PIA customers, Openreach is unduly favouring its own fibre deployment business over its PIA customers. Information about the conditions of the Openreach physical infrastructure should be equally available to PIA customers and Openreach itself.
12. Even if Openreach would not wish to announce Retro Newsites locations to the public, it should do so to its customers. Inability to attach a timescale to Retro Newsites deployments should not hinder the provision of information as to their locations so that any user of the Openreach physical infrastructure can use that more attractive infrastructure for fast and easy deployments.

# Improvements to the PIA product

1. It is important that altnet feedback to Ofcom is balanced and fair. Whilst there is a natural tendency to focus on where it hurts, rather than where little or no pain is felt, altnets can confirm that the PIA product is going through a constant improvement process and that these improvements are welcome.
2. The Statement of Requirements (SoR) process remains long and occasionally tortuous and altnets would be grateful for increased transparency regarding how Openreach generated PIA SoRs are generated.
3. Whilst it is clear that Openreach is increasingly viewing altnets as customers, it is also clear that the provision of the PIA product is a regulatory imposition on Openreach and not a commercial choice. If the infrastructure part of Openreach were to be separated from the services business, then the infrastructure business would be naturally seeking to deliver products that satisfy their customers, without the need for regulatory impositions, incentives, or oversight.
4. The role of the OTA2 (OTA) in interfaces between altnets and Openreach is important, and INCA and its members appreciate the support from the OTA as well as the OTA’s impartiality when assessing issues brought to it.

# Conclusions

1. Altnets acknowledge that progress is being made with the PIA product, but the overall Openreach experience for altnets is one of concern and distrust. Whilst this may be partially due to unfounded concerns by altnets, the day-to-day experience of using Openreach services, seeing what appears to be discrimination in favour of BT Group or other parts of Openreach, suspected data leaks resulting in business plans being harmed by what appears to be reactionary build by Openreach, imposition of surcharges to directly target the viability of altnet deployments, and other such examples make it difficult for altnets to develop the level of confidence that should exist between the altnets and one of their most critical suppliers.

1. A part of Ofcom. [↑](#footnote-ref-1)
2. Individual INCA members will consume different Openreach products, depending on their business and network strategies and where they are in the network construction lifecycles. [↑](#footnote-ref-2)
3. Which formed part of the recently concluded wholesale fixed telecoms market review (WFTMR). [↑](#footnote-ref-3)
4. Unique Premises Reference Number. [↑](#footnote-ref-4)
5. Email to Gita Sorensen from Darren Warrington dated June 15th 2021, 13.51 [↑](#footnote-ref-5)
6. Email To Gita Sorensen from Darren Warrington dated 23rd July 2021, 14.01. [↑](#footnote-ref-6)