

# Supplementary market definitions submission

INCA

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Non-confidential

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## 1 Introduction

- 1 On May 1<sup>st</sup> INCA submitted its first Telecoms Access Review (TAR) pre-consultation paper to Ofcom, covering the subject of market definitions across the TAR. This paper should be read together with that submission.
- 2 In this paper we introduce further consideration in two areas:
  - The leased lines product market definition, and
  - The definition of Area 3 for both the WLAM and the BCM.

## 2 Leased lines product market definition

- 3 In the 2019 BCMR and the 2021 WFTMR, Ofcom defined the leased lines product market to include only Ethernet services to an end user site within the relevant market. This means that Ethernet circuits used within a CPs network (such as for backhaul) were excluded from the relevant product market and, therefore, not subject to ex-ante regulation.
- 4 This resulted in BT introducing differentiated pricing for Ethernet circuits in specific use cases, in particular for circuits used for backhaul from FTTP networks. Notably, however, where BT faces competition for such circuits, it offers the regulated prices, and it also offers regulated prices for other circuits which are no longer within the scope of the relevant product market. This is illustrated in the BT Openreach slide included in Annex 1.
- 5 We understand that Ofcom's rationale for excluding Ethernet circuits used for FTTP backhaul from the relevant product market was that Altnets could use PIA as a substitute upstream remedy. Detailed analysis of the economics of that option, however, shows that PIA is often not an economically viable substitute. Evidence to

that effect has been submitted to Ofcom on several occasions and can be resubmitted if required.

- 6 Given that Ofcom now recognises in the TAR the materiality of competitive fibre deployment in rural areas as well as small towns and villages<sup>1</sup>, the competitive advantage to BT of having its existing network available for backhaul from such locations compared with Altnets often having no alternative but to pay the increased Ethernet price (either directly or via the third party backhaul providers that rely on BT for the last portion of the circuits) is significant and causes a market distortion.
- 7 INCA urges Ofcom to review the leased liens product definition to include Ethernet circuits for FTTP backhaul into the relevant market. Not doing so would allow BT to transfer its dominant position in copper-based services to fibre-based services in locations where no direct access to competitive backhaul exists. BT's dominance in that market is evidenced by the fact that there are no other providers available and that Altnets are forced to pay the increased Ethernet prices.
- 8 We expect this problem to increase significantly as BT progresses its exchange closure programme as they will without doubt result in third party commercial backhaul providers withdrawing from locations where exchanges are closing down (except in the few locations where a data centre is near-by, which can be used as a meet-me point).

### 3 Definition of geographic market Area 3

- 9 In its initial submission on market definitions, INCA discussed in some detail that it could not see a justification for the creation of a geographic market corresponding to the current Area 3<sup>2</sup>, other than perhaps to cover locations in receipt of government subsidies.

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<sup>1</sup> This has been recognised by Ofcom on several occasions.

<sup>2</sup> This being due to the extensive build by Altnets in the current Area 3, contrary to Ofcom's expectations in 2021.

- 10 Having now given further thought to that issue, INCA considers that Ofcom should, indeed, define a geographic market to cover where Project Gigabit funding has been applied.
- 11 The underlying rationale for this proposal is that the locations in receipt of Project Gigabit funding have been found, through the government's Open Market Reviews (OMRs), to not be viable for commercial deployment.<sup>3</sup>
- 12 Locations where commercial deployment even by a single provider represent a discrete and clearly definable market segment where competition conditions are characterised by an unwillingness to invest commercially without supplementary government aid.
- 13 Providers in receipt of government aid are mandated to make their networks open to wholesale access at both active and passive levels, but the business cases submitted to government will reasonably assume that their new FTTP network will be the only fibre network in that location. If OMR responses have been truthful and if there are no other material market distortions that favour one network provider over others, commercial overbuild in those locations should not be commercially viable.
- 14 Based on the characteristics above, INCA considers that it would be appropriate to define a geographic market for where Project Gigabit funding has been awarded.
- 15 In the WFTMR, Ofcom expressed its concerns that overbuild by BT (with its significant advantage of existing relationships with all the large UK retail ISPs and the majority of existing broadband customers already connected to its network) in subsidised build area could be anticompetitive:

*"As we set out above in relation to Openreach building strategically to deter investment by competitors, were Openreach to subsequently decide to overbuild in an uncommercial area where*

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<sup>3</sup> Resulting from OMR responses showing that no provider has plans to deploy commercially in those locations.

*a competitor had successfully bid, this could be anti-competitive. The Openreach Monitoring Unit plays an active role in deterring such behaviour.” [emphasis added]<sup>4</sup>*

16 INCA has, in the past, enquired what measures Ofcom could or would take in the case of such overbuild by BT, and it has not been clear that Ofcom would in fact be able to take specific action other than overall soft pressure to not do so.

INCA now has evidence from at least one Altnet where the latest analysis suggests a level of overbuild in excess of 28% of subsidised prems 2 years from the award of the contract. Further, as recently as the 29th May this year, Openreach announced new FTTP build areas including the Isles of Scilly, for which an Altnet has been awarded Project Gigabit funding less than one month ago.

17 On a more general level, data provided by Point Topic to INCA shows that BT is present in at least 10% of Project Gigabit postcodes. INCA suggests that Ofcom should specifically collect data from BT on its FTTP network presence and compare that to Project Gigabit postcodes. This is data that Ofcom should already hold for its Connected Nations reports and Ofcom should be able to obtain Project Gigabit postcode information from BDUK.

18 By defining a market for Project Gigabit deployments, Ofcom would be able to set a specific policy for that market and introduce specific remedies to prevent the repeat and continuation of BT’s current behaviour.

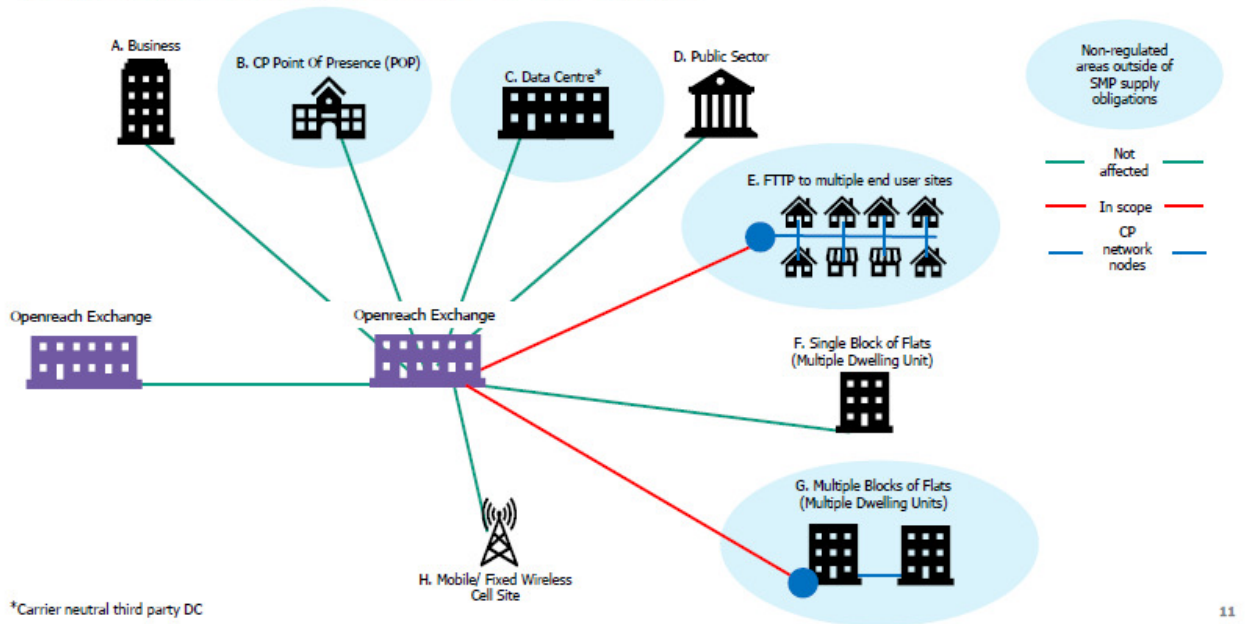
19 INCA will provide further inputs in later submission in relation to what an appropriate remedy would be but consider that a period of no overbuild by an SMP provider that matches the BDUK 7-year contract period during which the government can claw back subsidies in the returns of the investment exceeds agreed levels would be both appropriate and proportionate.

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<sup>4</sup> WFTMR V3 Paragraph 2.70 bullet 3.

## Annex 1

Diagram illustrating the scope of the change



20 The above diagram was used by BT Openreach in a presentation to CPs to explain which EAD circuit use cases are regulated and to which use cases it would apply the surcharge.



OTA2 Leased Lines  
used for FTTP 23 Ap