

## Further submission by INCA and altnets in relation to Ofcom's consultation:

### Existing Openreach FTTP offers with geographic pricing

#### Introduction

Further to the response to the above consultation, made by Altnets and INCA<sup>1</sup> (the first response), INCA, County Broadband, Fern Trading<sup>2</sup>, FullFibre, Truespeed, WightFibre, and Zzoomm wish to make this further submission.

Ofcom consulted on whether three Openreach pricing offers, already in place when the WFTMR was completed (the existing offers), should be allowed to remain in place in light of the new prohibition of geographic pricing introduced in the WFTMR. Ofcom's consultation proposed that all three offers should be granted exemptions from the geographic pricing prohibition and therefore they should be allowed to run their full terms.

The first response set out clearly that the respondents considered Ofcom's consultation on the geographic aspects of the existing offers to be superficial and to not properly apply the new rules and principles introduced in the WFTMR Final Statement (the WFTMR). The first response set out a sample decision tree to illustrate what a transparent analysis framework would look like, clearly highlighting the significant shortcomings of Ofcom's consultation document. It also presented precedents from other regulators and case examples from competition law cases to demonstrate that the approach proposed (in the first response) was proportionate and in line with international best practice.

In a subsequent follow-up call with Ofcom, Ofcom argued that it believed its analysis to be sufficient and that it would need detailed data from altnets to demonstrate the harm that could arise from the geographic aspects of the existing offers, if it were to reconsider its proposed conclusions.

Subsequently to the submission of the first response and the follow-up call mentioned above, Ofcom has issued an update that Openreach is extending the scope of the FTTH only offer V2 to bridge the gap between the original scope of locations where Openreach had deployed FTTP by 31<sup>st</sup> March 2021 to now cover areas where Openreach will have deployed FTTP up to and including 30<sup>th</sup> September 2021. Ofcom has stated that it does not consider that this change would affect its assessment of whether the offers should be allowed to remain in place.

#### Feedback on follow-up call with Ofcom

During the follow-up call with Ofcom on May 27<sup>th</sup> 2021, Ofcom suggested that, in order to demonstrate to Ofcom that its analysis and conclusion were insufficient and should be reviewed, the respondents

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<sup>1</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0029/219728/inca.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0029/219728/inca.pdf).

<sup>2</sup> On behalf of Jurassic Fibre and Swish Fibre.

would need to explain why the geographic aspects of the existing offers are of concern and submit more detail on the impact thereof.

The first response presented an analytical framework that, if applied by Ofcom, would present a transparent analysis, to justify whether an exemption from the prohibition of geographic pricing should be granted, or not. Such analysis should include exploration of the potential harms that could result from the geographic elements of the existing offers and a rationale for why the potential benefits of those geographic pricing elements would exceed the potential harm.

It is the view of the signatories to this letter that it is not reasonable for Ofcom to demand that altnets present analysis of specific harm likely to result from the existing offers. The remedy is an ex-ante prohibition with the possibility of Ofcom granting an exemption from that prohibition. We believe that it follows from this remedy structure that the burden of proof for granting an exemption lies with Ofcom, and therefore also with Openreach in its application to Ofcom for such exemption. The very nature of the ex-ante remedy is that it is preventative in nature. It is not therefore possible to submit a detailed impact assessment of the offers, as the impact may not have happened yet.

Despite some being at relatively early states in their deployment, altnets are cumulatively investing in excess of £12bn into uk fibre deployment, and will look to attract wholesale customers (the ISPs targeted by the Openreach offers) in the next year or two. Two of the existing offers provide benefits to the wholesale customers registered for the offers until at least September 2025, so they will be active and influence commercial decisions by wholesale customers for a considerable period of time.

Several altnets have joined forces to create a common wholesale platform that is intended to make it easier for wholesale customers to consume access to smaller altnet networks by presenting that access through a single physical interface, supported by common processes, and on standard or similar commercial terms. The fact that altnets are taking this initiative to attract wholesale customers demonstrates the importance of wholesale business to their business cases.

The existing offers (and legitimate expectation of new offers that will consistently cover all Openreach FTTP deployment) will create significant incentives for wholesale customers to remain with Openreach and therefore potentially foreclose the wholesale market for altnets. There is an acute concern that the existing offers will have the impact of foreclosing the wholesale markets in the geographic areas where they apply.

It is the view of the signatories to this submission that it is Ofcom's duty to present clear and transparent analysis to justify the granting of an exemption from the prohibition on geographic pricing and that Ofcom has not done so. It is also our view that it is not reasonable that Ofcom shift the burden of proof to altnets. If Ofcom needs data from altnets to assess the potential harm, then it has the powers to request that data.

It is the view of the signatories that the impact of this will be to disincentivise investment in certain geographies by altnets, significantly reducing the likelihood of competition at the infrastructure level, to the detriment of the consumer. Further, a reduction in investment caused by the changed market conditions will likely reduce the pace of fibre rollout, disadvantaging consumers further.

We therefore repeat our request that Ofcom reconsult in a more complete and transparent manner in order that altnets can fully understand the underlying rationale for Ofcom's proposal to grant exemptions to all the three existing offers.

## Assessment of existing offers against Ofcom's new conditions for other commercial terms (OCT)s

At the follow-up call, we also asked Ofcom why it had chosen to not consult on whether the existing offers comply with the OCT terms set out in the WFTMR. Ofcom explained that it did not believe it needed to consult on those aspects of the offers and also commented that, as the offers had already been in the market for some time prior to the WFTMR taking effect, altnets could and should have taken any concerns to Ofcom at an earlier date. Ofcom also implied that, as the existing offers had been in the market for more than 90 days prior to the WFTMR taking effect, the offers had effectively already been subject to the 90-day prenotification period and altnets had not raised concerns. That approach seems neither correct nor reasonable as the offers were introduced when different regulatory rules were applied, we therefore strongly object to that position. Ofcom did, however, also say that it would look carefully at any separate submission made by altnets in relation to OCTs in the existing offers.

A separate submission is being prepared in relation to the OCTs and we look forward to engaging with Ofcom on that matter.

## Summary and conclusion

The signatories to this letter remain of the view that Ofcom's analysis relating to the impact of the geographic aspects of the existing offers, as presented in the consultation, is deficient and fails to apply the framework that Ofcom has only just introduced via the WFTMR and will be to the detriment of consumers.

It is neither possible nor appropriate for altnets to prove whether the existing offers should be granted exemptions to the geographic pricing prohibition. Altnets have highlighted risks associated with the geographic aspects of the existing offers and it is Ofcom's duty to perform a thorough and transparent set of analyses to determine whether such risks outweigh any potential benefits from the geographic aspects of the existing offers.