Physical Infrastructure Market Review

Virgin Media's response

13 February 2019

Non-confidential Response

Contents

EXECUTIVE SUMMARY

We welcome the opportunity to respond to Ofcom's Physical Infrastructure Market Review ("**PIMR**"). [1]

In 2015 we welcomed Ofcom's Review of Digital Communications ("**DCR**").[2] The 'strategic shift' to infrastructure competition signalled that Ofcom would pave the way for CPs to move beyond the first rungs on the ladder of investment. Substituting build vs buy decisions for build vs occupy. Decoupling CPs from BT's longstanding practices and making innovation, not Ofcom market reviews, the main catalyst for improving consumer outcomes. The shift appeared set to usher in a new competitive landscape with end-to-end infrastructure providers going head-to-head to the benefit of consumers and UK plc.

The BCMR[3] and WLAMR[4] that followed were the first opportunities to put this new strategy into practice. We were clear in our responses that those reviews did not match Ofcom's prior rhetoric.

Therefore, it was with some caution that we welcomed the Future Telecoms Infrastructure Review[5] ("**FTIR**") and Ofcom's Strategic Policy Paper on full-fibre[6]. Both signalled a revival of plans to make infrastructure competition work for consumers.

In the PIMR, Ofcom finds that BT has SMP in the physical infrastructure market, across the geographic markets it has defined. As a result, Ofcom proposes that the WLA PIA remedy should be recast to service all geographies, network segments and uses. We agree.

Openreach's latest reports indicate it is rolling out its FTTP deployment programme at a rate of c.13,000 new premises passed per week.[7] Similarly, Virgin Media's latest public statements indicate a run-rate of c.8-9,000 premises passed per week with Project Lightning.[8] Both of these scale

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[1] https://www.ofcom.org.uk/consultations-and-statements/category-1/physical-infrastructure-market-review
[2] https://www.ofcom.org.uk/__data/assets/pdf_file/0026/55628/virgin_media.pdf
[3] https://www.ofcom.org.uk/consultations-and-statements/category-1/business-connectivity-market-review-2016
[4] https://www.ofcom.org.uk/consultations-and-statements/category-1/wholesale-local-access-market-review
[5] https://www.gov.uk/government/publications/future-telecoms-infrastructure-review
[6] https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/regulatory-certainty-investment-full-fibre
[7] https://www.btplc.com/Sharesandperformance/Financialreportingandnews/Quarterlyresults/2018-2019/Q3/Downloads/Slides/q319-slides.pdf
[8] https://www.libertyglobal.com/wp-content/uploads/2018/11/Liberty-Global-Q3-2018-Earnings-Presentation.pdf

network deployments are happening despite the PIA product not yet being fit for purpose. Therefore, PIA presents a significant opportunity if it can be made to work effectively.

1. INTRODUCTION

Ofcom's programme of work

The PIMR represents the cornerstone of a series of forthcoming consultations which, when taken together, should realign the UK's regulatory landscape. Virgin Media supports the proposals in the PIMR, but this presupposes Ofcom will achieve this broader realignment. For now, we have to have faith that Ofcom will deliver on its ambitions. This time inconsistency problem is a key challenge inherent to Ofcom's plans. Ofcom cannot fetter its future discretion nor disregard evidence available at the time it makes a market assessment. It is therefore important that its package of proposals is carefully analysed, swiftly proposed, debated and concluded with Ofcom's strategic objectives at the heart of its conclusions.

Government's and Ofcom's proposals set a challenge to industry to develop and deliver ambitious plans for investment in UK communications infrastructure. These ambitions, whether measured by coverage targets, the number of head-to-head infrastructure competitors, deployment of specific technologies or timing and pace of rollout, are extensive. Those that take up this challenge should have a fair opportunity to benefit from delivering these outcomes, those that do not, should work within the constraints that they had clear and fair warning of.

The above proposals encourage new entrants into the market, new business cases to be formulated and participants to compete in areas of the market they previously may not have considered. In many cases providers will do this ahead of consumer demand, with the anticipation of long-term payoffs and a stable regulatory backdrop. These proposals call on industry to be ambitious and take a calculated risk; Ofcom must do likewise.

It is important that PIMR is set in the context of the holistic package of proposals Ofcom intends to bring forward. As a consequence, below we briefly lay out our expectations for these forthcoming publications, to give context to our views in this response.

BCMR

In the BCMR, Ofcom proposes pricing stability for wholesale active services and to introduce a restricted dark fibre access remedy for inter-exchange routes. We support Ofcom's approach to pricing and would encourage it to provide further signals that this pricing stability is expected to continue longer-term. This will provide a stable backdrop to network investment and PIA uptake.

However, we have concerns about the rationale for Ofcom's dark fibre remedy. While less pervasive than the previous incarnation, it still appears to be too broad and it undermines the prospects for PIA uptake (the scale and scope benefits that Ofcom rightly acknowledges in the PIMR). It also conflicts with Ofcom's conclusion that usage restrictions on inter-exchange routes should not be introduced on PIA. Multiple overlapping passive remedies are neither necessary nor proportionate.

Initial consultation on geographic markets

Ofcom proposes to adopt a geographically differentiated approach to downstream wholesale regulation based on the competitive conditions, currently defined by three broad geo-types. We welcome this approach to provide regulatory forbearance where competition has taken hold, targeted intervention where it is unlikely to emerge and a pro-investment environment for areas where effective infrastructure competition is expected to emerge over time.

Prematurely designating areas as effectively competitive could risk poor outcomes for consumers in those areas. Equally, prematurely writing off areas as unlikely to be competitive will needlessly limit the potential for alternative investment and entrench BT's market position: misplaced remedies deter investment.

Unrestricted PIA is a cornerstone of Ofcom's strategy for encouraging network investment. Analysis of its potential adoption should be at the core of Ofcom's geographic market assessment.

Initial consultation on approach to remedies

Ofcom's forthcoming consultation will set out the framework for its approach to remedies in downstream markets across these newly defined geographic areas. It is clear to us that in prospectively competitive areas, Ofcom must do other than it has in previous WLA assessments. Access seekers will need to have an incentive to make network investments and to have confidence that their long-term investments can pay off. Ofcom will need to consider new and better ways to protect consumers and ensure existing competition is viable, but in a way that unabashedly encourages investment.

It should be infrastructure investors' 'fair bet', not BT's, that is key to informing Ofcom's analysis in these areas. Despite prospective improvements to PIA, Ofcom's and Government's ambitions may not be realised if Ofcom were to be preoccupied with BT's return on its existing assets in these areas, when CPs are weighing the potential risk of making a new investment today.

Similarly, Ofcom should avoid adopting a pessimistic approach when categorising areas where competition is unlikely to emerge. Doing so would risk entrenching BT's position in too many areas of the UK. PIA has the potential to open up new areas to prospective competition. **[✂]**.

Finally, we will be particularly keen to understand Ofcom's proposed approach and methodology for considering how and when to reclassify areas from prospectively to effectively competitive as well as uncompetitive to prospectively competitive. Ofcom's approach should be transparent and while we welcome a move to adopting longer market review cycles, we would anticipate that a mechanism is needed to reassess area classifications during market review periods to reflect investments that have occurred in-between reviews.

This consultation will be the litmus test for whether we were right to take the leap of faith in Ofcom putting investment at the heart of its decision-making.

PIMR findings and remedies

We broadly support the findings of the PIMR. In short, Ofcom proposes to transplant the WLA PIA remedy into the physical infrastructure market and remove current restrictions on its usage. In our view, this is a sensible proposal and establishing the physical infrastructure market as distinct from downstream service markets is logical and timely.

Previous attempts to introduce passive remedies in WLA and BCMR created clear challenges for adjacent markets exacerbated by overlapping market review periods. The plan to consolidate these reviews over time will provide greater flexibility for Ofcom's future downstream assessments.

We broadly agree with Ofcom's product and market assessments in the PIMR. It is clear that BT has SMP in the physical infrastructure market and that countervailing factors are insufficient to constrain its actions. We note that the PIMR market assessment relies on both the BCMR and the geographic markets consultations, where we provide further commentary on these market assessments.

As a result of the PIMR, Ofcom proposes to adopt the revised WLA PIA remedy and extend this remedy for unrestricted use. Virgin Media supports this intention. We anticipate that the WLA PIA Reference Offer, due to be published 1 April 2019, will serve as the basis for the PIMR PIA Reference Offer.

Progress has been made in refining the WLA PIA remedy, though it has been slow. If aspects of the current negotiations remain unresolved[9] we believe Ofcom should ensure sufficient time is made available to address these outstanding issues as part of PIMR PIA Reference Offer window; this will need to exceed one month. We anticipate at least four months would be required to implement Ofcom's proposals and potentially longer if unresolved issues are to be addressed.

The remainder of our response is structured as follows:

- In **Section 2** we comment on Ofcom's market assessment;
- In **Section 3** we discuss Ofcom's proposed general remedies;
- In **Section 4** we discuss Ofcom's proposed specific remedies;
- In **Section 5** we provide brief comments on Ofcom's draft legal instruments; and
- In **Section 6** we provide our responses to Ofcom's consultation questions.

[9] This is still to be determined as the consultation response window for PIMR closes prior to the resolution of the Reference Offer negotiations. Virgin Media has engaged extensively during that negotiation process and provided extensive feedback to Ofcom. For brevity, we do not reiterate our comments or concerns in this response.

2. MARKET ASSESSMENT

Ofcom's conclusions

Ofcom provisionally concludes that there is a single product market for supply of wholesale access to physical telecoms infrastructure and that four distinct geographic markets for this product exist in the UK. Further, Ofcom provisionally concludes that BT has SMP in all of these markets.

Product market definition

We agree with Ofcom's choice of focal product and broadly agree with the resulting analysis. Duct and poles, taken together as fixed telecoms physical infrastructure, provide the building blocks for deployment of telecoms networks that underpin the products analysed as part of the BCMR and WLAMR.

It would not make sense, for example, to first consider duct or pole as separate focal points. While some CPs (Virgin Media included) have a preference or a legacy of using one infrastructure type over the other, barriers to adopt another type are surmountable. For example, Virgin Media's UK network is underground, **[✂]**.

Constraint of non-telecoms physical infrastructure and wireless

We broadly agree with Ofcom's assessment that there are a number of practical and material drawbacks to considering non-telecoms physical infrastructure as an effective substitute for telecoms infrastructure. In our view, and based on our previous assessments and trials, these drawbacks and complicating factors severely limit the scope for significant use of non-telecoms physical infrastructure as part of normal build.

Non-telecoms physical infrastructure acts as a weak constraint on the telecoms infrastructure market and in our view it is likely to remain only a niche substitute where it is either not viable or cost-effective to deploy telecoms physical infrastructure. Due to the challenges inherent in repurposing these forms of infrastructure, our own adoption of non-telecoms physical infrastructure is typically by necessity, very limited and not preferred. Broadly, each alternative infrastructure type has its own shortcomings consistent with those Ofcom identifies[10] that in general make the use of

[10] PIMR, para 3.35

such infrastructure unattractive. We would be happy to share further evidence of these preliminary findings to Ofcom if this would be helpful.

We also agree that wireless infrastructure should not be considered within the scope of the focal product. Ofcom rightly notes that fixed infrastructure is often a pre-requisite for utilising wireless infrastructure. However, we would note that innovations in wireless infrastructure may provide sufficient improvements in capabilities to make more use cases viable in the future. Given these current limitations, we agree that microwave, FWA and satellite should not fall within the focal product scope at this time.

Strength of competition from existing upstream competitors

Ofcom's assessment of the existing upstream competition focuses on the strength and characteristics of competing alternative infrastructures as a mechanism to act as a constraint. Specifically, in the context of Virgin Media, we would broadly agree with the benefits that BT's infrastructure holds over our own. In particular, the cost of using our network would be higher and this, amongst a number of factors, is driven by the direct bury approach within the property boundary as well as the lower contiguity of coverage.[11] **[✂]**.

[✂].

Geographic market definition

Selection of the geographic unit

Ofcom proposes to use postcode sectors as the starting point for the geographic unit of measure.

We consider that, in the context of this review, this approach strikes a reasonable balance between seeking to maximise homogeneity within each area and avoiding excessively cumbersome analysis or excessive fragmentation of geographic markets.[12] We understand Ofcom's bias towards more granularity for this first PIMR analysis, but anticipate that this approach will evolve to a higher level of aggregation (i.e. less granularity) in future PIMRs and following Ofcom's consultations on factors related to downstream markets.

[11] Our partial coverage within postcodes, individual streets or even small groupings of premises would be expected to create significant barriers to designing a cost-effective network for third-parties. **[✂].**
[12] Heterogeneity within the geographic areas is unavoidable. **[✂].**

We support Ofcom's decision not to consider defining the geographic unit by reference to the network design of an operator, for example, BT's exchange areas.

Aggregation of geographic units into markets

As Ofcom recognises, market definition analysis is a means to an end, and so should serve its intended use.

Given Ofcom's strategic statements, we would expect that this (in part) would support Ofcom in its future intended geographically-disaggregated downstream remedies. It is not clear to us that the list of geographic markets that Ofcom defines in PIMR are well suited or easily mapped to Ofcom's intended downstream geographic markets. In PIMR, Ofcom defines:

- BT-only areas;
- Areas with alternative telecoms infrastructure, but not High Network Reach (HNR) areas (i.e. broadly BT and Virgin Media areas);
- HNR areas, excluding the Central London Area (CLA); and
- The CLA.

These geographic markets do not appear well-aligned to Ofcom's intended future geographic markets:

- Areas of effective competition;
- Areas that are prospectively competitive; and
- Areas unlikely to become competitive.

We recognise that Ofcom has published its geographic consultation and we will provide a response to that consultation. However, we would have expected that the PIMR markets would have been defined in a way that could directly map to the downstream geographic markets Ofcom intends to specify.

For example, it is likely that many areas that are BT-only under the PIMR assessment should not be assumed to be unlikely to have competition infrastructure in the future. This classification, at least in part, could result in the PIA remedy currently not being suitable for scale use. We welcome any clarity Ofcom can provide on how these distinct geographic markets will coexist and/or evolve over time. In particular, we would welcome clarity that Ofcom does not intend to restrict its downstream market remedies to align to the geographic markets identified in PIMR. For the reasons we have set out, we believe this would be an overly pessimistic view of the prospect for competition and would have a chilling effect on the ambition of CPs to adopt PIA.

3. GENERAL REMEDIES

As a result of the PIMR, Ofcom proposes to emulate the general remedies adopted in the WLAMR. Virgin Media broadly supports Ofcom's proposals. Below we provide brief comments against the remedies by exception, focusing on our experience of these remedies to date, and where we believe more guidance may be helpful to ensure that Openreach and industry are clear on the intent and interpretation of those remedies.

We also briefly discuss Ofcom's proposed implementation timeframe and why we agree with Ofcom that the Access to Infrastructure Regulations ("**ATI**") are not an appropriate or effective substitute to a workable and scalable PIA remedy.

Comments on the proposed general remedies

'Requirement to provide network access on reasonable request' and 'Requests for new forms of network access'

We agree that access on reasonable request and requests for new forms of access are necessary. We also believe that a key complication of these remedies is the need to recognise and reconcile that other operators may seek access to BT's physical infrastructure in a way, and for a purpose, which is distinct from how BT operates today. We recognise that Openreach's use of its infrastructure is, in some ways, distinct from other access seekers. That is the principal reason why we do not think a requirement for Equivalence of Inputs ("**EoI**") would be proportionate. However, this also means that it is not appropriate to impose Openreach network design rules or practices on how other CPs seek access. Divergence in design between BT and its customers is likely to grow overtime and BT's vertically integrated structure should not be a barrier to how others use its infrastructure.

As a CP that already has an extensive and distinct infrastructure presence, we have been amongst the first to observe the challenges that arise when access is sought in a way that resembles the use of our own network in the PIA environment. It is problematic when Openreach seeks to impose its preferences or design choices on CPs. Tying rules or limitations of the PIA product to BT-derived geographic areas, concepts of network design or limitations of Openreach's internal systems create friction when using the product, or a need to mimic BT's approach. This has been observed during the WLA PIA reference offer negotiations on variety of topics, for example demand forecasting, mixed usage limitations, PIA order size or linking orders to use Network Adjustment funds.

We believe Ofcom should make clear, in its guidance and (if necessary) the legal instruments, that divergent forms of access are inevitable and to be welcomed as this will allow PIA users to innovate rather than simply replicate Openreach's approach.

'Requirement not to unduly discriminate'

We agree that non-discrimination obligations are critical for PIA to be effective. This has implications for how Openreach should seek to allow access and new forms of access, but it also has implications for how Openreach's use of its own infrastructure compares to that of PIA access seekers. As we noted previously, stakeholders should recognise that Openreach's and CPs' use of its network are distinct in some ways. In our view it is appropriate that this divergence is recognised in the SMP obligations.

We acknowledge that, in abstract, the imposition of EoI obligations could be desirable. Such an obligation would ensure a level playing field, focus Openreach's attention on making PIA effective and create good incentives to make PIA systems and processes scalable, quickly. While progress has been made, our experience to date during the WLA PIA Reference Offer process would suggest that these incentives do need to be reinforced.

However, we also recognise Openreach's position within BT and acknowledge that where justifiable, Openreach should be able to adopt distinct, but still comparable, systems or processes to serve its own downstream business that PIA CPs do not use. Ultimately this is in the interest of UK consumers as EoI would likely cause Openreach's own ultrafast investment programme to be disrupted and delayed. In our view one of the main objectives of EoI would be to ensure the PIA remedy is fit for purpose. We believe this can be achieved using more proportionate mechanisms. As a consequence, we would agree that EoI is neither appropriate nor proportionate.

Ofcom proposes that Openreach will not be required to set out all instances of non-equivalence at the outset and instead that monitoring will be undertaking, including working with the OTA and PIA CPs. While we agree that this is likely to be proportionate, we would note that by design, these non-equivalent practices will often be invisible to PIA CPs. We would therefore encourage Ofcom to make full use of its information gathering powers as the PIMR PIA remedy is introduced and used, particularly where CPs raise concerns regarding restrictions or frictions in the consumption of the PIA remedy. Any issues that may arise could have an underlying non-equivalence root cause. If Openreach has not set these instances out to Ofcom and/or industry at the outset, they should be investigated thoroughly if issues with PIA arise.

As we go on to discuss below, we also believe Ofcom's proposal reinforces the need for extensive transparency and KPI reporting and clear guidance from Ofcom that Openreach should be forthcoming with further reporting to industry, should issues or concerns arise.

'Transparency and KPIs'

CPs, OTA, Ofcom (and potentially even Openreach) will not have clear visibility of the variations that exist between how Openreach uses its infrastructure and PIA users do. We believe it is vital that extensive reporting of the outcomes of these parallel activities is in place.

Providers' rollout of ultrafast networks using PIA may be slower, more costly or less effective than that of Openreach (or of independent network build, such as Virgin Media's). This may be due to shortcomings of CPs' practices and processes or business cases but it may also be due to deficiencies of PIA. No stakeholder will have perfect information regarding the latter and the only way to identify issues with PIA as the cause of issues resulting from using PIA is to have transparent information on the product's performance, as compared with Openreach's own deployment of fibre. Comparative reporting on relevant outcome metrics will make it apparent where processes or procedures adopted for the latter results in an advantage for the former.

During WLA PIA Reference Offer negotiations, Openreach has proposed inadequate KPIs to provide this benchmark information. PIA users have provided a broader and more complete suite of metrics. We believe it is important that Openreach should be open to adopting these and further reporting as the need arises.

We also believe there is merit in Ofcom undertaking further and more granular analysis of this and other information to identify if issues exist which are not apparent from summary statistics reported to industry. We would welcome an indication from Ofcom that this is likely to form part of its on-going monitoring programme, to give CPs confidence that it will have visibility of data to identify issues that otherwise may go unseen.

Implementation timeframe

We believe there may be merit in allowing a longer implementation timeframe than Ofcom's current proposal of one month from the date of the PIMR final statement, even on the basis that the WLA PIA Reference Offer will form a useful baseline for PIMR PIA implementation. There is merit in addressing any material aspects of the WLA PIA Reference Offer that remain unagreed as part of this implementation. The timeframe required to finalise these issues would be dependent on the issues that remain unagreed, which are unknown at the time of writing. However, at a minimum we believe four months would be required to ensure sufficient time to implement the changes proposed in this consultation.

Implementation of PIMR PIA

We recognise that progress has been made in a number of areas during the 12-month WLA PIA Reference Offer negotiation window. The result will be an extensive set of contract documents, many process guides, technical guidance and a systems development roadmap for further improvements.

We do not believe it will be feasible to review and revise these materials and plans effectively in a one-month period. This implementation timeframe would appear to assume Openreach would independently and mechanically adjust contract clauses or definitions to remove existing restrictions on mixed usage and geographic/network segment limitations. While prolonged engagement with industry should not be necessary, some industry engagement will be.

We note a relevant parallel with the WLA PIA remedy. Openreach was required to introduce (amongst others) changes to permit mixed usage and implement these changes one month after the WLA final statement.

Openreach’s interpretation of the requirements was not acceptable to industry and resulted in extensive discussions to make the mixed usage rules more appropriate.

We would therefore have concerns that setting a one-month implementation period may, again, raise the risk that Openreach may interpret and implement these requirements in a way that may not fully reflect the spirit or intent that Ofcom or other stakeholders envisaged. We therefore believe it is necessary to allow stakeholders to engage with Openreach properly as part of this implementation.

An additional benefit to an extended implementation timeframe would be to provide CPs (particularly those focused on leased lines) an opportunity to input into the negotiations. The usage restriction of the WLA PIA is likely to have led some CPs to not participate in these negotiations previously.

Resolving unagreed PIA issues

The vast majority of stakeholders would likely agree that the previous incarnation of PIA was not fit for purpose and certainly not fit for scale use. We recognise that progress has been made via the WLA PIA Reference Offer on a number of important aspects of the PIA remedy and how it can be consumed. We expect more progress to be made by the time negotiations conclude. However, it appears possible at this stage that the outcome will result in a product that is still not yet fit for scale use and therefore inadequate to meet Ofcom's broader objectives, even if it were to meet the strict minimum obligations defined in the legal instruments.

We acknowledge that perfect should not be the enemy of the good and that the PIA product will need to evolve over time. In part, this evolution will require time and experience of using the product. However, a number of fundamental aspects of WLA PIA product remain unagreed and therefore present a known barrier to PIA usage.

Many CPs will be assessing business plans to rollout ultrafast networks using PIA and existing network investors will be considering to what extent their plans should be augmented to accommodate PIA. Meanwhile, network rollout by a small number of CPs who have traditionally deployed their own infrastructure will continue at pace, leading to the real option value of PIA diminishing over time.

We believe there are a number of key topics that need to be addressed quickly and a pragmatic mechanism to achieve this would be a longer formal implementation period during which these topics can be negotiated.

Imposing a deadline to discuss and agree these issues will focus the minds of Openreach and industry and avoid discussions on these critical items being protracted. While open-ended and on-going dialogue will be helpful to ensure the product evolves effectively, where issues have been identified and time has expired on remedying these known issues during the WLA PIA Reference Offer, they should be addressed via the PIMR PIA Reference Offer.

Similarly, we would advocate that Ofcom continues the approach, adopted after the publication of the draft WLA PIA Reference Offer, of establishing regular CEO (or equivalent senior management) meetings to be chaired by Ofcom with participants from Openreach, OTA and industry. This will help to ensure that progress on PIA's development has the appropriate senior stakeholder attention and a direct channel is available for infrastructure investors to raise issues as they arise.

Access to Infrastructure Regulations

We agree with Ofcom's assessment that the ATI regulations are not appropriate or effective to deal with BT's SMP in the physical infrastructure market.

The ATI Regulations are intended to be used on a case-by-case basis where a third-party provider encounters an insurmountable barrier or obstacle to network deployment in a particular location. They are not intended to be used as a remedy to address enduring SMP.

The regulations do not provide a mechanism to establish processes or procedures to underpin a scale use passive remedy, nor do they provide appropriate incentives or obligations to make tools available for reviewing network infrastructure information or ordering.

Furthermore, we agree that there is no explicit obligation for the infrastructure owner to not discriminate between an access seeker and its own vertically integrated business. As many stakeholders will be aware, concerns regarding non-discrimination and equivalence have been at the centre of many of the discussions during the WLA PIA Reference Offer negotiations.

It is also clear that a challenge would likely emerge regarding pricing of access via ATI. Under ATI, the infrastructure owner has the opportunity to recover costs associated with the impact on downstream business cases. This would work directly against Ofcom's intention of mitigating the effect and advantages that BT derives from its SMP in the physical infrastructure market. Furthermore, the high-level guidance on recovering system development cost, while open to interpretation, would seem to conflict with Ofcom's proposals on Openreach's productisation cost recovery.

4. SPECIFIC REMEDIES

As Ofcom notes, it is "proposing that PIA in the Physical Infrastructure markets should be in the same form as the WLA physical infrastructure access obligation, but without the usage restrictions".[13] Below we discuss each of the specific remedies in turn, in particular Ofcom's proposed removal of usage restrictions on PIA and how our view on this topic has evolved since the WLA in light of the new context in which it is being proposed.

Usage and geographic scope of PIA

In the 2018 WLAMR Ofcom considered the opportunity of expanding the use of PIA from broadband access networks, either on the basis of a 'mixed usage' or 'any usage' rule; ultimately, it adopted a 'mixed use' rule.

At the time, Virgin Media was sceptical of the merits of either of these changes in the context of the WLAMR. Broadly, we reached this conclusion for three reasons:

- **The broader scope was not necessary:** Ofcom had not demonstrated that it held sufficient evidence that broadening the usage of PIA was necessary for the effective implementation of the PIA remedy in the WLAMR. **[✂]**.[14] **[✂]**.
- **The broader scope was not proportionate:** Ofcom had presented limited analysis of the potential impact of a broader PIA remedy on adjacent BCMR services, despite reviewing and rejecting the option to introduce a duct access remedy in that market. In conjunction, Ofcom appeared intent on introducing an extensive dark fibre access remedy in BCMR alongside significant reductions in active wholesale prices across both downstream service markets. Taken together these remedies appeared to be detrimental to current and future investors in infrastructure and incompatible with Ofcom's stated intention to usher in a new wave of network investment.
- **The broader scope would not be effective:** The introduction of the required changes to the WLA PIA remedy were to be laid down shortly after the conclusion of the DFA CAT appeal. In the contentious environment where BT had concerns about its ability to make fair returns on its current and future infrastructure investments it was apparent that a broader scope for PIA would likely act as a poison pill for PIA Reference Offer negotiations. With an ambitious

[13] PIMR, para 5.13

[14] **[✂].**

timeline envisaged to overhaul PIA to make it fit for purpose for the deployment of broadband access networks, the introduction of 'mixed' or 'any' usage rules would act as a distraction from the central objective of recasting PIA to be usable.

Government's and Ofcom's clear stated intent provides a new context to liberalisation of PIA usage in the PIMR. We would still maintain that the scope of PIA is sufficient to be effective if the WLA were considered in isolation. However, given Ofcom's objective is to accelerate full fibre investment, a broader product scope is sensible in this context.

In our view, when considering this package of intended proposals as a whole, the case for lifting usage restrictions on PIA has been strengthened:

- **Holistic regulatory framework:** Ofcom has set out a roadmap to consolidate its downstream service market reviews and assess any necessary remedies in the broader context of these markets that are converging over time. By design, this will place greater weight on the role of actual and prospective infrastructure competition and allow a fuller assessment of the implications of remedies on all relevant downstream services. We would expect this to result in remedies that complement rather than conflict with Ofcom's policy objectives and competition across adjacent downstream markets.
- **Avoiding the regulatory smörgåsbord:** Government and Ofcom have set out a strategy for policy and regulation that is focused on encouraging network investment with PIA as a linchpin of this strategy. This approach appears set to provide regulatory forbearance where effective competition takes hold, to largely avoid unnecessary duplicative regulatory remedies and to acknowledge the long-term and risky nature of network investments and the important role that a stable regulatory environment plays in influencing this risk. Therefore, as we set out in our responses to the BCMR and the Approach to Geographic Markets consultations, Ofcom should go further to avoid overlapping passive remedies and avoid setting a low ceiling for its ambitions for competition (this remains a concern in Ofcom's latest BCMR). However, we now have more clarity about the form, extent and role that regulatory remedies are intended to play in the evolution of competition in these markets and we welcome the additional clarity that has been provided to date.
- **Mixed usage negotiations were intractable:** Negotiations to implement the WLA PIA 'mixed usage' rule were not fruitful. Openreach's desire for extensive oversight and reporting as well as unacceptable operational restrictions would have made deploying network for 'secondary usage' cumbersome. At the time of this response, the topic has essentially been 'parked' in the WLA PIA Reference Offer negotiations because of the PIMR. With hindsight,

> it is clear that problems will arise when Openreach is responsible for designing, adjudicating and enforcing usage restrictions of PIA. One of the attractions of PIA is the opportunity to use the remedy largely unencumbered by scrutiny of the incumbent. This is particularly true for Virgin Media, which by using PIA, would be introducing its prime competitor into the process of our network investment. In our view, it is important that Openreach does not have a role in policing the purpose of PIA usage.

As we discuss below, while we agree with Ofcom's proposed liberalisation of PIA use, this is not without risk and these risks need due consideration from the outset, even if these risks are likely to emerge beyond the time horizon of this market review.

Risks of unrestricted PIA

Ofcom analyses the risk of imposing (or maintaining) geographic or usage restrictions on PIA as well as the potential impact of PIA on downstream markets.

Ofcom notes that imposing limits on the use of PIA may damage the viability of potential investment cases and this could ultimately undermine the rationale for such an investment and therefore the uptake of PIA. Ofcom goes on to note that investments are likely to be made with the intent on using this investment "to generate as many different revenue streams as possible".[15] While we agree in principle, we would note that PIA users' investment cases (particularly smaller CPs) are likely to be more targeted and that the intended service offerings, geographies and customers may not be unbounded, such that any restriction on usage would lead to foregone revenue streams. Therefore, we do not agree it necessarily holds that "[u]sage restrictions would undermine the effectiveness of PIA" or that "[a]ny restrictions placed on the geographic scope of the proposed PIA remedy would also impede its effectiveness.".[16] [17]

However, we recognise the benefits of the simplicity and flexibility created by avoiding geographic or usage restrictions on PIA. As a potential scale PIA user, we are keen to avoid being artificially constrained by BT's historical (or future) network design and the opportunity to supply our full portfolio of services via PIA, unencumbered, is attractive.

As we highlighted above, our experience from negotiating the implementation of 'mixed usage' has led us to conclude that even targeted geographic or usage restrictions are likely to result in PIA's

[15] PIMR, para 5.22
[16] Ibid.
[17] Ibid., para 5.23

usage being frustrated, cumbersome and bureaucratic and so these should be avoided. However, Ofcom's sweeping assessment risks placing too little weight on the short-/medium-term impact on downstream markets and potentially overstates the countervailing opportunities to existing competitors that unrestricted PIA enables.

While we avoid detailed discussions of the specific impact on downstream markets in this response, we believe there is merit in a deeper assessment of the relative risks and potential ramifications of PIA that may emerge beyond the time horizon of this review. If dramatic changes in the dynamics of downstream markets were to emerge which, for example, fundamentally undermined BT's ability to recover its efficiently incurred costs, it is not clear how Ofcom would respond or even its options. Introducing restrictions to PIA retrospectively would be near-unthinkable if Ofcom were to wish to maintain regulatory certainty for infrastructure investors. Changes to remedies in downstream remedies may need to be extensive to alleviate issues, which may conflict with other Ofcom policy objectives.

Such a scenario could lead to a conflict between Ofcom's clearly stated objectives to encourage infrastructure investment, BT's ability to recover its efficiently incurred costs, and a stable and predictable approach to regulation of downstream markets. All of these are desirable, yet they could represent an 'impossible trinity'. If Ofcom's policy objectives are achieved this issue is likely to arise. Without fettering its discretion, we would welcome any clarity Ofcom can provide on how it would resolve this potential issue. We believe Ofcom should go further than it has to date in the consultation, as the ramifications of Ofcom's approach will impact CPs beyond BT.

For example, regarding the future potential impact on BT's cost recovery, Ofcom notes:

"The impact on BT's cost recovery, specifically in the leased lines market, is likely to be minimal given the low take up expected in this review period. In the longer term the impact on BT's volumes could be more significant, but that is a matter we can consider at future regulatory reviews."[18]

To provide certainty to potential users of PIA, Ofcom has indicated the factors it would consider and the possible or likely implications of these on its decision making for (for example) PIA pricing in the longer-term, without fettering its future discretion.[19] We believe the same could be done for factors related to downstream markets to provide more early clarity if concerns were to emerge regarding

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[18] Ibid., para 5.33
[19] Ibid., for example, 6.18 and 7.10

the proportionately of PIA. This would give greater certainty to downstream competitors as well as PIA CPs, of which Virgin Media is both.

Impact in geographies

We also agree that despite some variations in the competitive conditions between the geographic markets Ofcom has defined, it is practical and necessary that a uniform remedy exists across these markets. Evidence from WLA PIA Reference Offer negotiations indicates that the existence of specific restrictions or carve outs in how or where the PIA remedy can be used is likely to lead to disproportionate operational friction and administrative costs such as onerous contract requirements, compliance reporting or excessive oversight desired from Openreach. In our view the benefits from a ubiquitous PIA remedy and the greater uptake this is likely to encourage, would be expected to offset any specific concerns about a restricted or non-ubiquitous PIA remedy.

We also believe, particularly with regard to inter-exchange routes, that PIA should be the preferred passive remedy. By opting not to impose a restriction on PIA's usage in these scenarios we believe this renders Ofcom's DFA remedy proposed in the BCMR (for certain exchange areas) to be unnecessary. We provide further commentary on this in our response to the BCMR consultation.

Impact on downstream markets

We agree that the impact on downstream markets during this market review period is unlikely to be disproportionate. While the number of CPs using PIA and their usage is likely to increase and accelerate, the resulting volumes will still be de minimis in the context of BT's current market position.

Whether via the impact on dynamic efficiency, changes to BT's pricing structure or the effect of greater levels of competition, the risks envisaged would be expected to be outweighed by the benefits in aggregate. However, this reinforces our view that it would be desirable for greater clarity on how Ofcom will approach these downstream markets when greater competition takes hold.

Virgin Media, as an existing scale owner of infrastructure and, in our view the, key competitive threat to BT for decades in these downstream markets will face many of the risks of this downstream impact. Growth of alternative infrastructure competition, or the impetus for BT to redouble its network investment is likely to result in over-build that is focused in areas of existing Virgin Media presence.

While the prospect of this increased competition paves the way for a more dynamic and innovative market that will benefit all consumers – we do not have the safeguard of being allowed to ensure we can recover our efficiently incurred costs. We are not asking for an 'early warning system' in case BT intends to deploy network in an area of Virgin Media coverage. However, we are keen to understand how Ofcom will ensure that the influx of competition will be sustainable and that regulatory remedies will be swiftly and fully revised to account for the greater role that competition will play in disciplining BT. We do not think it would be a desirable outcome if unrestricted PIA were to be adopted, used largely to overbuild the hitherto primary infrastructure competitor to BT, only to find the introduction of regulatory forbearance then lags behind this competition.

Dark fibre backstop

We agree that a specific dark fibre backstop is not necessary, proportionate or appropriate. As Ofcom notes, it has already made provision for such a provision under its general access conditions and therefore should a specific scenario warrant a tailored solution that incorporated dark fibre, CPs are free to raise such a request.

As currently envisaged, the arrangements for Network Adjustments are clear and proportionate and appear to provide positive incentives for Openreach and PIA CPs to expand investment and also manage civils costs. In the event capacity for PIA use is not available, and making capacity available does not meet the Network Adjustment criteria test, it is reasonable that PIA CPs should find their own alternative mechanism to meet their requirements.[20] PIA is intended to mitigate BT's SMP position in physical infrastructure. It should not be intended to make BT the only, or strictly preferred first-best, vehicle to deploy infrastructure in all cases.

PIA CP users should have a reasonable expectation of building their own infrastructure where circumstances require. While this may lead to higher costs where this is required, it also provides countervailing externalities. Not only would this increase the aggregate stock of civil infrastructure capacity, it would provide other benefits such as physically diversified routes. Were a dark fibre backstop to be put in place and it was required in a given location, this is likely to be a hotspot for vulnerability in the event of an incident, such as the ever-present fear of the apocryphal wayward JCB.

[20] Provided the application of this test is objective, transparent and (demonstrably) consistent with the approach Openreach adopts for its own needs.

Ofcom's proposal not to introduce a dark fibre backstop, in our view, conflicts with its proposals in the BCMR. Having reviewed the need for dark fibre in PIMR and, along with assessing international precedent, determined it is not appropriate, it seems counter-intuitive to introduce such an additional passive remedy in that downstream market review. We provide further discussion of that remedy in our response to the BCMR consultation.

Network adjustments

Consistent with the decision in the WLA, Openreach should be required to make reasonable adjustments to its infrastructure where the need arises due to PIA and it is the efficient choice to do so. The three-step test remains appropriate. We also agree that it is proportionate that the financial impact of this should be limited. As the network adjustment regime for the WLA PIA remedy has yet to be introduced, it will take time to form a view on whether the specified financial limit is the right one. Not only will this assessment be dependent on the frequency that capacity issues arise but also the extent to which network adjustments are accepted or rejected by Openreach.[21]

Openreach currently imposes a limit on the size of PIA orders due to its own system limitations. It is not appropriate that Openreach's obligation to fund permanent improvements to its network is constrained by the scale of PIA orders that CPs are permitted to raise. Some segments of Openreach's network may be in a better state of repair or have more spare capacity than others. If the network adjustment fund limit has been set based on Openreach's broader FTTP build assumptions, this would suggest that in aggregate this would be a reasonable value, but CPs should be able to draw on these funds across their PIA-based network build.

An effective mechanism for accessing network adjustment funds will have a significant impact on whether or not PIA is adopted by CPs and therefore if the remedy will be effective for achieving Ofcom's strategic objectives.

A number of issues regarding the process of raising a network adjustment requests remain, transparency of the assessment of the requests and the ability to progress build by making retrospective network adjustment requests have been central to the WLA PIA Reference Offer

[21] While we have material concerns about how the approach to 'ordering' network adjustments will be administered, which we have shared with Ofcom separately, we do not comment on these concerns as part of this consultation response.

negotiations. At this stage, we do not know how these negotiations will conclude or if the processes and procedures that result will be effective.

Network adjustment limitations

In the consultation, Ofcom provides guidance on the interpretation of how the network adjustment criteria should be applied.[22] This is helpful, although we have a comment regarding how network adjustments will be assessed.

Ofcom notes that some circumstances could arise in which a 'factual scenario' results in effectively zero cost, due to (for example) Openreach's own network deployment or other factors that would have resulted in such an adjustment in any event.

Given the current processes and information flows envisaged in the WLA PIA Reference Offer, it is not clear that a mechanism would be in place for Openreach to make this assessment. Additionally, Openreach currently proposes to apply a list price method to determine the amount of the network adjustment fund to use for a given adjustment i.e., Virgin Media's network adjustment fund would be depleted by the same value regardless of whether or not Openreach had an imminent need to make this adjustment irrespective of Virgin Media's PIA demand.

In addition, Ofcom proposes that Openreach will be able to choose how to undertake network adjustments. This will allow Openreach to take into account its potential future need. While this is pragmatic, and we expect this will provide reassurance to CPs regarding no undue discrimination, this could lead to adverse outcomes. As currently proposed, Openreach will be free to consider its own additional capacity requirements when it is assessing the appropriate network adjustment to make in response to a CP request. However, it is not clear that Openreach's own engineering principles would reflect the potential for PIA CP build when making adjustments for its own network build. This could lead to a bias in assessments where more expensive network adjustment choices are systematically selected when responding to a CP PIA request as compared to Openreach's own use – in effect gold-plating CP adjustments. As Ofcom notes, this risks undermining the effectiveness of the remedy, either by exhausting the adjustment fund prematurely or leading to adjustments being rejected as it fails the three-step test due to Openreach's incremental future assumed capacity.

Pricing remedies

[22] Ibid., para 5.65-5.69

We agree that pricing stability for PIA is important. Following the WLAMR, CPs may have reassessed business plans or established plans based on anticipated real terms price stability for PIA. Ofcom alludes to the potential to revisit the mechanism to regulate PIA prices and that it would expect any reassessment would likely maintain pricing stability and that this is desirable.[23]

In our view any future reassessments should also give due account to the 'strategic shift'. Not only should Ofcom consider the relative incentives to build vs buy, but also the incentives to build vs occupy. Even if PIA were to become an effective and extensively used remedy, CPs will still find it necessary to build their own infrastructure. PIA should not be priced so that self-build becomes an uneconomic option.

If pricing of PIA were to fall significantly, the market could arrive at downstream price equilibria that make self-build unattractive and unjustifiable and at the same time undermine Openreach's own incentives to invest in infrastructure. This could result in barriers to the growth of infrastructure competition, as network expansions via self-build could become economically unattractive.

[23] Ibid., para 7.23

5. DRAFT LEGAL INSTRUMENTS

Virgin Media provides limited comments on the draft legal instruments below. We acknowledge Ofcom has broadly transplanted these from the WLA PIA where possible.

Condition 6.6

In our view, it would be appropriate to set the PIA Adjustment Limit to vary in accordance with CPI, consistent with the approach adopted for PIA charges specified in 6.1-2. We do not anticipate any significant technical challenges in updating Adjustment Limits annually, particularly given the maximum 'NoI' order life of 12 months. Alternatively, if practical challenges were to arise that we have not envisaged, a conservative approach of applying revised limits only to new PIA orders, once adjustments for CPI have been made, would ensure that the fund limit tracks growing costs in line with charges.

Given labour costs will substantively drive the cost of network adjustments (and Ofcom acknowledges no specific technological changes will vary the broader cost of civils activities), we believe this is a sensible approach for the short-term, even if Ofcom were to look to an alternative mechanism to derive this limit in the future. Alternatively, to introduce consistency, Ofcom should remove CPI adjustments to all other regulated charges, though we anticipate this alternative adjustment would likely be more problematic.

Condition 7.3.l

In our view, Openreach should be required to provide Service Level Commitments in relation to ancillary services, in addition to those specified in i-v. Where CPs are reliant on Openreach to undertake activity to facilitate the planning or use of PIA, it is important that CPs have guarantees on that necessary activities will be undertaken in good time. Whether it is co-op surveys or support in addressing locked lids, delays in completing this work have a direct impact on the time to build and therefore the reliability and ultimately the usability of PIA. We have faced unacceptable delays in arranging these ancillary services when using PIA to date and therefore we believe these obligations are both necessary and proportionate.

As part of the WLA PIA Reference Offer negotiations, Openreach has signalled that it may be willing to consider the introduction of SLAs for these activities in the future. We believe this potential future intention should be facilitated by an obligation from Ofcom.

6. CONSULTATION QUESTION RESPONSES

For completeness, we provide responses to Ofcom's questions below. These should be read in conjunction with the main body of our response.

Question 3.1: Do you agree with our proposed market definitions? Please set out your reasons and supporting evidence for your response.

Virgin Media broadly agrees with Ofcom's initial approach to its PIMR market assessment. In particular, we agree it is correct to exclude wireless (at this stage) and non-telecoms physical infrastructure from the product definition.

As set out in our response, we have some concerns on geographic area definitions, and the extent this will be helpful in the context of future downstream assessments. However, we agree with the geographic unit adopted and that Ofcom did not seek to derive its market assessment based on the network design of any one CP.

Question 3.2: Do you agree with our proposed SMP assessment? Please set out your reasons and supporting evidence for your response.

We agree, given Ofcom's assessment that BT has clear SMP across the markets Ofcom has defined with no alternatives/substitutes providing an effective constraint. **[✂]**.

However, we would also note that alternative infrastructure operators, notably Virgin Media, provide an important and effective constraint on BT's position in downstream markets. In the case of Virgin Media, and in the future other CPs, an important aspect of this is the independent upstream infrastructure competition that we (and others in time) hold. In our view, this is an important feature of the UK market and one that Ofcom should seek to preserve and encourage, as the PIMR seeks to do.

Question 4.1: Do you agree with our proposed general remedies? Please set out your reasons and supporting evidence for your response.

Virgin Media broadly agrees with Ofcom's general remedies. We would welcome further clarity on how Ofcom's pragmatic approach to not requiring strict EoI will be reflected in the additional monitoring that CPs will desire to ensure a level playing field. We also believe there is merit in recognising that not requiring strict EoI should have a symmetric application. There may be scenarios where it is proportionate for Openreach's process of using its infrastructure for its own fibre build varies from that of PIA CPs. Equally, it may be the case that there are circumstances where it is proportionate that PIA CPs adopt approaches or processes which are distinct from Openreach's.

One of the current shortcomings of the WLA PIA Reference Offer is a lack of sufficient transparency from Openreach on how it delivers PIA and the associated performance metrics. As a complex product, more so than downstream services, we believe Ofcom should provide further guidance to Openreach about how it should seek to meet its obligations regarding this topic.

We would agree that ATI regulations are not an appropriate foundation for Ofcom's strategic objectives and that these regulations were introduced for a specific and targeted circumstance.

We believe that one month is not sufficient to implement these changes. Documentation associated with the WLA PIA Reference Offer is extensive and mechanical changes to these are unlikely to be appropriate. At a minimum the implementation period should be extended to four months and in our view more time should be made available to address issues that remained unresolved as part of the WLA PIA Reference Offer.

Question 5.1: Do you agree with our proposed specific remedies? Please set out your reasons and supporting evidence for your response.

We broadly agree. A specific unrestricted (use and geography) PIA remedy is likely to be beneficial for scale adoption of the remedy and to develop a product that is not operationally cumbersome to consume. While we desire further reassurance of Ofcom's longer-term assessment of regulatory remedies in downstream markets (as VM is likely to face many of the risks created by PIA), we believe the benefits from applying no PIA restrictions outweigh localised issues in particular geographies or segments of product markets.

A network adjustment regime is necessary, and that it is proportionate to apply a financial limit. Although we believe CPs will already have an incentive to only make efficient requests for network adjustments, a cap provides a reasonable safeguard to Openreach that the regime will be sustainable.

As the network adjustment regime has not yet been introduced, it is not possible to determine at this stage if the cap has been set at the right level.

Question 5.2: Do you agree with our assessment not to impose a dark fibre backstop remedy in this review period? Please set out your reasons and supporting evidence for your response.

We strongly agree. A dark fibre backstop is unnecessary and disproportionate and risks sending mixed signals to CPs. CPs should anticipate the need for some self-build should they intend to consume PIA. There are externalities from continued growth in the stock of physical infrastructure.

PIA is intended to mitigate BT's SMP position in physical infrastructure. It should not be intended to make BT the only, or strictly preferred first-best, vehicle to deploy infrastructure in all cases. Designing a remedy to do so would likely harm BT's and other CPs' incentives to invest in infrastructure.

Question 6.1: Do you agree with our proposed approach to the recovery of network adjustment costs? Please set out your reasons and supporting evidence for your response.

We broadly agree. We continue to have some reservations that that delinking network adjustment costs from CP will somewhat weaken the incentive for CPs to make efficient choices. However, we accept Ofcom's decision in the WLA and acknowledge that Openreach has a clear incentive to ensure this is avoided. The network adjustment limit does maintain a link between CPs incentives and costs via the cap and given CPs would still have an incentive to avoid unnecessary delays due to unnecessary work, we believe Ofcom's approach is pragmatic.

However, we are concerned that Openreach has a strong incentive to create barriers to CPs considering network adjustments. Openreach's approach to the WLA PIA Reference Offer seems to have: time delays, extensive administrative tasks and financial penalties for rejected network adjustments. This will act as a barrier to requesting network adjustments, even if inadvertent. We would have significant concerns if, as a result of the process Openreach imposes, CPs are dissuaded from using the SMP remedy Ofcom has introduced. Further guidance from Ofcom to Openreach on some of the important characteristics or principles that should underpin any network adjustment regime would be welcomed.[24] We believe reasonable mechanisms can be put in place to ensure that Openreach has proportionate and reasonable oversight of how funds are spent, without causing any impact in deploying infrastructure.

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[24] For example, that any validation of network adjustment orders should not have any impact on the time required to deploy infrastructure.

Question 6.2: Do you agree with our proposal regarding the level of the financial limit? Please set out your reasons and supporting evidence for your response.

As noted above, it is too early to determine if this financial limit has been set appropriately. We believe an effective mechanism is needed to revaluate and adjust the limit if it is determined to be inadequate.

We note we have limited ability to comment on this proposal even in abstract, as the details provided on how the proposed cap has been derived from Openreach's data is limited. It is not clear to what extent the underlying data used is comparable to the costs PIA CPs would face when using Openreach's network.

More broadly, we recognise that it is right that CPs should not expect OR to fund all network capacity enhancements required for PIA rollout. CPs should reasonably expect to undertake self-build themselves, even if they consume PIA. Equally, in our view, it would not be appropriate to set the limit at a level that ensures that the cost of all necessary adjustments falls within the limit defined for PIA.

For example, some areas are likely to be more complex and expensive to deploy network to, due to known issues with Openreach infrastructure age or state of repair. The result is fewer CPs may wish to deploy there. This may lead to greater take-up rates for those CPs that choose to do so and as a consequence the higher cost to build (by breaching the network adjustment limit) may be offset by higher than expected penetration.

However, while a fund limit is proportionate in our view and the current level may ultimately be determined to be correct, CPs should have the ability to make full use of available funds within localised build plans.[25]

Openreach's systems should not act as an artificial constraint on the ability to make full use of pooled funds where CPs have a coherent plan to build in a given area. The geographic limits of this 'pooling' of funds should not be defined by Openreach's systems, nor by reference to how Openreach designs its own fibre build. Equally, we foresee significant challenges with any mechanism that is designed so that Openreach is required to 'police' how this 'pooling' occurs. We would appreciate Ofcom providing further guidance on this matter, as it may require an explicit role

[25] This has broadly been described as 'linking NoIs' as part of the WLA PIA Reference Offer negotiations, though we envisage a more comprehensive approach to this issue will be required to ensure it is effective at scale.

for Ofcom or the OTA to ensure that a regime for CPs to designate ‘build’ or ‘project’ areas is defined in a reasonable way that is not subject to ‘second-guessing’ by Openreach at the point they seek to deploy.[26] Setting aside any delays this would cause, we believe it would generally be desirable to avoid sharing information about significant build plans where possible, despite any GC obligations that may be in place.

As noted in Section 5, for consistency, we believe the financial limit should be adjusted annually to reflect CPI.

Question 6.3: Do you agree with our proposed approach to the recovery of productisation costs? Please set out your reasons and supporting evidence for your response.

As noted in our response to the WLA, Virgin Media has concerns about the implications of Ofcom’s proposals on cost causality of productisation with respect to WLA PIA. However, we accept Ofcom’s previous decision and its adoption in this consultation.

Question 7.1: Do you agree with our proposed approach to regulation of PIA charges? Please set out your reasons and supporting evidence for your response.

We broadly agree, notwithstanding our reservations above on productisation costs, that rental and ancillary charge proposals are reasonable. Updating these charges to reflect CPI is also reasonable. We believe it is important to maintain price stability to help CPs develop long-term business cases associated with PIA usage.

If Ofcom reassesses the basis of deriving PIA charges in the future, in our view it is important to avoid material changes, positive or negative, to the quantum of charges.

Although it is difficult to determine the longer-term impact at this stage, we agree that impact on downstream product markets will be limited (across services and geographies) during the review period. However, by its nature, PIA requires stability over time as a remedy – given the long-term nature of these investment plans.

As we noted in the body of our response, given the challenge in forecasting longer-term impacts on downstream markets, we would welcome clarity on Ofcom’s broader view of how it might approach

[26] Equally, on previous topics during the WLA PIA Reference Offer, Openreach has noted that it cannot expect a third party to adjudicate and enforce its contractual terms. Consequently, it should be made clear in Ofcom’s final statement that this responsibility will not fall on Openreach and that alternative mechanisms are used to assure the information it receives is bona fide.

issues that might arises, in particular, were BT to experience a challenge in recovering its efficiently incurred costs in those markets.

Such a scenario could lead to a conflict between Ofcom's clearly stated objectives to encourage infrastructure investment, BT's ability to recover its efficiently incurred costs, and a stable and predictable approach to regulation of downstream markets. All of these are desirable, yet they represent an 'impossible trinity' that is possible or likely to occur. Without fettering its discretion, we would welcome any clarity Ofcom can provide on how it would resolve this potential issue.