Response to Ofcom's consultation

Promoting competition and investment in fibre networks: Telecoms Access Review 2026-31

12th June 2025

Group submission by CityFibre, Glide, Hyperoptic, Virgin Media O2, Vitrifi and Vorboss

Introduction and summary

1. We are a group of communications providers ("**CPs**") consisting of CityFibre, Glide, Hyperoptic, Virgin Media O2, Vitrifi and Vorboss ("**our group**" or "**we**"). The members of our group are all active purchasers of Openreach's Physical Infrastructure Access ("**PIA**") product.

2. This submission has been prepared in response to Ofcom's consultation (the "**Consultation**") on the Telecoms Access Review ("**TAR**") and focuses on issues relating to the use of the PIA product. This submission is further to our group's letter to Ofcom dated 22nd July 2024 (the "**Pre-Consultation letter**"), in which we set out a number of key points for Ofcom's consideration aimed at improving upon the PIA product and resolving some of the issues that CPs experience when attempting to use PIA. A copy of our Pre-Consultation letter is included in this submission at **Annex 1**.

3. A number of our group's members have submitted individual and separate responses to the TAR consultation, and the contents of this submission should be considered as separate from, and supplementary to, those individual submissions.

4. As noted in our Pre-Consultation letter, whilst there has been a marked improvement in the usability of the PIA product since its creation in 2011, industry-led discussion and negotiation can only go so far in addressing the many detailed implementation challenges of PIA. Further, whilst the OTA performs an invaluable role in helping facilitate industry discussions, it has no formal powers to resolve deadlock or otherwise discourage intransigence (such as Openreach's attempt to impose on CPs 'compensation' charges for unauthorised use that extend beyond cost-recovery, as discussed below). As a result, industry is reliant upon Ofcom to carefully and continually monitor Openreach's delivery of PIA, and take regulatory action (including enforcement action) where necessary, to ensure the PIA product remains viable and effective in the long term.

5. Having reviewed the Consultation documents, our group is concerned that Ofcom intends to simply maintain the 'status quo' for PIA; with the Consultation proposing to maintain the remedy in much the same form as under the Wholesale Fixed Telecoms Market Review ("**WFTMR**") and earlier market reviews. We believe a more proactive and pre-emptive approach to what is Ofcom's flagship remedy, with more demanding standards imposed, would better demonstrate Ofcom exercising regulatory foresight and would be more obviously conducive to promoting competition within the fixed telecoms market — thereby benefitting consumers[1].

6. We therefore urge Ofcom to revisit its proposed approach to the regulation of PIA within the TAR and to take steps to address the challenges that CPs continue to face

[1] Our references in this submission to 'consumers' include both residential and business customers.

in using PIA. This submission builds on the key points raised in our Pre-Consultation letter and introduces further issues we believe warrant Ofcom's careful consideration.

PIA legal instrument

7. In our Pre-Consultation letter, we urged Ofcom to consider adding greater detail to the PIA legal instrument, as we believe having this extra detail would aid clarity and transparency of Openreach's obligations. Ofcom has not proposed to address this issue within the Consultation.

8. Since our previous submission, the need for greater clarity in the PIA legal instrument has become even more evident as a result of the negotiations between Openreach and industry regarding changes to the PIA 'unauthorised use' regime.

9. As part of these discussions, Openreach expressed the view that it is entitled to receive financial compensation from CPs for unauthorised use of PIA in their network, not only to recover lost revenue and associated costs, but also to reflect what it refers to as its "legitimate commercial interest" in ensuring that CPs report unauthorised use promptly. This additional "legitimate commercial interest" element clearly goes beyond a cost-orientated approach. We understand that Openreach considers the inclusion of this additional 'incentive' component is justified because it does not constitute a regulated charge or other payment that falls within scope of the PIA legal instrument, (i.e., the legal instrument is 'silent' on the issue), and thus Openreach believes it is entitled to claim an additional amount based on rationale under general principles of commercial and contract law.

10. Negotiations on a revised unauthorised use regime are (we believe) close to being concluded, with the above point essentially parked as a side issue. During the negotiations, our group made it clear at all times to Openreach that we do not agree with Openreach's interpretation on its right to impose non cost-orientated charges. Our view is based on the fact that the PIA remedy imposed by Ofcom is cost based, as indeed are the required Service Level Guarantees ("**SLGs**"). This nature of the SLGs is a point that Openreach itself has made very strongly in negotiations with industry numerous times — and used as the rationale behind why SLGs payable to industry for poor Openreach performance concerning network adjustment orders ought to be set at a rate that reflect the rental charges. Whilst we accept that Openreach should be able to recover backdated rental charges for the period of the unauthorised use, along with interest and a reasonable amount to cover the administrative costs incurred in identifying and resolving the issue – and we have offered to meet these amounts – we do not believe that it is appropriate or lawful to extend recovery beyond these defined categories into territory that could be characterised as a penalty, sanction or incentive. In other words, Openreach should not be permitted to seek payment from CPs for costs they have not incurred.

11. By its very nature, the PIA remedy applies a special set of rules to provide a competitive outcome that the application of standard commercial legal principles could not deliver. In our view, the PIA remedy is clear that Openreach is not permitted to introduce contract terms, pricing or any other type of fee or charge on CPs that go beyond cost recovery principles. Indeed, only Ofcom should have such a power. In the unauthorised use negotiations, we challenged Openreach's argument that they have sufficient leeway under the PIA remedy to introduce terms or charges that go beyond cost-recovery. Openreach disagrees with our view and it is clear there will be no likely meeting of minds on this point in the near future — despite, as we note above, the negotiations on a revised unauthorised use regime being close to conclusion. We are particularly concerned with Openreach's argument being allowed to stand and potentially setting a dangerous precedent for Openreach's future dealings with industry – which could go beyond PIA and apply across their portfolio of products.

12. The OTA is simply not empowered to resolve an impasse of this nature. We therefore urge Ofcom to proactively engage and clarify the position in respect of the above matter in the TAR to remove any argument of ambiguity and to provide regulatory certainty for stakeholders. Ideally, such clarification would be provided in the PIA legal instrument to ensure the highest levels of transparency and certainty for all parties involved. In the absence of such clarity and proactive engagement by Ofcom, the only recourse available to CPs would be to raise a dispute, which would be expensive and time-consuming for all parties involved.

Regulatory oversight of PIA

13. Rather than enhance regulatory oversight of PIA, Ofcom proposes in the Consultation to maintain its current compliance monitoring programme for PIA. For example, Ofcom proposes to maintain the requirement upon Openreach to publish an Internal Reference Offer ("**IRO**") in its current form[2], and whilst acknowledging that the Openreach Monitoring Unit ("**OMU**") plays a "crucial role" in respect of PIA compliance, there is no suggestion in the Consultation that this role should be enhanced[3]. In our group's view, these measures do not go far enough to ensure ongoing transparency and accountability for effective implementation of the PIA remedy.

14. Our group has long held concerns over shortcomings in the IRO, and we encourage Ofcom to require more detail to be captured within the IRO in respect of PIA. As noted in our Pre-Consultation letter, we believe there is currently not enough clarity in the text of the IRO for a reader to readily identify acceptable differences in the use of physical infrastructure between Openreach and industry, and whether what

[2] TAR Consultation, Volume Three, para. 4.113
[3] TAR Consultation, Volume Three, para. 4.75

Openreach is doing in practice is providing them with an anti-competitive advantage. PIA users still do not have any firm foundation for assessing whether Openreach is complying with its obligations — in particular its "no undue discrimination" ("**NUD**") and equivalence of inputs ("**EOI**") obligations (as discussed in more detail below). Part of this stems from the fact the IRO essentially comprises a limited list of differences between how Openreach uses its network and how PIA CPs are permitted to use it. While this is useful up to a point, there is generally not sufficient detail included to enable the reader to meaningfully understand how those differences potentially benefit Openreach. In some cases, greater clarity and understanding could be provided by the IRO explaining why the difference exists. However, Ofcom has told us a number of times in the past that the IRO is not required to explain why differences exist, and point to a reference in the WFTMR for justification. Given the benefits of explaining why differences exist, we would urge Ofcom to reconsider its thinking and position on this when formulating the remedy that will apply under the TAR.

15. However, a change in the IRO alone would not be sufficient to address these problems in assessing Openreach's compliance with its obligations. The fundamental information asymmetry that is inherent in the IRO is very difficult to fully engineer out, and truly provide the reader with enough detail and understanding to be able to obtain an informed view as to whether Openreach's NUD obligation is being properly discharged. Moreover, it's hard to imagine that a document shared with industry could satisfactorily demonstrate whether the NUD obligation was being properly complied with — as Openreach will naturally resist making true end-to-end comparisons available on the basis that much of the information about self-provision is commercially confidential.

16. Viewed as a whole, the current arrangement is such that Openreach has scope to enjoy incremental benefit itself (subconsciously or otherwise), which is helping to preserve its dominance in the fixed network market — at a time we understand Ofcom considers to be the end of the build phase for network competition.

17. To help remedy these issues, we would encourage Ofcom to recognise the fundamental limitations of the IRO as a tool to effectively assess NUD compliance and look at solutions beyond it. This could include proactively monitoring Openreach's own consumption of its physical infrastructure to ensure compliance with its obligations, and to require Openreach to justify how it has met its NUD obligations and/or explain its decision-making process behind any differences to processes / sub-products available to PIA users within the IRO.

18. Ofcom's proposal to maintain its powers to require Openreach, upon request, to demonstrate how it has met its NUD obligations, and if necessary issue a direction under the SMP Conditions to require Openreach to provide a report demonstrating NUD compliance, is insufficient in our view and does not go far enough in ensuring ongoing transparency and accountability.

19. Regarding the role of the OMU and regulatory oversight of PIA more generally, we noted in our Pre-Consultation letter how greater participation by Ofcom and enhanced regulatory oversight could accelerate and improve development of the PIA remedy. The significant bureaucracy, protracted nature of industry-Openreach discussions and other shortcomings of the PIA framework, as outlined in this submission, continue to significantly impede the speed and efficiency with which CPs can use PIA to build and deploy their networks. Whilst much of the work undertaken by industry in respect of PIA in recent years has focused on addressing these barriers, progress has often been slow and unnecessarily difficult. We believe if Ofcom had taken a more active and visible role in monitoring Openreach's conduct, and the processes and rules it followed itself which differ to those under PIA, development of the PIA remedy is likely to have been considerably more effective and timely.

20. By way of example, and as discussed in more detail below, Openreach has, in our view, continually developed new systems and processes in a way that does not fully support EOI, contrary to the 'expectation' by Ofcom referenced in the WFTMR.[4] When such issues have emerged, our group has seen little evidence that Ofcom is either properly aware of the full impact of these problems or is taking steps to address the negative impacts on the operations of PIA CPs. Rather, Ofcom appears to consider that the requirement it has placed on Openreach to produce an IRO is sufficient for these purposes. As noted above, however, the IRO has several shortcomings which prevent CPs from accurately assessing whether Openreach is complying with its obligations.

21. Another example is the apparent lack of scrutiny by Ofcom of Openreach's plans for copper cable recovery (as distinct from copper cable retirement), which Ofcom must monitor more closely to ensure these plans lead to tangible outcomes for the benefit of PIA users, and ultimately consumers. To deliver meaningful efficiencies, such plans should include, for example:
    a. Clear and measurable targets for copper removal;
    b. Transparent reporting of copper recovery activity;
    c. Prioritisation of recovery in areas where duct capacity is most constrained;
    d. Alignment of recovery activity with fibre rollout plans to maximise efficiency.

22. It is vital that industry, and those investing in the industry, have confidence that Openreach is complying with its regulatory obligations. A key priority for Ofcom going forward should therefore be to support faster, more effective use of PIA through more robust and consistent regulatory engagement. Two practical measures that might help include Ofcom representatives playing a greater and more visible role in industry meetings and discussions, and greater clarity being provided

[4] See paragraph 3.79 of volume 3 of the WFTMR.

to industry about precisely what Ofcom is monitoring (and how it is doing so) in respect of Openreach's PIA performance.

Openreach's 'no undue discrimination' ("NUD") obligation

23. Ofcom proposes to maintain Openreach's existing NUD obligation, and not to introduce a full EOI obligation on the basis that this would be disproportionate. Ofcom notes that full EOI would require extensive "re-engineering" of the network and organisational restructuring within Openreach, with associated disruption and cost[5]. This mirrors the position under the WFTMR, in which similar concerns were raised[6].

24. As noted in our Pre-Consultation letter, we consider that many of the concerns surrounding the introduction of an EOI obligation have now fallen away. Openreach's working practices are not so well-entrenched that changes would be inviably expensive, and ultimately for Openreach to continue operating two different systems for itself and the rest of industry is inefficient and leads to higher costs for consumers. Indeed, if over 150 CPs are able to use the product effectively, we believe there is no justifiable reason that Openreach cannot. We also understand from the OTA2 that a trial operated by Openreach in the Plymouth area last year illustrated that Openreach is able to consume PIA effectively, without significant disruption to its business. With these points in mind, we would encourage Ofcom to give further consideration to a move toward full EOI.

25. Notwithstanding our group's preference for a full EOI obligation, our group is supportive of Ofcom's proposal to require EOI for "new or upgraded services, systems and processes" for the supply of PIA[7]. This represents in our view a bolstering of Ofcom's earlier position set out in the WFTMR which was expressed as an 'expectation'.

26. Unfortunately, the real-world experience of our group does not match the aspiration of EOI for new or upgraded systems and processes. As noted in our Pre-Consultation letter, we have seen on a number of occasions the needs of PIA CPs being relegated to an 'afterthought' when Openreach develops new systems or apps — where timely consultation with industry ahead of design or development of such systems or apps simply hasn't happened. Indeed, it often seems that the need to consider PIA is overlooked by the wider Openreach and/or BT Group organisation, to the frustration of Openreach's own PIA product team. This has deprived CPs of meaningful opportunities to contribute to the development of services, systems and processes, and has potentially provided Openreach with an operational advantage that is harmful to competition. Openreach's lack of consultation with industry (comprised of the very customers who consume the PIA product) should not be

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[5] TAR Consultation, Volume Three, para. 4.60
[6] WFTMR Statement, Volume Three para.3.75, Volume Three, WFTMR
[7] TAR Consultation, Volume Three, para. 4.64 – 4.71

allowed to stand and is wasting a valuable opportunity for PIA CPs' requirements to be properly understood and incorporated into new systems and processes efficiently from the very start. The problems from the current approach are evident, for example, in respect of the introduction of the "Tungsten" finance system and the launch of apps used to report and monitor safety defects by network engineers in the field. In respect of the apps, Openreach was initially very reluctant to provide equivalent access to CPs and the matter was ultimately only resolved through use of the time consuming Statement of Requirements (SOR) process — and even then, not in relation to every app to which Openreach engineers have access.

27. Our group is hopeful that the proposed EOI obligation for new or upgraded services, systems and processes will help to address these concerns, though to ensure this happens, we would encourage Ofcom to actively monitor Openreach's compliance with the obligation, and to provide as much clarity and detail as possible in the TAR on how this obligation will operate in practice. We would also encourage Ofcom to consider what practical steps might be taken to ensure that industry's needs and views are properly heard and considered by Openreach at the outset. One option might be to formally require a new CP-industry sub-group to be created, through which Openreach must signal at the earliest opportunity when new processes, systems or apps were being designed or had been made available from other products — so that meaningful discussion could occur and industry's needs taken into account. This same activity could potentially be achieved through use of existing groups, such as the PIA Executive Steering Group, or even simply brought to the monthly Passives Product and Commercial Group. The key need in our view is a formal regulatory requirement for Openreach to engage with industry in this way on such topics and we would urge Ofcom to consider imposing as part of the TAR a measure as we've suggested above. This would help significantly in our view to provide enhanced governance and accountability, thus better ensuring operational equivalence.

PIA billing and charges

28. We observe that there are no major changes proposed by Ofcom in respect of PIA billing and charges.

29. In respect of PIA billing, in our Pre-Consultation letter we flagged to Ofcom that we feel changes are required to Openreach's billing platform in order to make it truly fit for purpose and operate efficiently for PIA. We also provided examples of the inefficiencies and impracticalities with the current system, including:
    a. A consistent failure to accurately label, assign categories, and/or provide correct reference numbers for amounts billed to CPs, leaving it to the individual CP to calculate and work out what exactly they are being charged for. These issues can result in CPs being inaccurately and unfairly charged.
    b. Delays in remedying billing issues once identified. For instance, we are aware of it taking one CP around 12 months to receive a full refund for an incorrect lead-in charge that resulted from an Openreach data issue.

   c. Openreach bills in pence, which is generally unsuitable for the amounts charged to CPs for PIA and leads to difficulties with CPs' internal accounting processes.

30. Ofcom has made no mention of these specific problems with PIA billing in the Consultation, and we therefore encourage Ofcom to consider further how Openreach's billing system could be improved to make it more efficient and fairer to CPs.

31. Similarly, Ofcom has not sufficiently addressed in the Consultation a means of tackling the continued lack of clarity and detail from Openreach on its plans for exchange-closures and its commitment to implement copper cable recovery from the network (not just copper retirement). Both programmes have a direct and material impact on the level of PIA charges.

32. In respect of exchange closures, as noted in our Pre-Consultation letter, eradicating the costs associated with the maintenance and operation of closed exchange buildings ought to lead to reduced costs for CPs (and thereby consumers), and we would urge Ofcom to monitor Openreach closely to ensure these cost efficiencies come to pass.

33. In respect of recovery of copper from the network, this remains critical to generating additional PIA capacity and delivering efficiencies that support the long-term viability of PIA, such as:
    a. Creating more duct space to allow for greater deployment of fibre services before new infrastructure is required, which would in turn require earthworks at greater additional cost and disruption;
    b. Recycling opportunities for removed copper cabling, allowing an unutilised (and otherwise useless) asset in the ground to be put to good use and with a lower environmental impact than mining and producing virgin copper; and
    c. Removing risk and burden from Local Authorities (who often face serious budgetary challenges anyway) by reducing the administrative workload on them associated with CPs carrying out 'dig' activities in public highways, and exercising rights under the Electronic Communications Code's Funds for Liabilities regime to seek redress for incomplete work or abandoned plant connected with a Code Operator which has ceased trading.

34. Despite these anticipated benefits, there has been very limited copper recovery during the current charge control period. Openreach has, in practice, widely opted to retire copper rather than recover it. This presents a fundamental issue in respect of PIA charges, as Openreach were permitted under an earlier market review to increase charges on the understanding that users of PIA would occupy a greater proportion of physical infrastructure space in ducts once copper had been removed. This argument is clearly without merit, and we believe the permitted PIA charges should be lowered accordingly.

Missing inventory

35. Openreach has invested significant time and resource into developing and negotiating amendments to the Reference Offer that address instances of inaccurate or incomplete record-keeping by PIA CPs (e.g., in respect of whereabouts or unauthorised use). Broadly, these changes are aimed at ensuring that CPs rectify such issues at their own expense and are subject to cost recovery mechanisms for any corrective work required by Openreach. This approach reflects a clear expectation that CPs maintain accurate and up-to-date records and are held accountable where they fail to do so.

36. However, equivalent failings by Openreach, including where infrastructure is either missing from or inaccurately recorded in its own systems (i.e., 'missing inventory') are not subject to reciprocal cost-recovery mechanisms or strict rules requiring the records' correction. In practice, the burden typically falls on PIA CPs to identify, document, and report any discrepancies with Openreach's inventory records discovered in the field. The scale of the problem of missing inventory and the burden borne by PIA CPs is far from insignificant. One member of our group recently calculated that its PIA admin staff had spent time equating to 192 working days throughout 2023 compiling and submitting reports to Openreach in relation to missing inventory. However, those tasks do not represent the full picture of dealing with missing inventory situations, and do not include, for example, gathering the evidence, travelling to site and taking and then processing the required photographs which must be submitted to Openreach.

37. This imbalance in obligations and in rights to recover costs is unfair; CPs are penalised for administrative shortcomings, while Openreach faces minimal consequences for its own issues with data accuracy.

38. We urge Ofcom to scrutinise this disparity more closely and consider introducing a more balanced approach that holds Openreach accountable to the same standards it expects from PIA CPs. We have long commended Ofcom's decision when setting the revised rules for PIA back in 2017-2018[8] to impose through the Network Adjustment regime a requirement on Openreach to correct (or to pay CPs to correct) physical problems affecting Openreach's network that adversely impacted consumption of the PIA product. Given that poor records can also impact CPs' effective use of PIA, we believe there ought to be an equivalent regime put in place to address problems with Openreach's data/records — with similar requirements for Openreach to identify and fix the issues themselves in a timely manner or to pay CPs to identify problematic/incorrect records on their behalf.

PIA licence term

39. Ofcom notes in the Consultation that it "understands" Openreach will offer a minimum term for PIA that is longer than five years, and that it "considers that this

[8] Under the Wholesale Local Access Market Review

would be beneficial in cases where potential end-users of altnets place weight on the minimum contract length as an indicator of long-term security of supply”[9].

40. Whilst these comments are welcome, we would encourage Ofcom to adopt a stronger position on this issue and require Openreach to offer a range of longer licence term options. In our experience, it is quite typical for Government contracts, for example, to require a twenty-year term providing security of supply, so the current five-year limitation faced by CPs is a significant impediment when bidding for such business. Openreach itself faces no such term restrictions when entering competing bids and this potentially gives Openreach a significant advantage over altnets in this regard.

41. We would also note that the PIA product was originally offered with both five and ten-year contract terms. In response to requests from CPs for a wider range of term-length options at the time, Openreach subsequently withdrew the ten-year term, leaving only the five-year option—a position that remains unchanged to this day. This has therefore been a long-standing concern for industry, with requests for greater flexibility dating back to at least 2012. To date, Openreach has not indicated in any industry discussions that a change is under active consideration, and as such, we remain unconvinced that any change to this policy is likely in the near term without Ofcom’s intervention.

42. As outlined above and in our Pre-Consultation letter, our group considers the current five-year minimum licence term imposed by Openreach to be unduly short and commercially restrictive for CPs, particularly in the context of long-term network planning and financing. Requiring Openreach to offer a range of longer licence term options as standard would ensure CPs have the flexibility and confidence required to scale their networks effectively and competitively.

Openreach wayleave information

43. We observe that Ofcom has not adopted the suggestions in our Pre-Consultation letter to bolster the obligation upon Openreach to provide CPs with more detailed information regarding Openreach’s wayleaves in order to give better effect to the infrastructure sharing obligations in the Product Security and Telecommunications Infrastructure (“**PSTI**”) Act 2022.

44. We repeat our request that this information be made available to CPs as part of the existing ‘PIA Database Access’ captured under the PIA legal instrument, in respect of which Ofcom notes in the Consultation (in the context of the specific access remedy for PIA ancillary services):

> *“PIA Database Access involves access to data that supports planning the deployment of a network over Openreach’s physical infrastructure. In*

[9] TAR Consultation, Volume Three, para. 5.60

support of this obligation, we consider that network records should be provided in a digital format where available"[10]

45. In line with this understanding, we believe the PIA database should include: (i) the date the wayleave was granted (or confirmation that the infrastructure predates 2003 and no wayleave exists), (ii) the exact property to which it relates, and (iii) a copy of the wayleave document itself. This information should be made searchable and accessible to CPs in a digital format.

46. This proposed approach is clearly more efficient and consistent compared to Openreach's current system, where CPs must request information manually from Openreach's wayleave team. This often results in delays, missing data or outright refusals by Openreach to provide the information requested.

47. A centralised, transparent, and accurate PIA wayleave database would materially reduce delays in network build and deployment, thus enabling faster, more efficient roll-out of full fibre networks across the UK. The advantages flowing from increased and more efficient access to Openreach's wayleave data could also be seen as aligning with the aims and intended benefits associated with the Government's National Underground Asset Register.[11] We therefore strongly encourage Ofcom to revisit this proposal in the TAR.

PIA novation processes

48. Ofcom acknowledges in the Consultation that "it is likely that further industry consolidation takes place through mergers and acquisitions of FTTP networks over this review period" and that PIA will be a part of this process. Ofcom also recognises the importance of ensuring that "PIA processes and contractual requirements work smoothly and efficiently in these circumstances and do not act as a barrier to consolidation by unduly adding complexity or delay to the process"[12].

49. In view of these comments, we are surprised that Ofcom has not proposed any changes to the PIA novation process in order to make it more efficient, as suggested in our Pre-Consultation letter.

50. We reiterate our concerns that the current Openreach novation process is unlikely to satisfy the increased demand expected over the forthcoming review period, and would encourage Ofcom to revisit this issue and consider further proposals for how this process may be improved.

[10] TAR Consultation, Volume Three, para.5.38 and fn. 152
[11] See the Government's guidance on the National Underground Asset Register, available at: https://www.gov.uk/guidance/national-underground-asset-register-nuar
[12] TAR Consultation, Volume Three, para.5.67

Conclusion

51. We trust that the points set out in this submission will provide valuable insight and contribute meaningfully to Ofcom's thinking throughout the remainder of the TAR consultation process and beyond.

52. We welcome the opportunity to discuss any aspect of this submission in greater detail and remain committed to collaborating with Ofcom, Openreach, and industry stakeholders to further develop and enhance the PIA product for the ultimate benefit of consumers.

Annex 1: Pre-Consultation letter

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22nd July 2024

Dear Ben

Ofcom's Telecoms Access Review 2026 ('TAR')

1. Towerhouse LLP acts for the following communications providers ('CPs') in connection with Openreach's Physical Infrastructure Access ('PIA') product: CityFibre, Glide, Hyperoptic, Virgin Media O2, Vitrifi and Vorboss ('our clients' or 'we'). This letter has been prepared with reference to and in anticipation of Ofcom's consultation on the TAR, which we understand will be published sometime early next year.

2. Ofcom will be aware that since its original creation in 2011, and its numerous improvements since then, including in 2019, uptake of the PIA product has grown significantly, such that PIA is now integral to the delivery of telecoms services throughout the UK. Thanks to the foresight of Ofcom's decision to overhaul the nature of Openreach's obligation to deliver PIA in 2017, and the efforts of industry, assisted by the OTA, to overcome the detailed implementation issues which inevitably emerged subsequent to that, there can be no doubt that the usability of PIA has improved markedly over the past few years. However, the progress from these industry discussions and negotiation only goes so far. In the run-up to the TAR, we recognise the time is ripe to reconsider once again how PIA should be regulated for the next market review period, with a view to providing as much long-term clarity as possible about the trajectory of the product, for builders and investors alike. With this in mind, set out in this letter are a number of key points we would encourage Ofcom to consider at this pre-consultation stage in order to improve upon the PIA product, remove some of the issues which Openreach's rivals experience when trying to use PIA, thereby bolstering competition within the fixed telecoms market, to the benefit of consumers. (Our references in this letter to 'consumers' include both residential and business customers.)

A) Openreach's 'no undue discrimination' ('NUD') obligation must be robustly monitored and enforced, with a view to introducing an 'equivalence of inputs' ('EOI') obligation

3. Whilst we understand that Ofcom has previously been reluctant to introduce strict EOI obligations for PIA, we believe there is room for improvement with the current NUD approach and that it's appropriate to now strive for a higher standard. In particular, we believe Openreach is not fulfilling its NUD obligations to a level that is as 'close to EOI as possible' as has been previously suggested by Ofcom[1].

4. Openreach's shortcomings against its NUD obligations are particularly evident in relation to Ofcom's expectation, as set out in the Wholesale Fixed Telecoms Market Review ('WFTMR'), for 'Openreach to build any new or upgraded services, systems and processes in a way that supports EOI'[2]. Some examples of Openreach not observing and/or giving proper effect to this obligation are set out in the sub-paragraphs below:

    4.1. Openreach developed its 'Arena' application, used for auditing PIA, in isolation and withheld sharing its existence with other CPs for some years.

    4.2. Openreach has provided its own workforce and contractors with read-only access to the 'map tool', a system used for infrastructure discovery and to access vital health and safety information, whilst other CPs have been denied similar access.

    4.3. Openreach is enabling itself to move CP's live network on to brackets to facilitate pole changes during joint site visits, though will not allow CPs to take similar action during their network build stage.

    4.4. Openreach is setting-up a 'graduated response' framework in place of contract breach notices, which Openreach will use to respond to defects and safety performance by CPs, though has not provided details of its own performance in these areas to see how this compares to industry.

    4.5. At the June passives product and commercial group session held on 19th June, Openreach claims it made use of 'industry insight' and 'worked with colleagues across industry' when developing new service level measures for its new OSA 2.0 agreements for outsourced

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[1] Para.4.79, Ofcom, *Statement: Promoting competition and investment in fibre networks – review of the physical infrastructure and business connectivity markets, Volume 1: Physical Infrastructure Market Review (PIMR)*, published 28 June 2019, available at: https://www.ofcom.org.uk/phones-and-broadband/telecoms-infrastructure/review-physical-infrastructure-and-business-connectivity-markets/

[2] Para. 3.79, Ofcom, *Statement: Promoting investment and competition in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26, Volume 3: Non-Pricing Remedies*, published 18 March 2021, available at: https://www.ofcom.org.uk/phones-and-broadband/telecoms-infrastructure/2021-26-wholesale-fixed-telecoms-market-review/

services with civils partners. However, so far as we are aware, Openreach at no point consulted with PIA CPs about how the OSA 1 contracts might be improved from a PIA perspective or what CPs felt the key concerns were. This means that PIA users were denied a useful opportunity to provide feedback which might help Openreach improve the product with industry's needs front of mind.

5. We have seen on many occasions the needs of PIA CPs being relegated to an 'afterthought' when Openreach develops new systems or apps and we are concerned that this deprives CPs of a meaningful opportunity to contribute to the development of new or upgraded services, systems and processes. It also gives Openreach an operational advantage that is harmful to competition. To tackle this, we would encourage Ofcom to consider setting higher standards for Openreach's NUD obligations in the TAR, in order to help ensure that PIA can generate sustainable network competition and ultimately deliver benefits to consumers — an outcome we note that Ofcom is keen to secure.[3] To this end, we would also encourage Ofcom to review the role of the Openreach Monitoring Unit ('OMU'), which we would like to see play a greater and more visible role in monitoring Openreach's compliance with its NUD obligations. However, we feel strongly that the OMU's current work, including publishing annual reports of Openreach's performance should continue.

6. To the extent that progress cannot be made on improving Openreach's performance against its NUD obligations, we would encourage Ofcom to give serious consideration to a move toward full EOI obligations for PIA, whereby Openreach would be required to use PIA on an equivalent basis to CPs. We believe there ought to be a longer-term roadmap established setting full EOI as the eventual goal. Indeed, we consider that many of the concerns that Ofcom has expressed previously about moving PIA to a full EOI basis[4] have now fallen away or are less pronounced than they were. Openreach's working practices are not too well-entrenched to inexpensively change, and ultimately for Openreach to continue operating two different systems for itself and the rest of industry is inefficient and leads to higher costs for consumers. As noted above, the PIA product has evolved significantly, and if over 150 CPs are able to use the product effectively, we believe there is no justifiable reason that Openreach cannot. Furthermore, we understand from the OTA2 that the recent trial operated by Openreach in the Plymouth area illustrated that Openreach is able to consume PIA effectively, and without significant disruption to its business.

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[3] Para 3.5, Ofcom document announcing the Telecoms Access Review, published 26 March 2024, available at: https://www.ofcom.org.uk/siteassets/resources/documents/phones-telecoms-and-internet/information-for-industry/telecoms-regulation/telecoms-access-review-2026.pdf?v=368495
[4] For example, paras 3.75 and 3.76 of volume 3 of the WFTMR (see footnote 2 above).

B) Ofcom's role in providing robust regulatory oversight is crucial, and the pressure must be kept on Openreach

7. Openreach's performance against its NUD obligations, its attentiveness to industry's needs, and the overall development of the PIA product all appear to be at their greatest when Openreach senses close scrutiny and oversight by Ofcom.

8. We commend the fact that regulatory oversight of Openreach has been particularly pronounced of late with the spectre of the TAR in the near future, and that DSIT has also taken a close interest in PIA (having been lobbied by several CPs). We would like to see this level of scrutiny sustained, and for Ofcom to pay, (and be seen paying), very close attention to Openreach's PIA activities. This should help to ensure that PIA generates sustainable network competition during the next market review period, and into the longer term.

9. Whilst there have been positive developments in the PIA product, (such as an improved novation process, a graduated response regime in place of 'single option' contract breach notices, and full retrospective network adjustments), many of these improvements have not yet been delivered by Openreach and/or have been hard won by industry following drawn-out negotiations. We believe that with greater Ofcom participation and oversight, these positive developments to PIA may have been secured more quickly and efficiently.

10. Ofcom should also consider requiring more detail to be captured in the Internal Reference Offer ('IRO') for PIA. Currently, we believe there is not enough transparency in the text of the IRO for a reader to readily identify acceptable differences in the use of physical infrastructure between Openreach and industry, and whether what Openreach is doing in practice is providing them with an anti-competitive advantage.

11. Further, when CPs have raised issues for Ofcom to explore with Openreach, there is an apparent tendency for Openreach to dismiss Ofcom's concerns with lengthy and complex explanations. We would urge Ofcom to liaise closely with industry to better understand and evaluate Openreach's explanations to ensure they stand up to real scrutiny from people who have practical day-to-day knowledge of using PIA. Another possible solution might be to enhance the role of the OMU in overseeing how PIA is used in practice. In particular, our clients would like to see the OMU play a greater role in policing Openreach's promise of copper cable <u>recovery</u> (and not just copper <u>retirement</u>) from the network to ensure it is carried out and additional capacity for PIA is generated, particularly given that Openreach was allowed to increase PIA prices to reflect the removal of copper from ducts. We would encourage Ofcom to scrutinise Openreach's plans for copper recovery closely, and ensure that these plans deliver efficiencies by (for example):

    11.1. Creating more duct space to allow for greater deployment of fibre services before new infrastructure is required, which would in turn require earthworks at greater additional cost and disruption; and

11.2. Recycling opportunities for removed copper cabling, allowing an unutilised (and otherwise useless) asset in the ground to be put to good use and with a lower environmental impact than mining and producing virgin copper.

12. As noted above, we believe that greater scrutiny and oversight of Openreach by Ofcom in respect of PIA will improve network competition, which will ultimately benefit consumers.

C) The PIA legal instrument would benefit from greater clarity

13. We believe that both Openreach and industry would benefit from greater clarity as to Openreach's obligations being added in to the PIA legal instrument. In past market reviews concerning PIA, there has been a tendency for the legal instrument to contain limited levels of detail, with the fine detail sitting in other separate volumes. We would therefore recommend that the detail of Openreach's legal obligations be consolidated in a single, clear legal instrument for PIA. There has also been a tendency for crucial detail to be inserted into footnotes, which may be better placed in the main body of the text.

D) Openreach billing and PIA charges

14. We believe changes are required to Openreach's billing platform so it is truly fit for purpose in relation to PIA and operates efficiently. An example of the inefficiencies and impracticalities in Openreach's current billing system include a consistent failure to accurately label, assign categories and/or provide correct reference numbers for amounts billed to CPs, leaving it to the individual CP to calculate and work out what exactly they are being charged for. These issues can result in CPs being inaccurately and unfairly charged. Furthermore, when such issues do occur, Openreach can be slow to remedy its mistakes; for instance, we are aware of it taking one CP around 12 months to receive a full refund for an incorrect lead-in charge that resulted from an Openreach data issue. Whilst we appreciate that billing mistakes will inevitably occur, we would encourage Ofcom to consider how Openreach's billing system could be improved to make it more efficient and fairer to CPs. Another example of the inefficiencies of Openreach's billing system is that CPs are billed in pence, which is generally unsuitable for amounts charged to CPs for PIA and leads to difficulties with CPs' internal accounting processes.

15. In respect of charging, and the specific issues as to the composition and scale of charges permitted under the PIA charge control, our clients have various concerns that they intend to raise with Ofcom directly and independently. In respect of charges more generally however, we would note that Openreach's previous argument about PIA charges needing to reflect the greater proportion of physical infrastructure space occupied by users of PIA once copper has been removed from the network is without merit. There has been very limited copper removal during the current charge control period, with Openreach widely opting to 'retire' copper rather than recover it. As such, the permitted PIA charges should be lowered accordingly.

16. We would also urge Ofcom to factor into any assessment of the PIA charge control the significant uncertainty industry is facing at present as a result of Openreach's exchange closure programme. We would like to see greater clarity and detail provided by Openreach about the full exchange closure programme, and would note that the detail provided by Openreach thus far has been limited to a relatively small number of closures. Eradicating the costs associated with the maintenance and operation of closed exchange buildings ought to lead to reduced costs for CPs (and thereby consumers), and we would urge Ofcom to scrutinise Openreach closely to ensure these cost efficiencies come to pass.

E) Limited nature of the PIA licence term

17. The current 5-year minimum licence term for PIA contracts imposed by Openreach is too short and restrictive for CPs, and we would encourage Ofcom to consider requiring Openreach to provide a range of longer licence term options. When the current PIA contract was first drafted Openreach offered a 10 year and 5 year term. When CPs requested an option for longer terms to allow them to bid for public sector contracts, Openreach simply withdrew the option for a 10 year term. We believe this requirement has, if anything, become more relevant than it was 7 years ago.

18. Ensuring that CPs have access to longer licence terms would serve to make CPs more competitive, particularly when bidding for Government-funded broadband projects, which typically require evidence of security of supply far in excess of 5 years. Whilst CPs currently have the option to explain in the contract bidding process the reasons for the limited licence term, this is an additional hurdle that CPs using PIA must surmount compared with CPs not using PIA, including Openreach.

F) Openreach wayleave information

19. In order for CPs using PIA to fully realise the benefits of the wider wayleave sharing rights introduced under the Product Security and Telecommunications Infrastructure ('PSTI') Act 2022, we believe Ofcom should consider amending the PIA legal instrument to clarify Openreach's regulatory obligation to provide more detailed information to CPs about BT/Openreach wayleaves.

20. We would like to see this information being offered and made available to CPs as part of the 'PIA Database Access' already captured under the PIA legal instrument. The information required to be provided should extend to the date the wayleave was entered into (or explain if the relevant apparatus was installed before 2003 and Openreach does not have a wayleave in force covering the relevant apparatus), the precise property to which it relates, and a copy of the wayleave document itself. Further, this information should be available and searchable by CPs. Adopting this approach would remove the manual, slow and inefficient process currently in place, whereby CPs must call the Openreach wayleave team to raise queries and elicit information on a case-by-case basis. This will also prevent Openreach refusing requests from CPs to provide

copies of wayleaves, which Openreach has done in the past. We are aware of multiple instances of CPs who have requested a copy of a wayleave listed in the file of wayleaves published by Openreach, only to be told that there was no wayleave at that location at all (although Openreach infrastructure was present on the private land in question). The current system is both inefficient and inaccurate at times.

21. Requiring Openreach to provide CPs with information on wayleaves in this way would enable CPs to roll-out full fibre networks faster and much more efficiently.

G) Openreach novation processes

22. Openreach should be required to have in place an effective novation process that supports and does not impede the increased rates of consolidation and a higher volume of transactions that we expect to arise during the TAR market review period. During this period, we also expect there to be a growing focus on network penetration and increasing customer connections, both of which require a more developed and effective novation process compared with network build, as has been the focus for CPs to date. The current Openreach novation process is unlikely to satisfy this increased demand.

Next steps

23. We hope the points raised in this letter are useful and help to inform your thinking as the TAR consultation document is put together over the coming weeks.

24. We would be very happy to explore with Ofcom any aspect of this letter in more detail, including as part of a meeting or call if preferred, and we stand ready to work with the Ofcom, Openreach and the rest of industry to develop and refine the PIA product further — to the ultimate benefit of consumers.

Yours sincerely

Towerhouse LLP

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