# PIA requirements for the Telecoms

# Access Review

INCA

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Non-confidential

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# 1  Executive Summary

1  The 2021 WFTMR required Openreach to provide the PIA product on the basis of no-undue discrimination (NUD).  It also required that Openreach introduced new processes and systems on the basis of equivalence of input (EOI).

2  Openreach has not provided new processes and systems on the basis of EOI.  In addition, Ofcom has not enforced this obligation on Openreach.  This has resulted in Altnets not having equivalence with how Openreach consumes Physical Infrastructure (PI) elements.

3  INCA requests that Ofcom considers how it mandates Openreach to migrate the PIA product to EOI.  NUD is the default approach and the enforcement of NUD should also be strengthened.

4  EOI should be introduced by Openreach on a prioritised project-by-project basis.  The prioritisation of the projects should be provided by PIA users.

# 2  Introduction

5  The Physical Infrastructure remedy (PIA), was first introduced in 2011.  The promotion of infrastructure competition in the 2015 Strategic Review of Digital Communications led to improvements in the PIA remedy with continuations of improvements through the 2018 Wholesale Local Access Market Review (WLAMR) and the 2019 Physical Infrastructure Market Review (PIMR).  In its 2021 WFTMR Ofcom set out its decision to impose on Openreach a requirement to provide specific network access in the form of PIA.  Ofcom stated in the WFTMR that:

*"[a]n effective PIA remedy is key to [Ofcom's] strategy as it secures the access to Openreach's physical infrastructure that will help support other telecoms providers in deploying competing fibre networks at scale."*.[1]

6   In addition, the 2015 Strategic Review stated:

*We believe competition between different networks (including those built from scratch or built using duct and poles owned by others) is the best way to drive investment in high quality, innovative services...*

*Our strategy for fixed competition and investment will therefore focus on reducing the cost and barriers to new network investment, specifically by giving operators improved access to BT's network of underground ducts and telegraph poles (Duct and Pole Access or DPA).  This can facilitate new investment in ultrafast networks.  This is the cornerstone of our new strategy.*.[2]

7   Whilst INCA is pressing for greater progress on PIA functionality and equivalence in the remaining years of the WFTMR, it does recognise that significant work has been undertaken to meet the requirements of PIA users.  INCA has recently provided Ofcom with a paper on the actions that it believes are required to ensure that the PIA product is fit for purpose and delivers for Altnets and for infrastructure competition.

8   Much of the planned Altnet network build will be during the WFTMR period. However, there is a requirement to ensure that the TAR reflects the ongoing needs of the PIA users, going forward, post the WFTMR.

9   The current PIA product (including the scope for improvement during the remainder of the WFTMR period) retains material differences between how Openreach can use its own PI and how that same PI can be used under the PIA framework.  Ofcom needs to ensure that the TAR eliminates as many as possible of those differences to

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[1] WFTMR final statement, 18 March 2021, Volume 3, Para 4.2.
[2] Initial conclusions from the Strategic Review of Digital Communications, paras 4.12 and 4.16.

provide a long-term level playing field between Openreach and its infrastructure competitors.

10 The WFTMR applied an NUD framework in the WFTMR, with EOI requirements for new and upgraded systems and processes. INCA now requests that Ofcom changes that approach to require a gradual move to EOI on specified priorities systems and processes and an increased focus on NUD compliance with the remaining parts of the PIA product.

11 This paper sets out INCA's proposals for changes to the duct and pole access (DPA) remedy to be provided in the TAR.

# 3  PIA requirements for the TAR

12 Whilst much of the Altnets' network build will be completed by the time of the publication of Ofcom's TAR some build activity will continue.  This means that Ofcom must ensure that the parts of the PIA product that are used for network deployment (Notice of Intent (NOI), Network Adjustments (NAs), etc.) are subject to robust and resilient rules and monitoring.

13 Significantly, however, Altnets will have substantial built networks to operate and maintain in the post WFTMR period and will be reliant on Openreach for operation, repair and ongoing maintenance of the PI.  INCA calls for Ofcom to target those parts of the PIA product for a gradual move towards EOI compliance.  This is because the current PIA systems and processes impose a material administrative burden on PIA users, which is not applicable to Openreach.  Any costs incurred by Openreach in developing and operating PIA can be recovered through PIA charges, paid by PIA users.

## 3.1 Equivalence of Inputs (EOI)

14 EOI means that any competitor to BT / Openreach can access and use the physical infrastructure in the same manner and can use the same systems and processes as BT / Openreach itself uses. This effectively means that Openreach itself should consume the PIA product and not use 'internal' processes.

15 As stated in INCA's 2023 Policy Report,[3] EOI is important because:

a. Despite progress on the functionality of the duct and pole access product, the processes are cumbersome and require significant administrative resource;

b. They slow down the pace at which Altnets can bring their full fibre network to consumers and increase the costs of doing so;

c. Openreach is not subject to those hurdles and, therefore, has a significant advantage in how it can roll out its new fibre infrastructure.

16 In its 2021 WFTMR Statement, Ofcom stated that any new and upgraded systems or processes should be designed to provide equivalence, unless BT / Openreach could justify otherwise. Ofcom has failed to enforce the implementation of its own regulatory obligation.

17 The 2023 INCA report also states that[4]:

*This means that the inherent advantages to Openreach remain baked-into the regulatory regime and are consistently reinforced rather than gradually eroded.*

18 This is contrary to stated government policy in the Statement of Strategic Priorities (SSP).[5] The lack of equivalence actively prevents the creation of a level playing field

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[3] Securing long-term benefits for broadband customers, Embedding infrastructure competition in the UK, INCA, 2023, page 15. https://www.inca.coop/policy/2023-report.

[4] Ibid.

[5] Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services. The Secretary of State for Digital, Culture, Media, and Sport designated this statement for the purposes of Section 2A of the Communications Act 2003 on 29 October 2019.

between the dominant incumbent (Openreach) and market entry competitors such as PIA users.

19 The need for equivalence and the requirements of EOI for processes and systems will remain as important for Altnets in the post-build period as it has been during the build stage. For the elements of the PIA product that PIA users continue to engage with post-build, it is essential that investment is made to ensure EOI is in place.

20 INCA requests that Ofcom mandate Openreach to provide EOI-compliant systems and processes on prioritised parts of the product to eliminate the on-going advantages currently enjoyed by Openreach compared to PIA users. When introducing EOI, it is important to ensure that the resulting benefits are available to all PIA users, irrespective of their size.

21 Ofcom must ensure that the setting of regulatory remedies and their enforcement align with the government's policies for the sector to ensure that it delivers the desired economic outcomes.

### 3.1.1   Introducing EOI through the TAR

22 When considering the introduction of EOI for PIA, it is important to recognise that INCA does not mean that the entire PIA product should be subject to a full EOI requirement. Rather INCA asks that Ofcom identifies the most important areas where the lack of EOI will continue to represent a disadvantage to Openreach's competitors in the medium to long-term. INCA is seeking a process of 'evolution' rather than 'revolution', and only for specified systems and processes where the investment in EOI will contribute materially towards a level competitive playing field.

23 The specific scope of the EOI obligation needs to be driven by the requirements of PIA users. Therefore, INCA asks that Ofcom consults with stakeholders, either through the main TAR consultation or through a separate (parallel) consultation, to identify the top three systems and/or processes that should be the initial focus for the introduction of EOI.

24 In mandating EOI for those prioritised areas, Ofcom should set specific dates for Openreach to complete the move to EOI for each such system/process.

25 Ofcom should ask the OTA to assist Openreach's development of EOI-complaint systems/processes. This is to ensure that the resulting systems and processes are designed to meet the needs of PIA users and that PIA users are included throughout the design and development processes alongside Openreach which would also be consuming the new systems/processes.

26 It is unlikely that only three systems/processes will need to be modified to be EOI compliant. The purpose of Ofcom identifying the first three is to ensure that work on the move towards EOI starts immediately upon the TAR taking effect. In parallel with that work, Ofcom should require Openreach to consult with its PIA customers to identify other PIA systems/processes for conversion to EOI. Again, INCA asks that the OTA be involved in this process.

### 3.1.2 *Monitoring of EOI and NUD compliance*

27 Ofcom has failed to monitor and enforce Openreach's compliance with the WFTMR obligation to provide EOI for new and upgraded systems and processes. Openreach has not delivered any EOI-compliant processes and systems during the Altnets' network build period.

28 Neither Openreach nor Ofcom have taken the WFTMR obligation for EOI seriously. It is important that, for the TAR, the OMU takes an active role in the monitoring of Openreach's compliance with both NUD and with EOI, and any other regulatory obligations included in the TAR when finally published.

29 Ofcom should ensure that KPIs are defined for each EOI-complaint systems/process and that Openreach reports regularly to the OMU.

30 With regards to the NUD requirements, which remain in place across the entire PIA product until such time individual systems and processes are moved to EOI, INCA asks that Ofcom (in particular the OMU) sets clear and transparent NUD compliance parameters and report on data collected on a regular and transparent basis. INCA

asks that Ofcom consult on NUD compliance parameters either in the main TAR consultation or perhaps separately alongside consulting on the top three priority systems/processes for EOI conversion.

31 INCA's experience of Ofcom's NUD compliance framework under the WFTMR, primarily based on the Openreach Internal Reference Offer (IRO), has been that it has been difficult for Ofcom to hold Openreach to account in a transparent manner. The TAR is the opportunity to change that. For the Openreach IRO to be an effective NUD compliance tool, it needs to transparently describe the internal Openreach systems and processes alongside the corresponding PIA systems and processes. There should be no confidentiality protecting Openreach's internal systems and processes – to have such restrictions runs counter to a transparent non-discrimination regime.

## 3.2   Regulatory Oversight

32 Robust regulatory oversight is crucial. Close scrutiny and oversight by Ofcom (the OMU and the OTA2) will help ensure that Openreach faces additional pressure to comply with its obligations as well as meeting the demands of their customers, the PIA users.

33 With greater Ofcom participation and oversight, INCA believes that important developments, that have taken years to secure (or are not yet won), could have been achieved more quickly, benefiting competition, customers and the Altnets.

34 In order to ensure that Ofcom is able to scrutinise the operations of Openreach it is essential that Openreach's IRO captures more detail of the PIA product, processes and systems used internally.

35 INCA asks Ofcom to ensure that Openreach is challenged on its PIA performance and Ofcom shouldn't be easily satisfied with Openreach's response. Many of the points INCA raised to Ofcom are important for both the operational and commercial performance of PIA users and therefore it is important that responses provided by Openreach do actually address the issues being faced by PIA users.

## 3.3    Changes to PIA product

36 As set out above, the outcome of the TAR consultation, or a parallel consultation, should be a prioritised list of three process / system changes to introduce EOI to the PIA product.

37 Whilst we do not intend to pre-empt the outcome of that consultation process we refer Ofcom to our recent report on the PIA product under the WFTMR which contains a number of the key issues faced by PIA users which we consider as candidates for the prioritised list.

### 3.3.1   Changes to PIA product

38 In addition to the introduction of EOI for key processes and systems PIA users also request Ofcom to consider other, non-process/system changes, that should be considered for the PIA product.  The following are some of the issues PIA users request Ofcom to consider.

- **Recovery of copper cables by Openreach**: PIA users have raised the issue of the lack of recovery of redundant copper cables in INCA's report on exchange closures.  PIA users seek Ofcom's engagement on this issue.  PIA users request Ofcom to oblige Openreach to recover redundant copper cable when that is the only option to ensure sufficient duct capacity to meet the needs of PIA users.  In addition, Ofcom should ask the OMU to provide oversight of Openreach's commitment to any obligation relating to this matter.

- **Limited duration of the PIA licence term:** PIA users consider that the 5-year minimum licence term for PIA is too short and restrictive.  There needs to be a range of longer-term options which would be of particular help to Altnets that make use of PIA to support bids for Government-funded broadband projects and other customer contracts where long-term commitment is required. At present, PIA users are often excluded from such contracts due to the short PIA licence term.

- **Wayleave information**: To assist PIA users to fully realise the benefits of the wider wayleave sharing rights introduced by the PSTI Act, (meaning the faster & more efficient roll-out of full fibre networks) INCA requests Ofcom to amend the relevant legal instruments to clarify that Openreach is under a regulatory obligation to provide more detailed information to PIA users about the wayleaves that BT/Openreach hold.  This should be offered as part of the 'PIA Database Access' already captured under the legal instrument.

- **Novation process:**  As Ofcom has acknowledged, there is likely to be industry consolidation in the future.  Such a consolidation process will require access to PIA usage and statistics and the ability to novate existing contracts from one party to another as part of the consolidation. INCA asks that Ofcom ensure that Openreach must cooperate fully in facilitating and easing that process.

# 4  Conclusions

39 Ofcom should ensure that, in those process / systems areas identified and prioritised by PIA users, EOI is implemented as soon as is possible by Openreach and that the provision of those EOI solutions is closely monitored and enforced by Ofcom through the offices of the OTA and OMU.

40 Ofcom should also ensure that Openreach strengthens the NUD obligations on Openreach and ensure that these are also effectively enforced.