

FAO: Mr Ben Harries
Ofcom
London
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By email only to: ben.harries@ofcom.org.uk

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 Ofcom¹.
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

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 basis⁴ 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.

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 recovery (and not just copper retirement) 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



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