

## **Consultation on the proposed template notices resulting from the Product Security and Telecommunications Infrastructure Act 2022 amendments to the Electronic Communications Code**

1. We are a group of Communications Providers consisting of AllPointsFibre, CityFibre, Glide, Hyperoptic, Virgin Media O2, and Vodafone ('our group' or 'we'). The members of our group are all active purchasers of Openreach's Physical Infrastructure Access ('PIA') product<sup>1</sup> and, since early 2018, we have been heavily involved in the negotiation of the 2019 PIA reference offer and subsequent discussions concerning the ongoing evolution and improvement of the product. Some of the members of the group will provide their own, separate responses to the consultation. This document contains a focused response on a specific part of the consultation where all members of the group have aligned views.
2. Our group welcome the changes brought about by the Product Security and Telecommunications Infrastructure Act 2022 (the "PSTI Act" or the "Act") in relation to the greater sharing rights that will be incorporated into the Electronic Communications Code ("ECC").<sup>1</sup> These additional rights are set out in sections 58 and 59 of the Act and essentially extend the right for operators to share duct without the need to obtain additional code agreements ("wayleaves"). This has the potential to greatly ease the use of Openreach's PIA product and help accelerate rollout of gigabit capable networks.
3. We do have a number of practical concerns as to how this will operate in practice — particularly in the context of PIA — and wish to bring these to the attention of Ofcom in order that the noticing regime can be configured to minimise any difficulties which might arise.

### **Content of notices ought to capture non-standard sharing arrangements such as PIA**

4. On the face of it, where an operator wishes to use the relevant provisions of the PSTI Act and the PIA product, its ability to share duct is dependent on Openreach, as the main operator, affixing the notice to the relevant land and doing so correctly and in a timely manner. The noticing requirements in the Act assumes that the infrastructure owner wishes to share the assets. This would make sense where an operator wishes to share under a commercial agreement into which they have freely entered, but it does not naturally align with PIA where Openreach has been ordered through regulation to share its assets — something which it might not have done, or might cease doing, if it had the commercial freedom to do so.
5. Openreach has not developed any supporting processes regarding how the noticing requirements might apply to PIA and there is no provision requiring them to post notices under PIA. Indeed, arguably they may say they do not "seek to exercise" their right to share.

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<sup>1</sup> Openreach's Physical Infrastructure Access, which allows other communications providers to use Openreach's established network of ducts and poles in order to provide competing services. The availability of this product has been mandated by regulatory remedy imposed by Ofcom through a sequence of Market Reviews — the most recent of which is the 2021 Wholesale Fixed Telecom Market Review.

6. We therefore believe that the form of noticing proposed by Ofcom ought to be reconsidered so that it reflects the involuntary nature of sharing in certain circumstances — i.e. that it is mandatory and the party seeking sharing is not the duct owner.
7. For example in para 3 of Annex 1, as an alternative form of words, we believe a third option should be added in effect saying “We are required to provide this notice because [insert name of code operator] has asked to share etc (to include brief description of PIA and make clear the sharing is under a remedy introduced by Ofcom rather than at the discretion of the duct owner).
8. Regardless of the form of the notice, we believe that it is possible that a duct owner which does not wish to share its duct, but has been instructed to do so, has an incentive to make the process for posting the required notices as cumbersome and slow as possible. We believe that in addition to the form of noticing, Ofcom may need to consider whether the PIA remedy needs to be amended to either oblige Openreach to carry out the noticing required under the Act or to permit the PIA access seeker to serve the notice in the prescribed form on behalf of Openreach. We believe this position ought to be put on a clear regulatory footing rather being left to an uncertain future of commercial negotiation between Openreach and industry.
9. Openreach would not necessarily know the date on which the access seeker plans to begin sharing the duct and so it will be very difficult for Openreach to meet the deadlines set out in the Act since they will be reliant on confirmation from the access seeker of the timescales involved.
10. We believe that posting of notices by PIA CPs on behalf of Openreach was specifically suggested by the Minister during the passage of the Bill. Specifically, Lord Harlech said in the House of Lords that:

*“I welcome the opportunity to point out that we expect a similarly pragmatic approach to be adopted in relation to new rights relating to underground networks, introduced through Clauses 59 and 60, which are also intended to facilitate faster and more efficient upgrading and sharing. **For example, it may be sensible when granting permission for a second operator to share the use of ducts and poles for the main operator to authorise the second operator to carry out the appropriate fixing of notices on its behalf.**”<sup>2</sup> (emphasis added)*
11. This was a comment made in relation to a specific concern raised about PIA where there is an unwilling sharer of ducts. We believe it is a sensible and pragmatic suggestion but one which ignores the fact that in PIA, the duct owner is only sharing because of a regulatory obligation. It is unlikely to succeed if left purely on a voluntary basis. The noticing requirements in the Act impact directly on PIA and ought to be reflected in changes to the obligations to which

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<sup>2</sup> <https://hansard.parliament.uk/lords/2022-10-12/debates/833202AC-9E8C-4B2A-B5FF-77042ABCF975/ProductSecurityAndTelecommunicationsInfrastructureBill#contribution-928DB825-D450-41D3-B5C7-A85E879C6536>

Openreach is subject.

12. We believe this could be done by Ofcom issuing revised guidance as to what is required in order to constitute network access as mandated under the PIA remedy. We were concerned that when we mentioned this in an industry meeting with Ofcom (as an example of where Ofcom might have the ability to amend guidance or Directions to accommodate changed circumstances), Ofcom indicated that Ofcom would not be prepared to become involved until after a proven failure to reach agreement with Openreach after a period of industry negotiation. This stands in marked contrast with the apparent willingness of Ofcom to amend ethernet QoS measures when asked to do so by Openreach. We do not accept that industry should require to negotiate changes to PIA in order to give effect to statutory changes, particularly where a Government minister has already set out the optimum approach which could be adopted to give effect to the Government's policy intent.

**Should the landowner's details be required on the notice?**

13. In addition, we query why the form of notice at Annex 1 requires the addition of the name and address of the landowner. This was not a requirement set out in the Act. The Act stipulated<sup>3</sup> that the Notice must:

- (a) be attached in a position where it is reasonably legible,
- (b) state that the main operator intends to upgrade the electronic communications apparatus or (as the case may be) share its use with another operator,
- (c) state the date on which the main operator intends to begin to upgrade the electronic communications apparatus or (as the case may be) share its use with another operator,
- (d) state, in a case where the main operator intends to share the use of the electronic communications apparatus with another operator, the name of the other operator, and
- (e) give the name of the main operator and an address in the Unit.

14. There is therefore no statutory requirement to include the details of the party with whom the duct owner has a subsisting agreement. We believe that requiring the inclusion of these details on a notice posted at the site of the infrastructure serves no useful purpose. It will not alter the landowner's awareness of the notice but it will require either the duct owner or the party seeking to share the duct to search records in order to obtain the name and address of the landowner. The additional bureaucracy involved will simply delay the sharing of the duct in question.

**Should there be two separate forms of notice?**

15. Ofcom's also envisages two sets of notices — one for ducts installed between 29th December 2003 and 28th December 2017, and another for ducts installed before 29th December 2003. Although this might appear logical from a legal perspective, operationally it makes no sense. A

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<sup>3</sup> s.58 (4) Product Security and Telecommunications Infrastructure Act 2022

communications provider will not know the date on which that duct was installed. Having different notices according to the date of installation will therefore require operators to submit requests to Openreach in order to establish which notice to affix — creating precisely the delay and administrative burden which the PSTI Act was designed to avoid. This would add to the bureaucracy rather than reducing it and will risks undermining the policy objective of the new sharing rights in the Act. The intention was to allow operators to share all ducts, regardless of when they were installed. The fact that the right to share duct stems from different legislative provisions depending on the date a duct was installed does not mean that an additional layer of complexity has to be added to the noticing requirements.

16. Our group is hopeful that with the right noticing regime in place, the new sharing provisions of the Act will bring real benefits for alternative network providers like our group and for the UK as a whole.