

**BT Regulatory Financial Statements –
Modification of the direction to withdraw
the requirement to provide physical
infrastructure information as part of the
additional financial information for 2019/20
and 2020/21**

STATEMENT:

Publication date: 17 July 2020

1. Explanatory Statement

Modification of the direction to withdraw the requirement to provide physical infrastructure information as part of the additional financial information for financial years 2019/20 and 2020/21

Background and Summary

- 1.1 BT is subject to regulatory financial reporting requirements across all of the fixed telecoms markets in which it is regulated, comprising:
- physical infrastructure;
 - wholesale local access;
 - business connectivity;
 - narrowband; and
 - wholesale broadband access.
- 1.2 As part of these requirements, BT must publish the Regulatory Financial Statements (the “RFS”) every year. It is also required to provide additional financial information (“AFIs”) to ensure that Ofcom can make informed regulatory decisions, monitor compliance with SMP conditions, ensure that those SMP conditions continue to address the underlying competition issues, and investigate potential breaches of SMP conditions and anti-competitive practices.
- 1.3 These requirements are imposed on BT by way of SMP conditions set in each regulated market and a suite of directions imposed in each market pursuant to those SMP conditions. The SMP conditions set out our general regulatory financial reporting requirements, including any accounting separation and cost accounting obligations. The directions then set out our detailed financial reporting requirements.
- 1.4 On 12 July 2019 Ofcom published a statement setting out the regulatory financial reporting requirements for the physical infrastructure (“PI”) market including the AFIs that BT would be required to provide for the two financial years, 2019/20 and 2020/21. The obligations to provide the AFIs were set out in a Direction setting the requirements in relation to preparation, delivery, publication, form and content of the Regulatory Financial Statements (the “Direction”).¹ The Direction included a requirement for BT to provide “Updated Inputs for our Calculation of the physical infrastructure access maximum rental charge” (the “PIA AFI”).² The obligation to supply the PIA AFI was imposed to ensure that Ofcom is provided with the following information and inputs it needs to populate its PIA pricing model:
- a) CCA operating costs directly attributed to the duct Activity Groups;

¹ The Direction is available on pages 33 to 78 of [Annex 1](#) to the Physical Infrastructure Market Review.

² Paragraph 12(2) of the Direction.

- b) CCA operating costs indirectly attributed to the duct Activity Groups;
 - c) CCA costs for Class of Work Local Distribution Cable;
 - d) CCA operating costs directly attributable to D-Side Copper Cable and D-Side Copper Cable Maintenance Plant Groups;
 - e) CCA operating costs indirectly attributable to D-Side Copper Cable and D-Side Copper Cable Maintenance Plant Groups;
 - f) CCA operating costs related to “Capex – safety assurance”.³
- 1.5 Since setting the requirement to provide the PIA AFI, we have developed a more detailed way of modelling PI costs to be used in the setting of prices. Given that the PIA AFI is only required to be introduced from 2019/20, we used our formal information gathering powers under section 135 of the Communications Act (the “Act”) to ask BT and Openreach for the information we need to develop the proposed PIA pricing model. We consulted on this model as part of the Wholesale Fixed Telecoms Market Review (“WFTMR”) in January 2020.⁴ We are currently undertaking further work to update the PI data for the purpose of reaching our decisions on the WFTMR before April 2021.
- 1.6 Given that we now have access to the information which is more detailed and more directly relevant to our proposed approach of setting prices, we consider that it would be appropriate and proportionate to modify the Direction to withdraw the requirement on BT to provide the PIA AFI to Ofcom.⁵
- 1.7 We have considered whether the consultation threshold set out in section 49A(1) of the Act is engaged. Under this provision, we are required to consult on the modification of a direction (among other things) where what is proposed would, in our opinion, have a significant impact on a market for any of the services, facilities, apparatus or directories which we regulate.
- 1.8 We do not consider that the consultation threshold is engaged in this case for the following reasons:
- a) The requirement to provide the PIA AFI concerns the provision of specific type of information relating to the PI markets provided to Ofcom to enable Ofcom to fulfil its functions.
 - b) Since imposing this requirement, we have gathered the information we need using our powers under section 135 of the Act; this information is more detailed and more directly relevant to our proposed approach to setting prices which we have now developed for the WFTMR than that which would be provided as part of the PIA AFI .
 - c) We will continue to require other AFIs in relation to PI costs set out in the Direction.

³ See page 77 of [the Direction](#).

⁴ The [January 2020 consultation](#).

⁵ As part of the WFTMR, in February 2020 [we consulted on what information on PIA BT should be required to publish in the RFS](#) and provide privately to Ofcom for the period covering financial years between 2021/22 and 2025/26.

- 1.9 In light of the above, we are satisfied that the modification of the Direction to withdraw the requirement to provide the PIA AFI to Ofcom would not result in information gaps and we will continue to have access to the information we need to continue to fulfil our functions. We do not therefore consider that the modification of the Direction will have a significant impact on a market for any of the services, facilities, apparatus or directories which we regulate.
- 1.10 We also consider that the modification of the Direction is not of EU significance as in Ofcom’s opinion it would not affect trade between Member States.⁶
- 1.11 In summary, we have decided to modify the Direction to withdraw the requirement on BT to provide the PIA AFI to Ofcom for the 2019/20 and 2020/21 financial years without the need to conduct domestic or EU consultation.

Legal tests

- 1.12 We have considered our decision to modify the Direction to withdraw the requirement on BT to provide the PIA AFI to Ofcom against the tests set out in section 49(2) of the Act and have concluded that it is:
- a) objectively justifiable as it withdraws the requirement on BT to provide information to Ofcom which is no longer necessary or appropriate for Ofcom to have to be able to fulfil its functions;
 - b) not unduly discriminatory because KCOM is the only other SMP provider which has regulatory accounting obligations, but we have decided not to require KCOM provide the same or similar information as that contained in the PIA AFI;
 - c) proportionate, as it recognises that BT should only be required to provide information to Ofcom where such information is necessary and appropriate for Ofcom to have to enable Ofcom to fulfil its functions; and
 - d) transparent, in that it is clear that our intention is to ensure that BT is not subject to any unnecessary or disproportionate regulatory burdens.
- 1.13 We have also considered our decision to modify the Direction to withdraw the requirement on BT to provide the PIA AFI to Ofcom in light of the requirements set out in sections 3, 4 and 4A of the Act. Our decision is designed to ensure that the RFS and the AFIs remain relevant and appropriate, thereby increasing transparency for the industry and/or Ofcom. Ultimately, this promotes competition.

⁶ The cumulative criteria that must be satisfied in order for a proposal to be of EU significance include the criterion that the proposal would, in Ofcom’s opinion, affect trade between Member States (please see section 150A(2)(d) of the Act).

A1. The Modification of the Direction

Modification of a direction under section 49 of the Communications Act 2003 and SMP services condition 11.4 contained in Schedules 1 of the 2019 PIMR Notification

Background

- A1.1 On 28 June 2019 Ofcom published a statement entitled “Promoting competition and investment in fibre networks: review of the physical infrastructure and business connectivity markets”.¹ At Annex 26 Ofcom published a notification under sections 48(1) and 79(4) of the Act of the identification of markets, the making of market power determinations and the setting of SMP services conditions in relation to BT under section 45 of the Act (“2019 PIMR and BCMR Notification”).² Condition 11 of both Schedules 1 (PIMR) and 3 (BCMR) was entitled “Regulatory Financial Reporting”. Pursuant to Condition 11.4 of Schedule 1, Ofcom may give directions in relation to BT's obligations under the Conditions.
- A1.2 On 12 July 2019 Ofcom gave (among other things) a Direction setting the requirements in relation to preparation, delivery, publication, form and content of the Regulatory Financial Statements (the “Direction”) under section 49 of the Act pursuant to Condition 11.4 contained in Schedules 1 of the 2019 PIMR and BCMR Notification. Paragraph 12 of the Direction provides that BT must prepare and deliver to Ofcom (among other things) the additional financial information entitled “Updated Inputs for our Calculation of the physical infrastructure access maximum rental charge” (the “PIA AFI”) at the same time it delivers its Regulatory Financial Statements. The PIA AFI is required to be provided in respect of the 2019 PIMR Markets (combined) in the form and content as described in Annex B to the Direction.

Decision to modify the Direction to withdraw the requirement to provide the PIA AFI

- A1.3 Since giving the Direction, Ofcom has developed a more detailed way of modelling physical infrastructure costs to be used in the setting of prices and has obtained the necessary information on physical infrastructure costs from BT and Openreach.
- A1.4 In light of the above, Ofcom has decided to modify the Direction to withdraw the requirement on BT to provide the PIA AFI for financial years 2019/20 and 2020/21. The modification shall take effect on the day it is published.

¹ Statement entitled "[Promoting competition and investment in fibre networks: review of the physical infrastructure and business connectivity markets](#)";: [Volume 1: Physical Infrastructure Market Review](#); [Volume 2: Business Connectivity Market Review](#); [Volume 3: Leased Lines Charge Control](#).

² [The 2019 PIMR and BCMR Notification](#).

A1.5 The effect of, and full reasons for, modification of the Direction are set out in the accompanying explanatory statement.

Ofcom’s duties and legal tests

A1.6 Ofcom considers that the modification of the Direction referred to in paragraph 4 above complies with the requirements of section 49(2) of the Communications Act 2003 (the “Act”).

A1.7 In deciding to modify the Direction to withdraw the requirement on BT to provide the PIA AFI, Ofcom has considered and acted in accordance with its general duties set out in section 3 of the Act, the six community requirements in section 4 of the Act and the duty to take account of all applicable recommendations for harmonisation issued by the European Union in section 4A of the Act.

A1.8 Ofcom has also had regard to the Statement of Strategic Priorities in making the decision referred to in this notification.

Interpretation

A1.9 Except as otherwise defined, words or expressions used shall have the same meaning as they have been ascribed in the Conditions set out in the 2019 PIMR and BCMR Notification and in the Direction. Otherwise any word or expression shall have the same meaning as it has in the Act.



David Brown

Director of Regulatory Finance, Ofcom

A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

17 July 2020