



**CityFibre response to the consultation on the proposed template notices resulting from Product Security and Telecommunications Infrastructure Act 2022 amendments to the Electronic Communications Code dated 23 January 2023**

**CityFibre response to the consultation on the proposed template notices resulting from Product Security and Telecommunications Infrastructure Act 2022 amendments to the Electronic Communications Code dated 23 January 2023 (the “Consultation”)**

1. CityFibre welcomes the long-awaited changes brought about by the Product Security and Telecommunications Infrastructure Act 2022 (the “PSTI Act”). In particular, sections 58 and 59 of the PSTI Act amend the Electronic Communications Code (“ECC”)<sup>1</sup> to extend the right for access seekers to share duct without the need for additional wayleaves, facilitating the use of Openreach’s PIA products under the PIA Remedy<sup>2</sup> and accelerating rollout regardless of when duct was installed.
2. In order for access seekers to benefit from the provisions of the PSTI Act as regards the sharing of duct, the PSTI Act provisions require a notice to be affixed by the main operator (i.e., the duct owner) prior to the commencement of sharing (or upgrade, as the case may be) of the relevant duct.<sup>3</sup> In accordance with paragraph 90 of the ECC, the form of those notices is to be prescribed by Ofcom.
3. On the face of the PSTI Act, where an operator such as CityFibre wishes to avail itself of the relevant provisions of the PSTI Act and the PIA Remedy, its ability to share duct is dependent on Openreach, as the main operator, undertaking the step of affixing the notice and doing so correctly and in a timely manner. However, as was made clear by the Minister during the passage of the PSTI Act through Parliament, the main operator can grant permission for the sharing operator to affix notices on its behalf:

*“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.** (emphasis added)”<sup>4</sup>*

4. Where access seekers wish to make use of Openreach duct under the PIA Remedy, Openreach may therefore authorise access seekers to affix notices on its behalf. However, as Ofcom recognised in the WFTMR, Openreach has an obvious incentive to refuse access to its ducts to prevent new networks from using those ducts to provide genuine competition at the network level.<sup>5</sup> Ofcom must therefore be alive to the risk that Openreach does not authorise access seekers to affix notices (and does not do so itself) to frustrate the sharing process, contrary to the spirit and intention of the PSTI Act. Ultimately, this could delay and deter the sharing of

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<sup>1</sup> Schedule 3A to the Communications Act 2003.

<sup>2</sup> Ofcom’s regulation of wholesale Telecoms Physical Infrastructure for deploying a telecoms network in the United Kingdom excluding the Hull Area as set out in Volume 7 of the Wholesale Fixed Telecoms Market Review 2021-26 (“WFTMR”).

<sup>3</sup> Sections 58(6) and 59(6) of the PSTI Act.

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

<sup>5</sup> See, for example, paragraph 4.11, Volume 3 WFTMR.

Openreach ducts by other operators, directly impacting the speed at which alternative networks can roll out across the UK.

5. To eliminate this risk and protect the pace of alternative network deployment, Ofcom should clearly indicate that the PIA Remedy requires Openreach to authorise access seekers to affix notices required under the PSTI Act on its behalf, rather than relying on Openreach to do so. This approach would (i) enable operators to share apparatus without delays which are inevitable when relying on third party cooperation; (ii) eliminate the ability for Openreach to frustrate the sharing process; and (iii) unburden Openreach of potentially very high volumes of individual noticing requests.
6. To give effect to this, Ofcom could make clear that the network access right in SMP Condition 1 requires BT to generally authorise counterparties to the PIA contract to affix the notices required under the PSTI Act on Openreach's behalf. Such advanced authorisation will facilitate a far more seamless process where all necessary noticing requirements can be met without requiring the ongoing and potentially disruptive involvement of Openreach.
7. On that basis, CityFibre considers that some changes will be required to the form of the draft notices as set out in the Annexes to the Consultation.
8. The Consultation envisages two sets of notices in Annexes 1 and 2 – one for ducts installed prior to 28 December 2017 but on or after 29 December 2003 and another for ducts installed prior to 29 December 2003. However, access seekers wishing to share duct will not themselves 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.
9. Prior to the implementation of the PSTI Act, access seekers were obliged to contact Openreach to establish whether or not apparatus was installed before or after December 2017 in order to establish whether or not a wayleave was required. If Ofcom's approach has the effect of introducing a more onerous requirement (since Openreach is not presently organised to provide a service which confirms the date of installation), Ofcom will have undermined the effect of the PSTI Act.
10. Distinguishing notices on the basis of installation date of the relevant duct is, in any event, unnecessary given that the purpose and ultimate effect of paragraphs 17 and 17A of the ECC is to allow operators to share all ducts, whenever installed. The fact that the right to share duct happens to arise under multiple provisions of legislation depending on the date a duct was installed need not require the implementation of an additional layer of complexity in practice, nor create a further opportunity for Openreach to potentially frustrate the sharing process. A single template notice should therefore be put in place for sharing under either paragraph 17 or paragraph 17A of the ECC.
11. CityFibre further notes that Annex 1 of the Consultation provides that, in the case of a notice issued under paragraph 17 ECC, the notice must include details of the wayleave agreement entered into by the main operator. However, it is unclear as to why this is necessary. Where an access seeker wishes to share the use of Openreach duct, it will not have any knowledge of the underlying wayleave and would need to approach Openreach to establish (a) the date on which any wayleave was granted and (b) by whom. This would therefore introduce an unnecessary

step for access seekers (even if authorised to affix notices) to ensure that they were in a position to complete the relevant notice, over and above the need under the proposals to approach Openreach to establish when the duct was installed.

12. In CityFibre's experience, Openreach does not have a readily accessible database of its wayleaves and is therefore rarely in a position to provide such information. Further, Openreach has incentives to frustrate the use of the PIA Remedy, as Ofcom recognises, and any additional administrative step introduced by Ofcom will allow it to do so. Moreover, it is unclear to CityFibre what benefits will be achieved by the inclusion of the details of the counterparties to the wayleave in a notice. It is CityFibre's understanding that the purpose of the noticing requirements is to allow a landowner to be aware that duct is being shared. Details of the original wayleave granted for the purposes of the installation of the duct would have no bearing on that outcome.
13. In light of the risks presented by continuing to require different notices outlined above, CityFibre considers that Ofcom should instead provide for a single notice that does not require the inclusion of details of the original wayleave agreement. Such notice could provide that the power to share/upgrade the duct derives from paragraph 17 or 17A of the Code and need not refer to whether the duct was installed pre-2017 or pre-2003. We have set out an example at **Annex 1**.
14. CityFibre is hopeful that the provisions of the PSTI Act, in conjunction with the PIA remedy, will bring about real benefits for alternative networks and it is important that these benefits are not frustrated by a burdensome, Openreach-controlled noticing process.

## ANNEX 1

### STATUTORY NOTICE

#### REGARDING THE UPGRADING OR SHARING OF ELECTRONIC COMMUNICATIONS APPARATUS INSTALLED UNDER THE ELECTRONIC COMMUNICATIONS CODE

##### Paragraph 17 or 17A<sup>6</sup> of Part 3 of Schedule 3A of the Communications Act 2003

1. This is a statutory notice pursuant to paragraph 17(6) or 17A(6) of the electronic communications code, set out in Schedule 3A to the Communications Act 2003 (the “Code”).
2. We, [insert name of operator], keep [insert brief description of the electronic communications apparatus] (the “Apparatus”) installed under the land at [insert address of the land where the Apparatus is installed] (the “Land”). We are required to provide this notice because we intend to upgrade the Apparatus that is installed under the Land.

[OR - delete appropriate version]

6. [insert name of main operator] keeps [insert brief description of the electronic communications apparatus] (the “Apparatus”) installed under the land at [insert address of the land where the Apparatus is installed] (the “Land”). We, [insert name of operator] are authorised by [insert name of main operator] to affix this notice because [insert name of main operator] has agreed to share the use of the Apparatus that is installed under the Land.

7. We intend to begin [upgrading OR sharing] the Apparatus on [insert date].

##### ADDRESS FOR CORRESPONDENCE ABOUT THIS NOTICE

8. We can be contacted about the [upgrading OR sharing] of the Apparatus in writing to:

[insert appropriate UK postal address]

[insert date of Notice]

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<sup>6</sup> Paragraph 17 gives rise to the rights detailed herein with regards to Apparatus installed prior to 28 December 2017 but on or after 29 December 2003, whilst paragraph 17A applies to Apparatus installed prior to 29 December 2003.