



Internet Telephony Services Providers' Association

12th August 2005

Consultation on BT's Undertakings in lieu of a Reference under Part 4 of the Enterprise Act

Introduction

ITSPA, the Internet Telephony Services Providers' Association, has carefully considered Ofcom's Statement of June 30th 2005 on BT's Undertakings in lieu of a reference under the Enterprise Act 2002. ITSPA is broadly supportive of the settlement proposed, although we must stress the paramount importance of ensuring that the spirit as well as the detail of BT's proposals are implemented accordingly and effectively – and without delay. ITSPA urges Ofcom to be vigilant in monitoring BT's adherence to its promises, as any delay in their implementation could have a significant effect on the competitiveness of the UK communications sector and the services available to consumers. ITSPA is committed to working closely with Ofcom to ensure that a competitive communications landscape develops in the UK and will also pay close attention to BT's practical compliance with the Undertakings.

ITSPA supports the key principles set out in the detail, namely, of Equivalence of Inputs and the establishment of the Access Services Division (ASD), as well as higher Chinese Walls between the 3 BT Divisions: ASD, BT Wholesale (BTW) and BT Retail (BTR).

ITSPA is pleased that Ofcom has decided to ensure that BT's Undertakings are legally binding and enforceable in the High Court. ITSPA welcomes this private law right given to operators in the UK for the first time, however we must stress that many ITSPA members do not have the resource to be seeking damages in the High Court on a regular basis.

ITSPA also welcomes the fact that the Undertakings in relation to Equivalence of Inputs and the Access Services Division (ASD) do not relate solely to LLU products, but also include other products such as IP Stream and Wholesale Ethernet Service.

However, although ITSPA is pleased with the progress made towards delivering a set of Undertakings that will improve the competitiveness of the current environment, ITSPA does have some concerns with the Undertakings and their implementation and would like to take this opportunity to submit our views on this and on how to ensure robust implementation of the Undertakings.

The Undertakings and the VoIP Market

ITSPA's primary concerns with the Undertakings lie in the lack of specific consideration of the growing UK VoIP market, which ITSPA represents. There is no reference to VoIP in the



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Undertakings themselves, or specific new obligations to support the VoIP market. Whilst we recognise that these Undertakings are designed to deal with specific, existing market failures and provide generic “rules” governing new or emerging products and services, ITSPA is concerned with the possible repercussions on the competitiveness of the VoIP market should BT decide the time was ripe to aggressively push ahead with a VoIP strategy. ITSPA would like to point out that the effects of such an assertive launch on the UK VoIP market, which is already beginning to flourish, may not be immediate, with the full effect of its entry taking time to take hold. However, we are very concerned that BT’s size and SMP in many voice related markets could allow for a “big-bang” effect, whereby BT would very quickly become the dominant player in the market once their VoIP service has been fully launched. A key example of how BT could leverage its dominant position lies in the fact that it may decide to provide free on-net calls to all BT customers, which would exert significant margin squeeze pressure on many VoIP providers. By the time Ofcom had undertaken the relevant Market Review and agreed necessary remedies, the alternative VoIP market could have taken a fatal blow.

ITSPA is also genuinely concerned that there would be no obligation on BT to facilitate CPS or 1XXX services over its VoIP product, therefore allowing BT to migrate its entire customer base to VoIP and regain the CPS market.

ITSPA believes, therefore, that BT, having SMP in voice markets, should not be permitted to launch a retail VoIP service without the provision and wide-scale availability of a wholesale VoIP product. As VoIP is not specifically covered by the Undertakings, ITSPA is concerned that BT has scope to aggressively launch a retail VoIP service, offering free on-net calls, which would likely have a devastating effect on the currently competitive VoIP market.

The second key concern for ITSPA is the lack of a mandated central database system (CDB) for number portability to be implemented from the outset of 21CN. We have discussed this many times with Ofcom and remain disappointed that the Undertakings do not specifically require this.

Specific Comments on Undertakings

Equivalence of Inputs – Products and product development

ITSPA understands that Equivalence of Inputs does not apply to BT DataStream. This is of great concern as DataStream will continue to be an important wholesale product until the proposed IP bitstream products (upstream and downstream) become available in line with 21CN rollout plans. This rollout will not be complete until the end of 2010. Whilst some changes are proposed to the existing product, these will not provide a truly level playing field for this key wholesale input. Wholesale broadband products other than LLU should also continue to be an important part of the regulatory portfolio. LLU is clearly a key driver of competition; however the market, and indeed the local exchanges, can only support a limited number of LLU operators. Meanwhile,



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there is currently a dearth of alternative, viable, wholesale offerings from LLU operators themselves.

We understand that the current IP Stream product does not use DataStream as an input and note BT's argument that it would not be appropriate for it to do so. However, relying on equivalence of outcomes or "transparency" is not likely to be sufficient as currently drafted, since there is insufficient incentive on BT to improve and update the product features. In the absence of additional undertakings in relation to DataStream, further disputes regarding fitness for purpose are likely to be referred to Ofcom, for example in relation to new "flavours" of DSL, such as ADSL Max and ADSL 2+, if and when they become available.

ITSPA also believes that the timescales for the delivery of equivalence of inputs by BT are too long; the delay in launching equivalent products gives BT an unfair first mover advantage. ITSPA urges Ofcom to ensure no further "slippage" is allowed to occur in terms of the proposed timescales – and indeed to encourage an accelerated timetable – so that effective competition can be enabled and a level-playing field established. For some of the products, the downstream versions are technologically no different, therefore it is hard to see why a "Ready for Service" date should not be possible with almost immediate effect. Without the knowledge at this stage as to whether it is the wholesale input or the downstream product (or both) that will change, it is difficult to appreciate whether the further delay in the migration of BT's end users to the equivalence based products is reasonable or not, nor whether the delay acts in BT's favour or to their detriment.

VoIP is a dynamic industry, with services still in the early phases of mass rollout. This means that VoIP providers are still seeking to understand the products that will be needed to foster competition. Hence we have some concerns that the Undertakings are not adequately "forward-looking" in nature and call upon Ofcom to ensure that BT does not renege on its commitment to deliver equivalence on any products that may be needed and emerge in the future. An example of such a product is "Naked-DSL", or bare copper access.

Finally, ITSPA would like to stress that whilst many aspects of discrimination may now be preventable, passive resistance or slow steps towards equivalence by BT are harder to guard against and requires the cooperation of wider industry with Ofcom to ensure evidence of such practices, should they occur, are identified, assessed and dealt with as soon as possible. Close monitoring by Ofcom is necessary to ensure BT does not delay the delivery of equivalence until the very last moment – structured, step-by-step delivery programmes should be drawn up with clear, regular "review points".

Organisation, structure and governance

ITSPA welcomes the proposals to ensure a clear structural division within BT, mainly through the creation of the new Access Services Division (ASD) and the delineation of product management



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roles within BT Wholesale (i.e. the creation of the so-called BTWS and BTS). ITSPA agrees that it is not only the functional separation of the ASD that is necessary, but also its physical and motivational separation. ITSPA believes a combination of Chinese walls and incentives are required in order to change BT's behaviour and ensure a clear separation of the different BT divisions. However, ITSPA is conscious that such changes will not take place immediately: with BT's current, integral culture firmly in place, it will take time and long-term commitment from BT to ensure BT staff at all levels also understand the structural divisions between the different divisions, and the consequences of not observing the divisions. In view of this, we urge vigilance to ensure that the Chinese walls are high enough from the outset of implementation. Should it become clear that these Undertakings are not sufficient to ensure clear structural divisions, action must be taken immediately.

Although the Undertakings seek draw clear divisions between the different branches of BT to ensure staff do not share sensitive information, ITSPA remains concerned that there is a lack of control over inter-division staff movements and the possibility that employees transferring from one division to another can still bring commercially confidential and sensitive information along with them.

ITSPA is concerned about the possible effects of the establishment of the ASD in its proposed form on the introduction of Naked-DSL. ITSPA believes the incentive structure of the ASD would prejudice the ASD against such a product: the ASD would still be motivated to sell a complete, bundled voice and data package at maximum price rather than separating out the two elements. ITSPA believes naked-DSL will play a key role in providing consumers with more choice over their communications service in the future and we are concerned that the Undertakings do not support its deployment whether in the ASD or BT Wholesale. We recognise that existing regulation may address this concern, but an explicit reference within the undertakings would have helped ensure the timely and appropriate development of this product.

With regards the Equality of Access Board (EAB), ITSPA believes this body must be given "teeth" and must be able to take steps to ensure pro-active monitoring of compliance with the Undertakings and not just react to allegations of non-compliance, as currently suggested by the Undertakings. Moreover, recommendations by the EAB must be enforceable by the EAB and not just "taken into due consideration". Unless the EAB can directly influence behaviour within the BT Divisions, its role could become very limited.

Furthermore, in order to ensure the neutrality and vitality of the EAB to act in accordance with its remit to ensuring compliance, members of the EAB should not be appointed for an indefinite period. In particular, the BT representatives need to be reviewed on a regular basis to ensure that the new generation of BT employee, who has always worked under the proposed new, structurally separated BT, also has a role to play.



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Next Generation Networks

ITSPA strongly believes that efficient and effective number portability is a key enabler of competition through facilitating consumer choice and encouraging users to switch provider. As ITSPA has stressed in previous submissions, the current onward forwarding system for number portability is inefficient and places disproportionate burdens on the new service provider, who has to pay for the onward forwarding process. ITSPA remains convinced that a Central Database System (CDB), as already implemented in other countries around the world, is crucial to ensuring a level playing field and the promotion of competition and must be implemented at the outset of 21CN.

ITSPA notes that Ofcom has not clearly stated which number portability solution it prefers for next generation networks, but rather believes it is a matter for commercial negotiation. However, ITSPA would stress that, due to the lack of incentives for market players such as BT to migrate to the more efficient and flexible CDB, it is imperative that Ofcom actively supports the deployment of such a solution for cost-effective number portability to be introduced in the UK.

ITSPA will continue to push for a CDB system for number portability in 21CN, and will seek to progress industry negotiations to this end through the relevant channels (bilateral negotiation, Consult21 and in the new NGNCo, when this is established). ITSPA will be sure to report back to Ofcom on the progress of these discussions.

Equivalence of Inputs

Although ITSPA applauds the requirement for the network to be designed with Equivalence of Inputs as standard, we believe BT has been given too much room to renege of its responsibilities, as it only has to deliver this where "reasonably practical".

Of great concern to ITSPA is the fact that Equivalence of Inputs is only required for SMP products and it is thus unlikely that a wholesale VoIP product would be considered for Equality of Inputs until after a market review has taken place. It is in this context, as stressed already in this document, that ITSPA is most concerned about the lack of specific recognition of VoIP in the Undertakings.

Conclusions

In conclusion, ITSPA would like to reiterate its support for Ofcom's decision not to make a reference under the Enterprise Act at this stage, but to give BT the opportunity to prove it is committed to fulfilling its Undertakings and to promoting a genuinely competitive telecommunications market in the UK. However, the possibility of the need to make a reference



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under the Enterprise Act must not be ruled out indefinitely and BT's action should be closely monitored over the coming months to ensure the Undertakings are delivered as intended and agreed. BT must not be allowed to compromise on the delivery, otherwise we will be in danger of repeating the past.

Although ITSPA believes the Undertakings meet the requirements of existing markets, ITSPA has some concerns that the proposals are not sufficiently forward thinking in their approach despite the rapid developments towards next generation networks and services. ITSPA recognises the difficulties of regulating markets that do not yet exist, however, we hope that reinforced non-discrimination guidelines will fill in the gaps for newer products and markets, such as VoIP, as they develop.

About ITSPA

The Internet Telephony Services Providers' Association was established in 2004 to represent the VoIP sector. ITSPA aims not only to encourage the innovation and development of the VoIP industry through the promotion of self-regulation and competition, but also to promote the benefits of the technology to consumers. ITSPA has the objective of ensuring consumers receive a first-class service and to reassure them that any product or service bought from a company displaying the ITSPA logo comes with a high standard of consumer protection, which is properly enforced and includes a dispute resolution procedure. Further information on ITSPA and its members, can be found on our website here: <http://www.itspa.org.uk>.