

Response to Consultation on Undertakings offered by BT plc in lieu of a reference under Part 4 of the Enterprise Act

Submitted by Energis Communications Ltd

Summary

- In our Phase 2 response we called for the separation of BT. We were sceptical that Equivalence of Inputs could be made to work
- The draft undertakings are not perfect; they don't remove BT's conflict of interest but they do have the potential to mitigate it
- The fact that BT is prepared to offer these undertakings and its commitment so far to implement them represent a big step forward compared with the status quo
- We have observations on specific aspects of the undertakings and the wider settlement as a whole – especially on input equivalence for Next Generation Networks and the need for real measures on market outcomes. We think both of these should be stronger
- Nevertheless we are prepared to endorse Ofcom's proposal to accept them in lieu of an Enterprise Act referral as we think this offers the best chance of breaking with the problems of the past at a critical stage of immense change in the industry
- But we do not presume that even with the best solution – which we hope this proves to be – the overall result will be one of success. We reiterate the need to measure success
- It's essential that a strategic piece of work deliver real and tangible results and if it doesn't then we need the reassurance that Ofcom will take an alternative approach and move to an Enterprise Act referral

Introduction

In our response to Ofcom's Phase 2 consultation document, we called for the separation of BT. We argued that the time had come to remove the causes of the fundamental conflict of interest within BT, rather than continue merely to manage the symptoms. We were sceptical that equivalence of inputs could be made to work; it felt more like the continuation of the status quo rather than a break from it.

And we need a break from the past. Ofcom's diagnosis of the problem in Phase 2 confirmed what BT's wholesale customers knew; that competition has suffered. Phase 3 provides the evidence; in annex after annex, in respect of every significant wholesale product, the same story of discrimination, delay and lack of transparency.

BT's response in Phase 2 confirmed many of our fears – a settlement that focused exclusively on unbundled local loops and which consequently failed to recognise the monopoly characteristics of much of BT's backhaul network, and which ignored fibre access for corporate customers – Energis' core market. The Phase 3 Undertakings go a long way to allaying these fears. They offer the prospect of real and lasting change in the way that BT treats its wholesale customers.

The draft Undertakings are not perfect. They do not remove BT's conflict of interest – only true separation can do that - but they have the potential substantially to mitigate it. The drafting contains some ambiguities and gaps that could undermine their impact on our industry - we set these out in our response. Above all there is a huge amount of work to do to make this prospect of change a reality. But the fact that BT is prepared to offer these draft Undertakings – coupled with what we've seen so far of its commitment to implement them - clearly represents a big step forward compared with the status quo.

We have a number of observations to make on the draft Undertakings and the wider Strategic Review Settlement. We trust that Ofcom will take those observations into account in making its final decision. But we are nevertheless prepared to endorse Ofcom's proposal to accept them in lieu of a reference under the Enterprise Act. We consider the draft Undertakings have the potential to provide a comprehensive solution to the problems in the market that Ofcom has accurately identified. We are also committed to working constructively with BT to implement them.

We have consistently argued that if Ofcom chose not to implement a structural solution, it must define and measure a range of metrics to assess whether the settlement was working. For although we are satisfied that the undertakings have the potential to solve the problems identified, there is no guarantee that this potential will be realised. Only sustained commitment on all sides can get us there. Regular benchmarking against metrics will provide early warning if insufficient progress is being made, as well as encouragement for all involved if the Undertakings are bearing fruit. We are encouraged by Ofcom's commitment to report quarterly on progress toward achieving the settlement. But it is essential that the final statement provides more detail on how such success is to be measured. We make a number of suggestions to this end later in this response.

When arguing for separation earlier this year, we said we'd be happy for Ofcom to prove us wrong by showing that its preferred option of equality of access could work. We're satisfied that Ofcom has done so, at least on paper.

Energis will work with BT and the rest of the industry to ensure that these Undertakings have a real impact on our marketplace. But it is clear that if this fails, the industry is left with no other option but the structural separation of BT. In contrast to what we said earlier in the year, this time we won't be happy to be wrong.

What do we think of the Undertakings?

1. For Energis, Phase 3 of the Strategic Review has been a unique (and frustrating) process: essentially a closed dialogue between Ofcom and BT. We recognise and appreciate the efforts that Ofcom (and to a lesser extent BT) has made to involve other operators. We also acknowledge the limits on that involvement imposed by the need to maintain the confidentiality of discussions. But we were never sure how far our views were being taken into account in the process – a stark contrast with Ofcom’s usual standards of transparency. We are pragmatic enough to recognise that in this case it is the ends which matter, not the means. But we trust that this kind of opaque process is a one-off; we would be concerned to see it proliferate.
2. As befits a unique process, the consultation document itself is unlike those we have seen before. Ofcom has restricted itself to inviting written views on the issues raised in its consultation rather than proposing a long and detailed set of structured questions. Ofcom has also made clear that it would like respondents to comment in a more binary manner than is usual on whether, as Ofcom proposes, ‘this package of undertakings offered by BT represents as comprehensive solution as is reasonable and practicable to the adverse effects on competition, and to the detrimental effects on consumers.’¹
3. As we have made clear above, Energis is satisfied that the draft Undertakings have the potential to provide a comprehensive solution to the problems of our industry. BT has voluntarily committed to abide by Undertakings which (according to Ofcom) ‘whilst they allow BT to retain its vertically integrated structure ... constrain its ability and remove the incentives of its component divisions to engage in the types of conduct identified which have the effect of restricting competition.’² This is a bold claim which should be relatively easy to test. We look forward to working closely and constructively with BT and other industry players to put this into practice.
4. But as we have also stated above, the Undertakings are far from perfect. We do not propose to go through a line by line commentary on the Undertakings in the main body of this response. We acknowledge that in the last few months there are signs from BT of a genuine commitment to change. But twenty years of experience inevitably means that it will take time for trust to be built. We have therefore scoured the Undertakings to identify any qualifications or ambiguity that we fear could be exploited by BT. We restrict our comments in the main body of this response to the key clauses which we think could fundamentally alter the nature of what is being offered because the drafting currently allows BT the option to interpret the provision to its advantage – although we accept that such ambiguity may be “constructive” in the sense that it is intended to create flexibility for practical implementation purposes. We encourage Ofcom and BT to address these issues, either via changes to the Undertakings themselves or in the form of guidance or public commitments.
5. In commenting on the draft Undertakings, we start from our Phase 2 response, in which we outlined four conditions that must be met for Ofcom’s Option 3 to be viable. In the following sections we assess the Undertakings against each of these conditions in turn.

“BT must demonstrate that it is prepared:

- (a) to implement input equivalence for key existing (and all future) services and equivalence of outcome for all other existing SMP services;*
- (b) to make the behavioural and organisational changes within BT that will create the right incentives to support this equivalence;*
- (c) to submit to an enforcement regime that will ensure compliance; and*

¹ Notice under Section 155 (1) of the Enterprise Act 2002, 5.60, page 25

² Notice under Section 155 (1) of the Enterprise Act 2002, 5.17, page 18

(d) make all of (a), (b) and (c) transparent and measurable outputs with stated targets and timescales for delivery.”³

Implementation of input equivalence

6. In many respects, delivery of equivalence of inputs is the key goal if the Undertakings are to have the desired effect. The catalogue of delays and problems outlined in annexes G to K are largely the result of a lack of input equivalence. This extends beyond the mechanisms of a process to the incentives that lie behind BT's fundamental conflict of interest. We said in our Phase 2 response that 'What we've wrestled with is not the elegance of the proposal to achieve true equality of access but the behaviours and practices – and the fundamental need to change the motives that drive the way BT conducts its business - on the ground, day in and day out.'⁴ We're prepared to proceed on the basis that it is indeed the motives and BT's daily behaviour that will change going forward.

Existing Products

7. In general the Undertakings are satisfactory on input equivalence for existing products. However it is critical that the definition is both wide enough to encompass all the components of product development and delivery and specific enough for BT's obligations to be clear. We are therefore concerned that the definition permits there to be "trivial differences"⁵. Ofcom states in the consultation in the section on the 'Supply of an inferior wholesale product' that 'Individually, many of these issues might not have had a material impact on downstream competition. Cumulatively however, Ofcom believes that they have contributed to wholesale products being materially inferior to the inputs that BT supplies to its own downstream products.'⁶ We are concerned that there is the same risk that individual issues might be classed as 'trivial' but nevertheless could cumulatively hamper the delivery of a truly equivalent product and the development of downstream competition. At the very least, where operators and BT cannot agree on what are trivial differences, the EAB should be asked to consider the issue, including the cumulative effect.
8. We recognise that input equivalence may be impractical to deliver on all existing services. We welcome the transparency that BT offers with respect to Partial Private Circuits, Carrier Pre-Selection and DataStream. However we still need outcome equivalence to be delivered for these products. We understand that Ofcom is confident of its ability to enforce outcome equivalence using the new non-discrimination guidelines. It is important for the Final Statement to make this clear.
9. We have separately queried the definition of Wholesale Line Rental and its reference to "ordinary maintenance". Ofcom confirmed that this was the standard definition used in other contexts. However it sits oddly in the Undertakings without context. It would be helpful for the Undertakings to make absolutely clear that all WLR care levels are included in the definition (and hence in the obligation for input equivalence).

Financial Allowance / Compensation

10. BT commits to provide an 'allowance' to communications providers for failing to meet a self-imposed Ready For Service deadline (six months before the required RFS date) for Wholesale Analogue Line Rental⁷. We do not understand BT's rationale for offering this only with respect to WLR Analogue and not for Digital WLR⁸. Presumably BT has the

³ Energis TSR2 submission, question 5 response, page 22

⁴ Energis TSR2 submission, para 36, page 7

⁵ Annex E Definitions and Interpretation, page 22

⁶ Notice under Section 155 (1) of the Enterprise Act 2002, 4.20, page 12

⁷ We have no understanding of how BT has arrived at this figure and therefore cannot assess whether it is a 'gesture' or a meaningful level of compensation for the delay

⁸ Annex E, 3.2, page 28

same level of confidence that it could meet the RFS for these other products. We would therefore like this gesture to be extended at least to digital (ISDN2 and ISDN30) WLR.

Equivalent Systems and Processes

11. There is less detail in the Undertakings on input equivalence with respect to systems and processes. We welcome the commitment to make access to the postcode address file which BT uses available by 31 December 2005 as this is a major source of rejections for orders. The earlier this can be provided the better. However we would also like to understand what format it is being made available in as we need to assess whether this requires IS development work for us. We expect that BT will continue to work on absolute improvements to the accuracy of this address file.
12. We would like to understand more specifically what '*improved access to the engineering appointment books*'⁹ (emphasis added) actually means and whether this is being offered on an equivalence of inputs basis.
13. BT also sets out its intention for BT employees and agents to use the Wholesale Line Rental service provider gateway to raise service transfer requests when BT takes over a customer from a Communications Provider and provides a retail service to that customer for the first time¹⁰. We support this move by BT as it reflects the first of our principles for systems equivalence outlined below. We'd like to see commitment to the other two:
 - a. BT Retail / Global Services / non-BTWS functions within BT should have the same access to current and future BTWS (and ASD) systems as BT's wholesale customers – and no more.
 - b. Open BTWS Systems development should take place incrementally following Principle 1 (say every three months).
 - c. Wholesale customers need to be involved in and contribute to the BTWS systems development roadmap, so that we can communicate our priorities to BT.

Next Generation Networks

14. Ofcom will not be surprised that our major concern in the Undertakings is in relation to next generation products. Although we recognise that it may be disproportionate to require BT to implement input equivalence for some legacy products and services, it is unacceptable that the advantages inherent in its vertically integrated structure should persist across the NGN migration to give it a first mover advantage following the deployment of its NGN. It is also unacceptable that OFCOM should outline all of BT's abuses and propose equivalence of inputs as a way of addressing this, and then anticipate stepping back from that requirement before we have any level of information or detail about 21CN.
15. The importance of getting it right cannot be overstated: as Ofcom acknowledges, 'the design and implementation of 21 CN represents a one-off opportunity for these issues to be addressed as new systems are designed.'¹¹ Therefore we have particular concerns that the NGN principles are in several cases heavily qualified, for example the delivery of equivalence of inputs on the basis of what is 'reasonably practicable'. We appreciate that BT is (understandably) reluctant to take on legal responsibilities in respect of products that do not yet exist without ensuring it has the right amount of legal protection. However, we make the observation based on our own network development that a business case for NGN is extremely difficult to make without having a view of product developments clearly in mind. We also understand BT's insistence on being able to determine its own timetable

⁹ Annex E, 3.5, page 28

¹⁰ We assume this includes both winback customers and customers joining BT for the first time

¹¹ Annex L, I6, page 109

for network roll-out (although we have a little less sympathy with this, given that it is only BT's market power that gives it the ability to act independently of its competitors and customers).

Information asymmetry / network foreclosure

16. We are concerned that BT's obligation to consult other Communications Providers on specific forms of Network Access is dependent on establishing demand for a specific form of Network Access. This pre-condition has been used by BT in the past to block the development of new wholesale products. One reason for that has been that BT's own demand was never taken into account, principally because BT has historically used different wholesale inputs. It follows that with equivalence of inputs it will be necessary for BT to take into account its own wholesale demand forecasts when establishing demand; if there is sufficient demand from BT Retail, it is likely there is demand among other wholesale customers. However, we would be concerned if 'reasonable demand' required BT Retail requirements before BT agreed. We would also be concerned if BT habitually consults BT Retail ahead of consulting with other operators which we know to have already occurred on Presence and Location common capability. It would be helpful for Ofcom to clarify these points, so as to provide more confidence that the pre-condition of reasonable demand will not become the blockage that it has been in the past.
17. This is all the more important because of the uncertainty pervading BT's NGN plans. It is possible that wholesale customers will not have sufficient knowledge of the proposed design of BT's NGN, for example where new points of interconnect may be located. This makes demand forecasting an uncertain process. Three months for negotiations to establish demand for a particular form of network access may not be sufficient time for communications providers to understand their own network requirements where they do not have sufficient knowledge of BT's Network Access proposals from the outset. Therefore an independent assessment of the inputs to the process, to ensure that BT Retail, Wholesale and communications providers have **exactly the same information** on which to make decisions about forms of network access would seem to be a more reasonable basis on which to proceed. Only when this symmetry of information has been confirmed should the negotiation phase begin.
18. This process may already have foreclosed network access where proposed designs have already been consulted on and for which demand was not established; this could simply have been the result of a lack of information and / or too early in the process for communications providers to commit to a particular form of network access. We request that BT publishes a list of proposed designs which it thinks have already been consulted on and for which demand has not been established.
19. BT undertakes to provide input equivalence in markets in which it has, or may reasonably expect to have, SMP. However, this is qualified by a 'where reasonably practicable' condition that could potentially undermine the obligation. We note that more information is provided on the interpretation of this qualification in paragraph 3.59 of the NGN consultation document. This gives us cause for concern, since it appears to suggest that there may be many circumstances in which equivalence of inputs is not 'reasonably practicable'. It is crucial that Ofcom clarifies that this qualification will be an exceptional, rather than everyday, experience and, where it is invoked, the decision to do so is independently verified by the EAB and Ofcom. We need BT to provide comfort on this either in the Undertakings or via some sort of public statement or guidance.
20. The evidence is clear that where BT has launched retail services in which it has SMP in upstream markets, associated wholesale inputs have rarely, if ever, been available in time to enable other providers to enter the market at the same time (to prevent BT gaining a first mover advantage). BT now undertakes to make available network access to other Communications Providers 'sufficiently in advance of the launch of such new product or

service so that such other Communications Providers are able to launch competing products or services to End-Users at the same time as BT.’ (11.10, page 54). The question is how ‘sufficiently in advance’ is defined and by whom.

21. Ofcom identifies a number of ways in which interconnection arrangements to BT’s 21 CN will affect the competitiveness of other communications providers; ‘First, the points of interconnection to BT’s 21 CN may be in different locations to the points of interconnection to its current network.’¹² We’re taking this as a given. But already a suggested two stage migration process for other communications providers where a one stage process exists for BT undermines equivalence of inputs from the very outset.
22. Finally, we note that BT commits merely to compensate wholesale customers for the ‘network costs’ associated with the migration to 21CN. While this is BT’s stated position in negotiations on the issue within the Consult 21 working group, we are concerned that Ofcom appears to consider in the NGN statement that the scope of the Undertaking goes wider, to take in all the issues referred to in paragraph 3.27 of the NGN statement. Although we would like BT to compensate us for these costs (in fact, all direct costs), taking a strict interpretation of the words we wouldn’t necessarily expect them to include System changes or communications to end users.

Recommendations – Implementation of input equivalence

1. That where there is a disagreement between a communications provider and BT as to what constitutes a ‘trivial’ difference, this is referred to the EAB for advice
2. That a financial allowance is also provided for WLR ISDN 2 and WLR ISDN 30
3. That BTWS commits to systems development in an open and transparent manner and on an incremental basis such that other communications providers can contribute to the process
4. That input equivalence for NGN is more robustly defined and that there is a mechanism for independent verification that information provided is transparent and equal between BT and other communications providers
5. That clarity is provided on the process for establishing reasonable demand and an assurance that the process will not be exclusive of BT Retail but also not dependent on it
6. That circumstances in which it is not ‘reasonably practicable’ to deliver equivalence of inputs are defined as exceptional rather than everyday experiences; and again these exceptions need to be independently verified

¹² Annex L, L8, page 110

Behavioural and organisational changes

23. We said in our Phase 2 response that 'While BT remains vertically integrated the conflict of interest will always be there because whatever the behavioural remedies imposed on BT, there will be a common incentive: to maximise BT Group's shareholder value. No amount of transparency or compliance can counter-balance that profit motive.'¹³ In remaining as a vertically integrated company, the profit motive still exists. However we think that the behavioural and organisational changes proposed in the Undertakings go some way towards ensuring that BT's incentives to maximise its profits and not to discriminate against other communications providers are more aligned than they have been to date. As we said earlier, whether this goes far enough remains to be seen.

The ASD

24. In general terms, the structure and governance around ASD looks sufficient to support input equivalence. But there are a number of areas where further clarification is required.

Separation of physical and transmission layers

25. While we understand the rationale for separating the physical layer assets from the transmission layer, Ofcom and BT must provide more transparency as to how this will work. Further, although the mechanisms for the ASD to influence the investment decisions of BT Wholesale are outlined, there remains much detail to be filled in. How for example will BT Wholesale respond to an aggregate demand forecast (based on BT's downstream requirements as well as those of ASD customers) which exceeds BT Wholesale's transmission capacity¹⁴?

Closely linked products

26. The Undertakings require ASD and BT Wholesale individually to sell products that need close coordination of provisioning and repair. The most obvious example of this is in relation to PPCs where the ASD will sell terminating segments and BT Wholesale will sell trunk segments.¹⁵ While this distinction makes sense conceptually, the practical reality of implementing this raises a number of problems such as ensuring consistent end to end levels of service. Similar issues arise in relation to WLR and CPS, where provisioning requires close coordination. We need greater clarity as to how this will be managed to ensure that wholesale customers do not suffer as a result. We welcome the fact that the Undertakings require ASD to set service standards that reflect the needs of its customers rather than those of BT's downstream businesses. But we note BT Wholesale does not have such a requirement, and therefore question how BT will ensure consistency of standards of service delivery where a product or service is provided by platforms that are separately owned by ASD and BT Wholesale?

Access services

27. We have a number of specific concerns in relation to Wholesale Extension Services. The ASD will take on Wholesale Extension Services, including enhancements and successors¹⁶. The new services offered "Wholesale Extension Service Access" and "Wholesale Extension Service Backhaul"¹⁷ are defined as Ethernet only, and the new service between end-user sites, "Wholesale End-to-End Ethernet Service" is obviously Ethernet only. However, the WES portfolio within the SMP AISBO products also has or will shortly have SDH speeds of 155, 622, 2.5G and 10G SDH. We are concerned that

¹³ Energis TSR 2 submission, para 25, page 5

¹⁴ Annex E, 5.12.2, page 31

¹⁵ Similarly WLR is managed by ASD and CPS by BTW

¹⁶ Annex E, 5.3 & 5.4, page 29

¹⁷ Annex E, 2.1, pages 25 & 26

these SDH speeds required by our customers between their sites and by other operators to provide access from end sites to network POPs appear to be excluded from the new services. The backhaul principles in 5.14 cover SDH backhaul, so we would expect Wholesale Extension Service Access also to be provided as SDH.

Backhaul

28. The backhaul products proposed refer to the straight line distance but limited to the greater of 15km unless agreed between BT and Ofcom, or between the Local Access Node and nearest BT Core Node¹⁸. The current products have different "Core Node" sets, - PPC are linked to around 70 tier 1 nodes, DataStream to around 120 MSIP ATM sites, and WES has no concept of core nodes. The Core Node definition as 'a node in an Electronic Communications Network whose primary function is not to support the provision of access services to End-Users but to switch or route traffic between other nodes in a network'¹⁹ provides insufficient clarity about how these core nodes will map onto those previously listed. In particular we need certainty that we will not be adversely financially impacted for example were BT to select the Fibre MSANs as being the limit for PPC Backhaul products, and hence increasing from 70 nodes to a potential 1500 nodes at which trunk charges would start to be incurred.
29. We also note that "point of handover" is not defined. We currently have handover options of on-site, in-span and in-span extension, and would like to be reassured that the new offerings include these going forward, with suitable additions such as in-building links if using Equipment Location as outlined in section 6.16-6.23, and in-span to handovers that are beyond the Access Node fibre serving area, to avoid stranded assets.

Information sharing

30. Measures to ensure the separation of the ASD – such as remuneration incentives – look well constructed in relation to people and assets. We are more concerned about ensuring the separation of information. We encourage BT to adopt the principle that the minimum necessary commercial information should be exchanged between divisions of BT. We acknowledge that the ASD will utilise resources of BT Group. But although BT states that these individuals 'shall not abuse their positions to circumvent the intent of these Undertakings'²⁰ the list in Annex 2 is questionably long and we'd like to understand the rationale for the availability of information to such a long list of individuals. This is an area where the EAB needs to play a key role early on so that we can have confidence that this is not being abused.

Prioritisation of capital expenditure

31. We are not sufficiently reassured by BT's approach to the prioritisation of capital expenditure (capex) in the event of competing demands from the ASD, BT Wholesale and BTS. The Undertakings state that 'BT will not unduly discriminate in its prioritisation. BT will seek the view of the EAB on the best means of avoiding such undue discrimination.'²¹ The qualification of 'undue' discrimination sits uncomfortably with the notion of equivalence of inputs. We would like to see (and be able to comment on) written principles as to how capital would be prioritised between the three divisions.
32. The Undertakings state that 'ASD shall ensure that the way in which new product and service requests are received and evaluated and Commercial Information of ASD is made available is on a *non-discriminatory* basis in relation to products and services where Equivalence of Inputs applies and on a *not unduly discriminatory* basis where other SMP

¹⁸ Annex E, 2.1, page 19

¹⁹ Annex E, 2.1, page 21

²⁰ Annex E, 5.36.3, page 36

²¹ Annex E, 6.12, page 41

products are involved.²² (emphasis added) We question the appropriateness of this distinction especially given Ofcom's latest consultation on 'Undue discrimination by SMP providers'²³. The guidelines particularly focus on the incentives of SMP providers to discriminate using non-price differences and state that 'non-price differences in transaction conditions offered by a vertically integrated SMP provider favouring an internal customer can be presumed to harm competition given the incentives for such behaviour and the lack of benefits that may accrue.'²⁴ We are concerned that the distinction is made in the Undertakings since it suggests that BT will continue to discriminate on SMP products - if, in BT's opinion, this discrimination is not undue and that where this occurs on non-price transactions, such differences will damage competition. We are also concerned that, where such differences do occur, they will not be transparent to communications providers. We would like to see the same terminology applied to both input equivalence and other SMP products.

33. We support the recent work done by Ofcom in the areas of BT's regulatory accounts and cost of copper. We believe that Ofcom will need to continue to work in these areas in order to ensure that the ASD is separated from the rest of BT Wholesale in a manner which is justifiable both in terms of the underlying economics of the two 'networks' and in terms of general accounting standards. We are particularly concerned to ensure that assets which are common to the ASD and the 'core' are allocated between the two areas in a sensible manner. Finally we urge Ofcom to ensure that there is a clear reconciliation trail between the first set of accounts published this year and the accounts published next year which will presumably include the ASD as well as BTW.

BTWS and BTS

34. The separation of BT Wholesale into BTWS and BTS is less absolute than the creation of the ASD; in essence this is focused on the separation of product management functions whereas responsibility at the BT Wholesale Board level still falls to one individual. Whilst Management Information Systems remain jointly managed – 'BT shall secure the Management Information Systems which hold BTWS and BTS Commercial Information such that such systems are not available to BT people outside BT Wholesale'²⁵ - it is difficult to see how measures put in place to prevent the disclosure of information between BTWS and BTS - as outlined under non-discrimination provisions - can be effective.
35. It is also surprising, given BT's ability to commit to other dates with regard to systems and process that a date by which BT is able to secure the Management Information Systems of BT Wholesale has not been set. Instead for this particular activity, BT commits to do so 'as soon as is reasonably practicable.'²⁶ We'd like to see a firm date by which BT aims to achieve this.

Northern Ireland

36. We note the proposal not to extend the ASD or the separation of BT's upstream and downstream businesses to Northern Ireland. Although we accept that such a split may not be proportionate for Northern Ireland, nevertheless we are concerned that in the absence of the organisational changes proposed in the rest of the UK, the Northern Ireland division

²² Annex E, 5.38, page 37

²³ 'How Ofcom will investigate potential contraventions on competition grounds of Requirements not to unduly discriminate imposed on SMP providers', consultation 30 June 2005

²⁴ Ditto, 3.18, page 10

²⁵ Annex E, 6.13, page 41

²⁶ Annex E, 6.13, page 41

may have greater incentive and opportunity to discriminate against its wholesale customers. We think this is an important area for the EAB and Ofcom to focus on. We also think that the programme of training and briefing proposed on the launch of the Code of Practice²⁷ to ensure that all people in the ASD, BTWS, BT Wholesale and BTS are aware of their responsibilities should also be extended to employees in Northern Ireland especially as the Code of Practice will contain specific guidance on Northern Ireland.

37. We are pleased that in all other respects – ‘Equivalence of inputs, prices..the provisions relating to next generation networks..’²⁸ – the Undertakings will apply in Northern Ireland as in the rest of the UK. However, we think that Ofcom should assess the levels of competition which develop in NI as compared to the UK after the Undertakings have been in place for (at the most) two years. Should there be an increasing gap between the two geographies then Ofcom should seriously reconsider whether operational separation within BT NI would be appropriate. We don’t think this option should be foreclosed.

Equality of Access Board

38. The establishment of the EAB seems to be the primary mechanism by which BT will ensure that it complies with the Undertakings. Therefore it has a critical role in the overall success of the Settlement. With this in mind we have a number of comments and requests for clarification.
39. We would like clarification as to the grounds on which independent members of the EAB may be removed and indeed how the BT Group plc Chairman may remove the Chairman of the EAB or the BT Senior Manager. Greater transparency on these points will be important in ensuring that the EAB has credibility. It is absolutely vital that the EAB is established with the right culture from the start.
40. The role of the EAB is described as one of ‘monitoring, reporting and advising’. We recognise that it has no executive policy making role for any part of BT which seems appropriate for it to maintain its independence. However we think the EAB needs to command respect in BT and be able to *influence* BT’s compliance not just *report* on and *monitor* it. We are concerned that statements such as ‘[the EAB] may suggest to BT remedial action’ and that ‘BT shall take due account of any suggestions or comments’²⁹ are not strong enough. We would like to understand Ofcom’s view of the escalation route available to the EAB in the event that its suggestions or comments are consistently not acted on even if this does not result in an actual / identifiable breach of the Undertakings.
41. The EAB ‘shall inform Ofcom, within ten working days when it comes to its attention that there has been a non-trivial breach of these Undertakings’³⁰. We’d like to understand how a non-trivial breach of the Undertakings is defined and think that this should be transparent to employees of BT and to industry. We’d also like to understand what mechanisms are in place for ensuring that a number of trivial breaches do not cumulatively undermine the Undertakings to a material degree.
42. With this in mind, the mechanism for dealing with potential breaches of the Undertakings, non-trivial or otherwise, needs to be defined. The role of the Equality of Access Office (EAO) includes that it ‘consider any complaint brought to it by a Communications Provider that these Undertakings have been breached’³¹ and that ‘It shall inform Ofcom of any such complaints within a reasonable time of their receipt.’³² In reality we would expect that a Communications Provider would bring a complaint to Ofcom in parallel or in preference

²⁷ Annex E, 9.3, page 47

²⁸ Notice under Section 155 (1) of the Enterprise Act 2002, 5.58, page 25

²⁹ Annex E, 10.15.1, page 49

³⁰ Annex E, 10.17, page 49

³¹ Annex E, 10.22.2, page 50

³² Annex E, 10.22.3, page 50

to the EAO. We need clarity as to how complaints will be handled and the timescales for such.

43. Clearly the independence and skills of the three non-BT members of the EAB are critical. We would like an opportunity to comment on the Terms of Reference for these roles before they are filled. We think that the following criteria (and experience) should be included in the search for suitable candidates:
- a. Experience at senior level of an auditing or regulatory function in the sector or another related industry (Audit Commission, OFT, Competition Commission)
 - b. That all should be appointed on merit – not to represent any particular interest
 - c. That there should be an appropriate mix of skills and experience to ensure that members can understand and assess all aspects of equivalence
 - d. That length of tenure should be sufficient to enable members to understand the issues and make significant contribution, not long enough to lose independence

Recommendations – Behavioural and Organisational Changes

ASD

1. That BT provide SDH speed WES access services (34, 155 & 622)
2. That the definition of Core Nodes is clarified in such a way that we understand how the equivalents in existing legacy networks will be affected
3. That a principle is established to ensure that the amount of commercial information exchanged between divisions of BT is minimised and that the necessity of access to information for each of the functional roles outlined in Annex B is explained
4. That clarification is provided as to how capex will be prioritised where for example an aggregated demand forecast exceeds the available transmission capacity
5. That BT undertakes to provide ASD commercial information on a non-discriminatory basis for both the products which it commits to provide on an equivalence of inputs basis and other SMP products

BTWS and BTS

6. That the Management Information Systems of BTWS and BTS are separated
7. That a target date is set for the separation of the MIS of BT Wholesale from other (downstream) parts of BT

Northern Ireland

8. That training on the Code of Practice is extended to employees in Northern Ireland
9. That Ofcom should revisit the question of creating an ASD within BT NI after two years

EAB and escalation

10. That clarification is provided as to the grounds on which independent members of the EAB may be dismissed
11. That a non-trivial breach of the Undertakings and the mechanism(s) for dealing with these – including route for complaint - are clearly defined
12. That terms of reference for the independent members of the EAB are published with an opportunity for comment and industry encouraged to nominate suitable candidates
13. That a role is established for an individual to pro-actively check compliance with the Undertakings across the company as a whole (not like the EAB confined to the ASD and BTWS)

Enforcement

44. For the Settlement to be successful, enforcement of the Undertakings is as critical as the nature of the Undertakings themselves. Much depends on the Equality of Access Board as outlined in the previous section. However it is also clear that, for BT to comply with the Undertakings, will require commitment from everyone across BT; all employees need to understand the nature of the Undertakings and the consequences of a breach. The Code of Practice is a solid proposal for ensuring that all employees understand their responsibilities. However as this has not yet been published, we are unable to comment on it in our response.
45. We would expect that any breach by BT of the Undertakings would be treated seriously within BT. We are surprised that even after Ofcom has investigated based on reasonable grounds for a suspected breach and issued a Direction to BT, that BT may still decline 'to accept the direction and for the avoidance of doubt in such case the direction shall be of no effect'.³³ It would be helpful for Ofcom to clarify that in such a case, Ofcom would take the case before the High Court.
46. We think that in addition to the publication of the Undertakings by BT, Ofcom should publish guidance on how it will monitor and enforce BT's compliance with the Undertakings, which would also include guidance as to when and how the Undertakings might be modified. Ofcom states that 'the proposed undertakings would constitute a more comprehensive solution to the problem than could be achieved by a series of interventions under the Competition Act 1998'³⁴. Therefore we'd like to understand how ensuring compliance with the undertakings will align with Ofcom's use of its other powers.

Recommendation - Enforcement

1. That Ofcom publishes guidance on how it will monitor and enforce BT's compliance with the Undertakings and how this will align with the use of its other powers

Transparent and measurable outputs with timescales for delivery

47. Whether acceptance of BT's Undertakings and the Settlement as a whole is the right outcome can only be analysed by assessing the future state of the market. Metrics are an essential part of this.
48. The EAB must report to Ofcom annually on performance against KPIs. However, as we said early on in the process, whilst KPIs to measure input equivalence are important, we also need metrics that tell us whether the Undertakings are addressing the problems identified in the consultation document. There are definite outcomes that we would expect as a result of the Settlement. We've outlined these below. Without time bound metrics for improvement, it's impossible for BT, Ofcom or the industry to objectively assess success.
49. Fundamentally the outcome of the Strategic Review should drive a step-change in the performance of BT Wholesale in respect of its wholesale customers, and hence in the market. We've identified six outcomes that we would expect to see as a result of a successful Settlement:
- More choice for consumers and businesses in the UK;
 - Greater transparency (within BT Wholesale);
 - Lower wholesale prices;
 - Better products and processes;

³³ 14.1.3 a), page 58

³⁴ consultation document, 5.11, page 17

Energis Response to the Consultation on Undertakings

- Better service;
- Better people.

We have grouped proposed metrics and measures under each of these headings below.

50. **More choice** – would ultimately mean greater differentiation than based on price alone. There would be less resale of BT's products and services and more differentiation at a wholesale level.

Specific measures:

- A reduction in BT's market share in those markets in which it has a legacy incumbent position³⁵;
- Emergence of sustainable, profitable competing telecoms operators³⁶;
- Consumer and business awareness of competing providers to BT established by research surveys
- Better products, innovation and price for consumers

51. **More transparency** – we think that BT should aim for an independent assessment of its commitment to and delivery of input equivalence. For example BTW could undertake to establish a Kitemark as a mark of quality, integrity and trust that all relevant products and services are offered on a true input equivalence basis.

In addition the following specific measures should be in place:

- Retail products and their wholesale equivalents launched simultaneously – which these Undertakings commit to;
- Proportion and absolute number of SORs from wholesale customers accepted and implemented by ASD and BTWS;
- BTWS responses to SORs ahead of prescribed timetable;
- Greater transparency on SOR approval;
- Evidence of downstream divisions of BT e.g. BT Retail / BT Global Services going out to tender to purchase wholesale inputs from other operators;
- Achieving equivalence made an integral measure of BTWS's corporate governance.

52. **Lower wholesale prices** – if BT supplies itself using the same inputs including systems and processes on exactly the same cost base as other operators, then those costs (for example the provision of gateways) will be smeared over a larger volume and which we'd expect to deliver some cost reductions and more efficient product delivery.

- Increasing productivity per employee.

53. **Better products and processes** – a measure of the lack of success of the existing regime has to be the number of disputes and complaints that Ofcom handles. A very practical outcome of the successful implementation of the Undertakings would be a statistically significant reduction in the number of disputes between BTWS and other operators. In addition:

- Faster time³⁷ to market for new products – and operators other than BT being the first to market with new products;
- Ofcom must monitor BT's capital investment programmes to ensure that they are efficient and do not result in under investment in any parts of the network.

³⁵ This would be a statistically significant decrease rather than the observation of a downward trend

³⁶ We recognise this would need careful an precise definition

³⁷ Again we'd expect this to be statistically significant not just a general trend

54. **Better service** – similarly we would expect an absolute improvement in service delivery from BT because the incentives to offer a worse service would be removed. We think that availability measures rather than break / fix times are an important measure. In addition we'd expect to see KPIs measured in absolute terms, and relative performance to BT Retail / Global Services vs. wholesale customer covering the metrics below. This is not an exhaustive list and we recognise that many of these KPIs will exist already but as a collective set of measures they will have more impact in enabling us to assess the effectiveness of equivalence of inputs:

- Number of days between Order acceptance and the provision of a firm order confirmation (this gives us a fixed lead time and price);
 - Percentage of orders where quoted BT delivery date is within the lead time for the product;
 - Percentage of orders rejected;
 - Percentage of orders provisioned on the original quoted date at firm order confirmation;
 - Number of orders where BT has had to make 'in flight' date changes, split between those that were within its control and those that weren't (e.g. because of customer or because of Force majeure);
 - Percentage of orders delivered by the longest quoted delivery date (thereby measuring BT's ability to meet its original delivery date where no changes are made to the date, and the revised date where changes are made to the date);
 - Average provisioning time compared with the lead time for the product;
 - Number of new provisions reported faulty within 28 days of installation;
 - Number of repeat faults (more than 2 faults in a 28 day period);
 - Percentage of customer base reported as faulty, split between BT faults and customer fixed faults;
 - Average out of service time across all faults;
 - Average out of service time across BT resolved faults.
- Wholesale provisioning and repair times shorter than Retail³⁸;

55. **Better people** – the Code of Practice and the training intended for employees of the ASD and BTWS will be a positive move to ensure that BT's people understand the impact of the Undertakings and how this should affect everyday activities. However we think that the following additional measures will underpin BT's commitment to making the Undertakings work in practice:

- Proportion of BTW staff taking customer service training;
- Proportion of BTW staff seconded to other organisations;
- Proportion of BTW staff recruited from outside BT.

56. We have not proposed timescales against the specific measures above but realistically we need to see some changes within two years of BT adopting the Undertakings.³⁹

57. In addition to the measures outlined above, we'd like to work with BT to develop a Customer Satisfaction survey which could be completed by people in different functional roles across other network operators including company CEOs. We envisage that such customer stats would be a genuine reflection of whether the Undertakings are working on the ground and making a difference for both business and residential customers.

³⁸ with statistical significance

³⁹ Specifically from the date of the Undertakings being adopted following the end of the consultation and not two years after which everything committed to in the Undertakings has been delivered

Implementation

58. We are aware that BT is already advanced in planning for the implementation of the Undertakings if they are accepted. We are pleased that BT appears to be willing to work with industry on implementation, for it is in the detailed implementation that we will build the necessary confidence to make the Settlement work. We trust Ofcom will encourage BT to ensure that it acts as transparently as possible in the way in which it implements the Settlement. We commit to engage constructively in that effort.
59. We are particularly keen to ensure that activities are in place to ensure that the delivery of input and outcome equivalence is achieved. For example we anticipate receipt of internal reference offers for Carrier Pre-Selection and DataStream as already received for PPCs. We suggest that existing industry product working groups should be used to agree implementation roadmaps for each of these products with an appropriately granular timeline towards ensuring outcome equivalence. We'd also like to see a process agreed for reporting progress on the delivery of input equivalence for each product.
60. We would like to see an equivalence roadmap on NGN which would provide enough transparency to ensure that equivalence is built in at all levels: systems, processes, commercial terms and migration. An agreed industry roadmap would enable us to both influence and have sufficient notice of for example system interface developments. Equally this should provide visibility sufficient to ensure that legacy products are also migrated to electronic interfaces and not de-prioritised because of NGN work.
61. We recognise BT's commitment to ensure that 'all people in ASD, BT Wholesale, BTWS and BTS are aware of their responsibilities in ensuring that BT complies with these Undertakings'⁴⁰ – as well as a commitment to a wider compliance regime across the company. However we would like to understand how BT's existing management team will ensure that the spirit of the Undertakings is embraced across the whole organisation such that the Undertakings become a part of BT's mode of operation and culture – a living agreement - rather than another component of the compliance regime. We think this is vital to ensure ongoing commitment to the Undertakings especially in the event that senior management individuals in BT - who have been fundamental in formulating the agreement – do not stay on long enough to see it implemented in the manner that they envisage.

⁴⁰ Annex E, 9.4, page 47

Recommendations – Transparent and Measurable Outputs

1. That BT aims for an independent assessment of its commitment to and delivery of input equivalence – for example by seeking Kitemark status
2. That metrics which measure market outcomes, in addition to KPIs to measure input equivalence, are included in the overall Settlement
3. That specific outcomes are identified which indicate a successful Settlement. We think this should include:
 - More choice for consumers and businesses in the UK;
 - Greater transparency (within BT Wholesale);
 - Lower wholesale prices;
 - Better products and processes;
 - Better service;
 - Better people.
4. That as part of the implementation, BT publishes granular roadmaps for achieving outcome and input equivalence on all designated products

Conclusion - The next 5 years

62. We are entering a period of immense change in the industry as BT and other network operators make significant investment to upgrade their networks to Next Generation Networks. With the right conditions in place for investment in access, we expect also to see the erosion of BT's market share at the access and backhaul level although this will not happen overnight.
63. A successful outcome of the Strategic Review presents a genuine opportunity for the telecoms landscape to look very different in ~ 5 years' time. Conversely, the wrong solution to the problem could perpetuate the problems of the past and result in another period of slow product development and regulatory arbitrage ultimately letting down customers. We hope it won't come to that.
64. We agree with Ofcom's analysis that the problems in the markets identified are still sufficiently serious to merit regulatory intervention. As we outlined at the start, we think that structural separation would be the most effective way of addressing the problem but we are persuaded that this alternative course of action has the potential to deliver the desired outcome.
65. However we think it's imperative that everyone – by which we mean BT, Ofcom, industry and other stakeholders – has a clear view of what success looks like and that everyone understands the basis on which it is being measured. We'd expect to see some of those measures that we've previously outlined included in this. We think that this is a key missing piece of the Settlement and believe that Ofcom should publish a document outlining its expectations and measures of success.
66. Another key aspect of a successful settlement is a solid implementation plan, transparent to all stakeholders. We look forward to working closely with BT over the coming months to develop this. And we recognise that there is a lot of work to do.
67. We are pleased that Ofcom has undertaken this review. But we do not presume that even with the best solution – which we hope this proves to be – the overall result will be one of success. We reiterate the need to measure success. It's essential that a strategic piece of work deliver real and tangible results and if it doesn't then we need the reassurance that Ofcom will take an alternative approach and move to an Enterprise Act referral.

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