Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: Notice Under Section 155(1) of the Enterprise Act 2002

To (Ofcom contact): Dougal Scott

Name of respondent: Nancy Saunders

Representing (self or organisation/s): Kingston Communications (Hull) PLC

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CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing	X	Name/contact details/ job title	
Whole response		Organisation	
Part of the response		If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

Yes		No	

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet. If I have sent my response by email, Ofcom can disregard any standard email text about not disclosing email contents and attachments.

Name Nancy Saunders

Signed (if hard copy) N/A

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Your Ref:
Our Ref: NJS/Sub/TSRU

12th August 2005

Dear Dougal,

Notice Under Section 155(1) of the Enterprise Act 2002

Kingston Communications (Hull) Plc (Kingston) welcomes the opportunity to respond to the consultation on the undertakings offered by BT in Lieu of a referral under Part 4 of the Enterprise Act 2002.

Kingston supports the submission made by UKCTA, however there are areas that we would particularly wish to focus on that are of particular interest to the Kingston Group. This response therefore comments only on those particular areas.

Executive Summary

Kingston believes that the intention behind the Undertakings sought by Ofcom and offered by BT is commendable, as the alternative – a lengthy process of referral to the Competition Commission would cause great and possibly destabilising uncertainty to the Telecommunications Industry during a critical period for its development. Therefore, although Kingston has a number of reservations concerning the drafting of the offered Undertakings (as there are a number of instances where the proposed drafting is either unclear, open to be misinterpreted or both), Kingston believes that Ofcom should accept the offer made by BT.

Kingston would however encourage Ofcom to revisit the following areas with a mind to amend the drafting of the undertakings that deal with the following areas:

- Enforcement (Sections14-18)

- Implementation Detail (Section 5)
    - Sales Interface
    - Systems

- Implementation timetable (Annex 1)
- Migration of existing products (Sections 5 –6)
- Incentives

Each of these areas are discussed in the following sections:

1. **Enforcement (Sections14-18)**

Kingston requests some further clarification of section 14. It is not clear in what circumstances Ofcom would invoke 14.1, or whether, indeed, it would apply at all times. Kingston is concerned that this section adds an unnecessary extra iteration to the process. If BT are breaching any part of the Undertakings they should be compelled to comply. Since the Undertakings are those that have been offered by BT, Kingston cannot suppose a valid reason that BT could give for not being in a position to comply with them.

Where BT is in breach of the Undertakings, it is not clear to Kingston whether third party rights to enforce and seek recompense under Part 4 Chapter 3 167 (3 & 4) of the Enterprise Act would be constrained by Section 14 of the undertakings as drafted.

Regarding the third party rights of enforcement and the pursuing of loss or damages, Kingston seeks clarification from Ofcom whether or not Ofcom would require notification from a third party that they would seek to exercise those rights.

Section 18 deals with the Expiration and Termination of the Undertakings. It is not clear to Kingston what aspects of the undertakings would expire in the event of a market investigation reference to the Competition Commission. Would the entire Undertakings terminate if the reference only covered a particular section covered by the Undertakings – or would such a referral automatically terminate the relevant section?

Similarly, if Ofcom found that BT did not have SMP in particular geographic area in a particular market, would the entirety of the undertakings cease to have effect in that particular geographical area or just to cease to have effect for that particular market? Furthermore, even if BT were found not to have SMP for a particular market in a particular geographical area, would the potential of leveraged dominance have any bearing on whether or not the undertakings would continue to apply in that area be considered?

18.4 gives BT the entitlement to make representations to Ofcom to review the applicability of the undertakings, and whilst Kingston believe that this is indeed appropriate it seems that an additional reciprocal right for Ofcom to seek to review the undertakings applicability in emerging markets etc. would also seem to be appropriate.

2. **Implementation Detail (Section 5)**
    a. **Sales Interface**
    b. **Systems Interface**

The intention to split SMP products across the Access Service Division and BT Wholesale Division is, in principle a sound idea, however a number of practical difficulties will develop, most notably how these products are purchased and how they are supported by IT Systems.

While not detailed in section 5, the practicalities of Sales and System functions are of considerable concern to Kingston. Kingston understands that, as the proposed Undertakings are silent on the issue of Sales and Systems within the ASD and BT Wholesale that there are a number of options open to BT.

Kingston currently purchases a wide range of SMP products from BT, a number of which are intrinsically linked; e.g. CPS and WLR, and to further separate the development, support and sales of these products would create an artificial disconnect for their delivery. Indeed, the business as usual Commercial Groups for these two products have recently combined, as there was enough synergy between the two not to warrant separate groups. It would seem to Kingston to be a backwards step if the two products had to separate again, with regard to fundamental process and systems issues.

The management of sales interfaces both from a person to person and IT perspective is time consuming and extremely costly. Currently, Kingston has a single point of contact in its commercial management relationship with BT. To coordinate dual Sales Channels; one for ASD and one for BT Wholesale, would require considerable duplication of effort and resource. This would be detrimental to the business as a whole, as obviously one of the main aims for successful business is to maximise efficiencies.

Moreover, as you are no doubt aware, there are currently multiple IT interfaces available for the procurement and management of various SMP products. Whilst any improvement on this is welcome, the suggestion that parallel and completely separate ASD and BTW systems would need to be created and maintained seems perversely inefficient and would lead to pointless duplication of effort and investment within both BT and its wholesale customers.

How BT manage effective “back office” separation of both Sales and IT System functionality is, of course, a matter of concern and needs careful scrutiny. However, the clear need to establish appropriate structures for effective EoI should not be allowed to have a detrimental impact on effective, efficient delivery.

3. **Implementation timetable (Annex 1)**

The Equivalence of Inputs Timetable seems to have a great deal in common with the draft timetable offered by BT for the implementation of their 21st Century Network (21CN). Whilst we suspect that this is not just a happy coincidence, it does give cause to a number of concerns, not least of all that the current timetable for 21CN is not fully developed and, even at this early stage, further slippage would appear to be inevitable.

We believe that to introduce true equivalence of input without a major change in technology would probably not pass even the most basic cost benefit analysis. Consequently, progress in the 21CN programme is likely to be inextricably linked to achieving the EoI objectives outlined in the Undertakings. Consequently, the slippage likely in the 21CN programme will leave BT open to breaching the Undertakings by being physically unable to meet the defined timetable. This being the case, it would seem to be prudent to agree with Industry compensation payable for failure to meet deadlines well before they pass. This would be beneficial in two main ways- in order to minimise potential actions by third parties, and in order to appropriately incentivise BT to stop all unnecessary slippage.

4. Migration of existing products (Sections 3, 5 & 6)

Kingston has a number of specific concerns surrounding the migration of existing products to those specified to change in the Undertakings.

Kingston's first and main concern is the proposed definition of "Equipment" as drafted in section 6.16 of the Undertakings offered by BT.

The current definition limits the use of equipment to be used in a "Communications Provider Operational Area" to that owned by Communications Providers but not their customers or any other third party.

Kingston has a number of customers who have contracted for managed services to be supplied by Kingston. This entails that equipment purchased by Kingston effectively becoming the property of the customer, although the operation of that equipment is managed by Kingston on the customer's behalf. We understand that this is an increasingly used arrangement across the Industry. In addition, in many cases more creative "vendor financing" arrangements in which title in the equipment is not passed are now the norm.

Consequenlt, the current definition of "Equipment" would restrict Kingston's commercial ability to continue to offer or benefit from these types of arrangement, as we understand that "Communications Provider Operational Area" will be effectively replacing the current commercially available "Comm.Locate" product offered by BT.

Obviously, this would put Kingston at a commercial disadvantage, which is not, we believe the intention of the section in the proposed undertakings.

Kingston urges Ofcom to amend the definition so that "Equipment" was able to be used in a "Communications Provider Operational Area" if it was wholly managed by a Communications Provider for or on behalf of their customer or any third party or other such wording that would allow us to continue to offer wholly managed services to our customers with their ownership of the equipment, and potentially benefit from some forms of vendor finance schemes.

Kingston believes that the creation of this new form of co-location should, if it is truly cost oriented be considerable cheaper than the currently available "Comm. Locate"

Commercially developed product, and as such no artificial barriers should be created to halt Communications Providers from using them. Therefore the ability to use the space to terminate both retail and wholesale products in the space is crucial, as is the ability to use wholly managed third party equipment in the space as outlined above.

A further concern is that the process of migrating to the equivalence if input products will have considerable operational and product support difficulties. There may be a time when there are effectively 4 versions of any applicable product available with the associated supporting processes and IT systems. For example – It may well be that WLR is available in it's current form for both the existing access network technology and on the new 21CN, at the same time the new "Equivalent" product would also be available on the existing network and 21CN in certain areas. Kingston urges that Ofcom seek to minimise the impact of this in whatever way is appropriate.

5. Incentives

Section 3.2 details what BT will offer "as a gesture of good faith" to Communications Providers over and above the outputs required in line with the timetable set out at Annex 1. While Kingston accepts the gesture, the allowance BT would have to pay for BT failing to deliver as per 3.2.1 and 3.2.2 of 25pence per line is derisory. It represents approximately one fortieth of the current months rental for WLR and less for MPF and SMPF. It would seem to Kingston that a more appropriate allowance that would appropriately incentivise BT to observe the "gesture" would be for one tenth of the associated rental.

Kingston notes that on the 20th July Ofcom published a consultation "The replicability of BT's regulated retail business services". Kingston will be responding separately to this consultation but wishes it noted here that until the undertakings have been met by BT it would be inappropriate to relax regulation in other areas such as BT's regulated retail business services as it would reduce the incentive for full compliance with the undertakings.

Should you have any questions relating to this submission, please do not hesitate to contact me.

Nancy Saunders
Regulatory and Interconnect Manager