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Dear Dougal

ISPA welcomes the opportunity to submit comments on the consultation on undertakings offered by BT plc in lieu of a reference under Part 4 of the Enterprise Act.

The Internet Services Providers' Association (ISPA) UK is the trade association for companies involved in the provision of Internet Services in the UK. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry. Its membership includes Internet service providers (ISPs), cable companies, web design and hosting companies and a variety of other organisations. ISPA currently has over 140 members, representing around 95% of the UK internet access market by volume.

A full list of members is available at:

http://www.ispa.org.uk/html/about_ispa/ispa_members.html

ISPA's comments in response to this Consultation reflect the views of ISPA members excluding BT. As ISPA members, BT were involved in the discussions, but given that the Consultation focuses on BT's Undertakings, BT will make their views clear in a separate response to this consultation.

ISPA is pleased that the Telecoms Review has concluded that effective competition remains the best means to deliver benefits to businesses and consumers in relation to telecoms. ISPA agrees that the best way to further the aggregate interests of businesses and consumers in the UK is to promote effective competition in telecoms, and agrees with Ofcom's analysis that BT's vertically integrated structure and enduring market power provides BT with incentives to engage in discriminatory behaviour through the various means described in section 4.

ISPA believes that competition is being restricted in markets for the supply of wholesale access and backhaul network services in the UK, and agrees that BT has had the ability in the past to discriminate against its downstream and Retail competitors who are also BT Wholesale customers. However, at the current point in time, ISPA fully supports the fact that Ofcom have decided not to refer BT to the Competition Commission, and have given BT the chance to prove that they are able to offer real equality of access.

Comments on undertakings:

Equivalence of Inputs

BT has committed to ensuring equivalence of inputs between BT's downstream divisions and retail competitors. However, ISPA believes that this is a highly sensitive issue which requires thorough analysis, and therefore require more detail how Ofcom plan to ensure that Equivalence of Inputs is achieved.

Many ISPA members believe that BT is prone to 'last minute delivery'. ISPA would like to see incentives for BT to deliver products as soon as they can, rather than at the latest point possible. It is a very real concern for some ISPA members that if it is agreed that BT has 7 years (for example) to develop and deliver a new product, it will not be delivered any sooner.

While ISPA would have liked to see quicker timescales for the implementation of Equivalence of Inputs, ISPA is happy to accept the dates put forward as long as there is a strong commitment on BT to deliver against them, and BT are held to these dates as the latest date for delivery. ISPA further believes that there should be similar incentives to ensure Equivalence of Inputs applies to all new BT products within a set timeframe.

Organisational Structure

There is a very real need for both the functional, and the physical separation of BT Retail, Wholesale and the proposed Access Services Division.

ISPA considers that each of the three divisions should be considered as separate entities, but if the undertakings are to be successful real clarity is needed regarding BT's proposals. ISPA firmly believes that as in the undertakings laid out for ASD at section 5.35.2 in Annex E, similar clarity is needed for the new organisational structures of Retail and Wholesale.

ISPA believes that best practice such as separate offices will help to ease the confusion for BT employees, and ensure that all levels of BT staff maintain compliance with the promises made in BT's undertaking, particularly those in Retail and Wholesale, where different practices may have been in operation in the past. Other areas of best practice should include separate IT systems, billing mechanisms, client contacts, and separate Codes of Practice for the different divisions rather than one Code of Practice as set out in section 9 of Annex E.

ISPA supports the idea of a Code of Practice to ensure compliance. However, section 9.1 Annex E states:

"Within three months of the date these Undertakings take effect, BT shall draw up and publish a Code of Practice, to be made available to all BT employees, which sets out how BT employees must act to ensure compliance with these Undertakings."

ISPA is not clear why this should take 3 months to achieve, and believe that this should be done as soon as practically possible in a robust and fit for purpose manner. If it is expected to be as long as 3 months then ISPA would suggest that a clearer explanation of why this is so is needed.

ISPA feels the need to be particularly persistent on the area of BT behavioural change, because ISPA members' past experience has shaped current beliefs and expectations of BT. ISPA also

believes that rigorous separation will offer for protection for BT, protecting against BT being stuck with an inaccurate reputation based on out of date and inaccurate perceptions of previous behaviour.

BT Retail and BT Wholesale

ISPA supports 8.1.1 (Annex E) whereby BT commit that BT Retail will not be in a position to influence the commercial policy of BT Wholesale in any way that is different to options open to other Service Providers.

ISPA would like more detail on how BT will logically separate its systems holding Commercial Information and Customer Confidential Information between ASD, Retail and Wholesale, as many ISPA members have a genuine concern that BT Retail products will be sold through BT Wholesale.

ISPA seeks more clarity regarding the services that will be found within each division of BT. ISPA suggests that Ofcom could release an explanatory memorandum indicating how they envisage the new structures to work, and which division of BT will be responsible for the roll out of new infrastructure moving towards 21CN. This would act to provide other Service Providers with the full factual information, they require, and to also ensure BT's real transparency.

ISPA supports the good principles laid out in the Undertakings, but requires more information detailing how these principles will be translated in the market. The Undertakings regarding BT Retail and BT Wholesale need the same level of clarity as that which has been given to ASD in the Undertakings.

Access Services Division

ISPA welcomes BT's undertaking to establish a separate division of the BT group to be referred to as the Access Services Division to control and operate the physical network assets that make up BT's local access network and backhaul network.

However, ISPA members are concerned that there will be insufficient competition outside high density metropolitan exchanges at the wholesale level. It is for this reason that ISPA firmly believes that there will still need to be rigorous measures in place to maintain the clear structural divisions in BT. It should not be assumed that BT will be able to achieve satisfactory operational separation immediately, and further to the Code of Practice mentioned above, BT should be held accountable to ensure that behavioural change occurs. ISPA therefore supports a physical separation review on a regular basis with Ofcom, as set out at 5.39.4 Annex E, and believes that target delivery dates for specific areas of behavioral change would be beneficial.

ISPA particularly supports the undertaking set out in Annex E at 5.35.2 whereby BT commit that only ASD staff will have access to ASD commercial information, unless the information is able to be provided to all Communications Providers. ISPA also supports the undertaking laid out at 5.36.4 whereby BT commit that any individuals undertaking 'sensitive' roles will be subject to dedicated training relating receiving and sharing information relating to ASD and on the restrictions on the exercise of influence required by the undertakings.

ISPA is pleased to see that there are requirements for both ASD and BT, and supports the principle of the ASD. The ASD, as a division run at arms length to the rest of BT, committed to Equivalence of Input for its products, has the potential to address many of the issues associated with BT's vertical integration.

Next Generation Networks

ISPA encourages the efficient design of 21CN, so that it is able to deliver equivalence of inputs into SMP products. ISPA acknowledges that moving forwards there are very real concerns that BT might otherwise consolidate a monopoly on the industry.

ISPA is concerned with the fourth bullet point in paragraph 2.9, whereby BT undertake not to launch new retail products based on 21CN before a suitable upstream wholesale SMP product is available for its downstream competitors, and considers that there needs to be more detail about this, and about how it will work.

ISPA members believe that true equivalence means that everyone should be able to launch products at the same time as BT retail. Current industry perception is that this is not possible due in part to the pricing processes that Ofcom are allowing BT to adopt.

Pricing issues cannot be treated as a separate issue going forward, rather they must be part of the specification process, or BT would be given an unfair advantage, and the level playing field BT's undertakings aim to create would be undermined. While ISPA doesn't expect 100% accurate estimate of prices, ISPA firmly believes that BT must be like other competitive businesses in their product development processes, and must be open with the targets that they are attempting to achieve and share this with other market players. The current timescales between the launch of pricing, and the launch of a product are not enough to ensure real equivalence for other players in the market. The current timescales leave ISPs with 9-10 months of uncertainty, and not enough time to compete with the products BT is offering particularly in instances where an ISP might have to put additional infrastructure in place in order to offer the same service. The uncertainty ISPs are faced with currently is above and beyond the accepted uncertainty of dealing with changing markets, and needs to be addressed.

ISPA's full thoughts on Next Generation Networks are covered fully in ISPA's response to the Further Next Generation Networks Consultation.

Equality of Access Board

ISPA welcomes the establishment of the Equality of Access Board (EAB) and the associated Equality of Access Office (EAO). Ofcom needs to work very closely with the EAB to ensure its terms of reference and membership fully reflect its main function which is to police the Undertakings. ISPA believes that there are some areas in the Undertakings where further details are needed to give full clarity regarding BT's proposals and assurance that the necessary incentives are in place to guarantee BT's behavioral change.

ISPA has very real concerns regarding how the EAB will function and ensure real equality of access, and ISPA is particularly concerned that abuse will still occur to the maximum levels that it can without action against BT following.

ISPA agrees with Ofcom's concerns laid out in 4.12 regarding discrimination in relation to non-price terms and conditions. As Ofcom state, such discrimination is harder for a regulator to detect and address, and has equally negative affects on the market. The effects are not only the tangible effects – but also result in a lack of trust, and a failure to believe that there is a possibility that real equality of access can be achieved, which will have a similarly detrimental effect on competition in downstream markets.

ISPA UK