

Response by Olswang to

Ofcom Notice under Section 155(1) of the Enterprise Act 2002

We are grateful for the opportunity to comment on the Ofcom consultation on undertakings offered by BT (**Undertakings**) in lieu of a reference under Part 4 of the Enterprise Act 2002 (**EA**).

1. Nature of the Undertakings

- 1.1 Given that the Undertakings represent part of what was previously described by Ofcom (Phase 2 Consultation Document at 1.43) as in effect a new *regulatory contract*, the Undertakings bear examination in this regard. This tends to show, in our view, that the Undertakings do not provide the durability and flexibility that one would expect in a medium-to-long term contract.

Specifically, the Undertakings can only be varied and amended by mutual agreement of BT and Ofcom. This leaves the Undertakings as essentially a static instrument, whereas they relate to network access arrangements which are, by their very nature, dynamic and, one would hope, continuously improving. The whole evolution of UK regulation itself, particularly in relation to initiatives like CPS, WLR and LLU, shows that official interpretation and application of rules of this kind lead to a gradual improvement, the benefits of which can only be realised by appropriate modifications to the rules. By contrast, in the Undertakings there is no provision for such modifications or improvements other than by mutual agreement: we would therefore recommend inclusion of a mechanism to provide for modifications and additions to the Undertakings, at least to reflect case decisions and ideally to capture BT-industry agreement on products to which Equivalence of Input (**Eoi**) is to apply based on the proposed approach to NGN network access. Admittedly disputes could arise between Ofcom and BT concerning specific applications of such a mechanism, and so it may be necessary to have some dispute resolution procedure (e.g. independent expert) for this purpose. We recognise this would seem unusual in a regulatory context but then again these Undertakings are themselves unusual, indeed unprecedented.

- 1.2 This approach to bringing into the Undertakings the effect of case decisions also ties into our recommendations regarding enforcement, at paragraph 6 below. It should also be clearly understood by everyone, and we appreciate that Ofcom is already well aware of this, that these Undertakings do not replace or override the existing SMP regulatory regime (based on conditions imposed on BT with respect to different markets under the Communications Act). Rather they will, it seems, sit alongside that regime and the Competition Act as three parallel and potentially overlapping sets of legal principles. We revert to this aspect at paragraph 3 below.
- 1.3 We think it is important to remember that the Undertakings are not the "be all and end all" of the new regulatory approach. As Ofcom explained in the policy annex (Annex G) to

the Phase 2 consultation document, equality of access was to be approached by reference to change at both the product level and in BT's behaviour. It is behavioural change and EoI which essentially is being addressed by the Undertakings and in particular by the establishment of the Access Services Division (**ASD**). Change at the product level should also be captured somewhere.

Such change could be captured through the SMP route, which is a specific benefit of the inter-relationship of the different regimes applying to specified products, their successors and to BT's NGN. NGN products developed consistent with the Undertakings could be included in a direction made under the appropriate SMP Network Access obligation and included by way of an amendment to the Undertakings (either by agreement or preferably as per paragraph 1.1 above) specifically to include that product. We note here that the SMP route in this case offers greater transparency to third parties than an agreed amendment to the Undertakings. This concern may be more apparent than real in practice assuming working groups draft up technical specifications and new terms and conditions but it is important in terms of industry confidence in the utility of the Undertakings.

As regards equality of access more generally, quite apart from the continuing requirement on Ofcom to ensure that BT complies with its SMP obligations, Ofcom has proposed setting clearer guidelines for such obligations, stricter application of the Access Guidelines (see further paragraph 2.3 below), improvements in transparency and information asymmetry and more use of the Competition Act. Not least because of the EoI timetable, it will be important that Ofcom pursues these associated tasks which, even after the various RFS dates have been met, will continue to be relevant and useful to underpin implementation of the Undertakings.

- 1.4 As we discussed in our previous submission on the Phase 2 consultation document, in our view it is vital for the success of the new regime, now to be enshrined in the Undertakings, that Ofcom should be available to ensure that the rules are vigorously and fairly applied and enforced. It is not going to be sufficient for Ofcom to launch the Undertakings and leave the industry to a self-help remedy when dealing with BT. This has not worked in the past and is unlikely to do so in the future. We recommended previously that an equivalence "Czar" be appointed to be a dedicated resource of Ofcom in dealing with all disputes relative to the Undertakings, whose decisions should wherever possible be utilised to clarify, improve and supplement the Undertakings. (We appreciate that this would require additional drafting and some fine tuning to the Undertakings).
- 1.5 Although the Undertakings automatically terminate in the event of a market investigation reference to the Competition Commission under the EA (Section 18.1), the fact of the matter remains that so long as the Undertakings continue to be applied with varying degrees of success, the less likely it is that a successful market investigation reference could be made, in the sense of the Competition Commission being convinced of the anti-competitive impact of BT's activities and the need for semi-structural remedies to be

maintained. This underlines the importance of Ofcom providing the commitment and mechanisms to ensure continued supervision and enforcement of the Undertakings.

2. **Meaning and application of Equivalence**

2.1 The obligation to apply Eol is expressed at a fairly high level in section 3 of the Undertakings. This in turn adopts the definition of Eol in section 2.1. This definition requires that BT (ASD or Wholesale) should apply the same timescales, terms and conditions, and the same systems and processes, to all-comers, including BT. The assumption behind this is that BT will stipulate (arms-length) terms and conditions applicable to its in-house "purchasing": there is in fact no express requirement for this in the Undertakings, so we would assume that reliance for this is placed on BT's various SMP obligations to publish Reference Offers.

2.2 The Eol definition could possibly be interpreted narrowly to require only one Reference Offer for each product or service, with no scope for differentiation to meet particular needs. It is surely possible that some customers might require more or less features to a product and as long as BT is prepared to make such variations available on the same terms to everyone there should not be an issue. We suggest some clarificatory/avoidance of doubt wording be included to cover this.

In this regard we would note the fact that if a Communications Provider is seeking a product or product components which BT Wholesale could provide but which are not available as a standard offering from ASD, that provider could potentially find BT Wholesale cannot or will not meet its requirements, with an uncertain outcome to any referral of the dispute to Ofcom.

2.3 The Phase 2 consultation document envisaged (at G.15) a stricter application of the Access Guidelines to require that BT's wholesale activities would not supply BT's retail activities with any new products/connections in markets where BT has SMP until it was also able to supply other wholesale customers with equivalent regulated wholesale products. This wholesale analogue principle was meant to be part of the tighter and more robust concentration by Ofcom on ensuring that the equivalence of outcome model delivered better equality (see also paragraph 1.3 above). However, this approach is dependent not only on BT's co-operation but also on the ability of Ofcom to monitor, intervene and enforce in a timely and effective manner. This has not, as Ofcom readily admit, been the pattern with regulatory intervention in the past and so a better approach we believe would be to restate the wholesale analogue principle in the Undertakings themselves. After all it is another aspect of equivalence.

2.4 We note that this approach is specifically included in the Undertakings for new retail products launched using BT's NGN (section 11.10). The prohibition on retail launch by BT without wholesale inputs being available is expressed in an odd way given the framework for NGN regulation included in the Undertakings. A "for the avoidance of doubt" provision seems actually to cast some doubt on whether Eol is to apply to all NGN-based Network Access products. Sections 11.1 and 11.2 seem to make it clear that

the system should be designed so that the obligation to provide Network Access on an Eol basis can be met and where BT provides Network Access, it must be on this basis. On the other hand, section 11.10 refers to where BT "undertakes" to provide Network Access on an Eol basis. BT is, in fact, required to do so and no intervening step, such as a new or additional commitment by BT, is needed. This drafting seems to contradict the clear framework established only a few sections earlier.

- 2.5 The interaction between ASD and other BT divisions is described but not clearly delineated. Precisely what assets, processes, equipment, products and services fall within which BT entity is important for the application of the Eol obligation and its enforcement. There is obviously a balance to be struck between the detail included in the Undertakings and the detail to be developed on the ground as BT implements its obligations. If such relevant detail cannot be included at this stage, provision must be made for updating the Undertakings (see paragraph 1.1 above).

3. Broader Regulatory Framework

- 3.1 As we mention at paragraph 1.2 above, the Undertakings will, if accepted, effectively form another regulatory framework. Ofcom's acceptance of the Undertakings does not, of course, alter in any way obligations imposed on BT under other legislation (we note the "for the avoidance of doubt" provision included at Section 16.1 of the Undertakings). During the implementation period and possibly in other respects, it is not clear how Ofcom will approach anti-competitive behaviour which could be caught under their sector-specific powers and/or their competition law powers. In particular, the fact that BT will be working towards Eol for the specified products and in its NGN programme must not detract in practice from Ofcom's continued vigilance under the SMP framework.
- 3.2 Oftel, and subsequently Ofcom, set out their approach to choosing between their sector-specific and competition law powers in non-binding guidelines. The corresponding query can be simply put in relation to the Undertakings. How does Ofcom intend to choose which of their powers to exercise, where there is a choice? Are the Undertakings to be treated in an analogous manner to Ofcom's Competition Act powers and relied upon over their Communications Act powers (by way of presumption) or do Ofcom intend to rely on both EA and Communications Act powers where both are engaged?
- 3.3 Whether or not the enforcement of the Undertakings could be said, as a matter of policy, to trump reliance on sector-specific powers, at least as an initial presumption, how do Ofcom intend to balance their options for enforcement under section 14 of the Undertakings or Section 167 of the Enterprise Act or would there be a procedural presumption that Ofcom would only pursue one enforcement route? Ofcom's approach to exercise of its section 14 powers should be set out in guidelines. We consider that section in more detail at paragraph 6.1 below.
- 3.4 Updating the current complaints guidelines or better still, drawing up specific guidelines taking into account these new regulatory Undertakings would aid BT and the wider

industry in assessing what risks and remedies may realistically be available and in setting a (non-binding) indicative approach to enforcement by Ofcom.

- 3.5 The proposed guidelines on non-discrimination are silent on any potential cross-over with the concept of EoI. An SMP product to which EoI applies or its successor in the NGN context could fall within the prohibition on undue discrimination (approached in accordance with the proposed guidelines) and the EoI obligation (where relevant, once the implementation date is met). A specific question here is whether EoI is a specific type of undue discrimination which comes within the guidelines (which therefore apply for SMP conditions and relevant Undertakings) or not. This is both conceptually important and of practical relevance as it will impact on the approach to enforcement.

4. **Access Services Division**

- 4.1 To use the regulatory contract analogy again, these are BT's Undertakings which are capable of acceptance by Ofcom. Thus, only BT and Ofcom are "parties" to the Undertakings. Although BT is required to create the ASD, BT is the only legal entity against which obligations including those on ASD can be enforced. In order to make this clear, the Undertakings could include a provision stating that references to ASD are references to BT or the relevant obligations could be re-cast to require BT to ensure that the ASD does what is required. This latter approach may not reflect the spirit of the proposed BT internal restructuring but does reflect its reality.
- 4.2 Similar concerns arise from references to BT Wholesale and the proposed sub-divisions of BT Wholesale.
- 4.3 We are less confident than Ofcom (Section 5.33 of the Consultation Document) that the distinction between the physical assets and the electronic "transmission" assets (excluding the assets belonging to the network layer) is "clear and coherent". Presumably, this covers all layers in the OSI model other than the physical and network layers. Although ASD's products are defined as those using the physical layer and transmission layer, ASD only controls and operates the physical assets (section 5.11). It is anyway unclear what 'control' really means in this context.
- 4.4 We assume BT Wholesale retain the network layer assets. If so, it may be necessary to include Undertakings dealing with ASD's access to such assets (in the same way as the Undertakings cover ASD's "influence" concerning the management of transmission layer assets). The terms of access to the transmission layer and network layer should be transparent, as we discuss at paragraph 2.1 above.
- 4.5 With regard to ASD's limited influence, we think that it is appropriate for this ASD "right" to be balanced by an obligation on BT in the form of BT Wholesale dealing with the allocation of influence as between its customers (Communications Providers and BT ASD). We are also concerned that the reference in section 5.12 to ASD's influence over the way in which BT's assets are "managed" is probably too narrow if implementation of

the Undertakings is to evolve. Insertion of "and developed" after "managed" would go some way towards addressing this.

- 4.6 In the context of specifying in general that ASD will not provide products to BT unless that product is also offered to Communications Providers, section 5.41 lists the exclusions to this requirement. This includes at 5.41.3 a product or service where BT and Ofcom agree for reasons of practicality or otherwise (a basis for change which appears to be extremely wide) that EoI does not apply. Transparency is particularly important here and we note that no provision is made for informing Communications Providers before such agreement is made.

5. **Equality of Access Board**

- 5.1 We are not tremendously sanguine about the prospects for the Equality of Access Board (EAB). According to the Undertakings (10.9) the role of the EAB is a general one of monitoring, reporting and advising BT on BT's compliance with the Undertakings, with a specific focus on EoI and the operation of ASD. However, in practice the EAB will, we expect, be largely dependent upon BT for its information. Its ability to suggest to BT remedial action to ensure compliance with the Undertakings (see 10.15.1) will necessarily be after the event and, in many cases, too late to provide a suitable remedy for any complainant. In short, the EAB looks like an ex post facto auditing body which in many cases will be putting its stamp on reports from BT which it will not have the wherewithal seriously to question.

- 5.2 We do not think that the EAB is the right kind of body nor does it have the requisite machinery to function as the equivalence Czar we proposed again in paragraph 1.4 above. Apart from the provision of the EAB's annual review report to Ofcom, liaison between the EAB/EAO and Ofcom appears to be minimal. In particular, in relation to the EAO activities (see 10.22) we would have thought that Ofcom should undertake to give the EAO its support, particularly in relation to information gathering, whilst correspondingly the EAO should keep Ofcom informed of its activities, particularly where breaches of Undertakings have been alleged. On this point, it is unclear how investigation of a complaint by the EAO would relate to or interact with investigation of such a breach by Ofcom. It also begs the question as to the status of any decision by the EAO/EAB as to whether or not Undertakings have been breached, in the light of Ofcom's own enforcement responsibilities and action.

- 5.3 The EAO, a resource of some kind to be provided by BT to the EAB, is not properly defined in section 10. More substantively, it apparently has a significant role (e.g. consideration of complaints of breach of the Undertakings) but its constitution and composition lack transparency and impartiality. When considering complaints by Communications Providers it is not sufficiently clear that it should do so from a perspective independent of BT. Section 10.25 refers to the "level of independence required" of the EAO but there is no explanation of what that level should be.

6. **Enforcement**

We now comment on section 14 of the Undertakings. Here we have a number of comments and concerns as follows:

- 6.1 Section 14.1.1 requires that Ofcom gives BT a notification that it has reasonable grounds for believing BT has breached any of the Undertakings, setting out its reasons and a draft direction. In the absence of a requirement to publish this notification, interested parties will not necessarily be aware of the action Ofcom has taken or the reasons for it. Yet it seems to us very important that this procedure should be open and transparent. It is vital for the industry to have confidence in the Undertakings and their enforcement. It is also potentially significant for aggrieved communication providers who have been harmed by BT's actions and who may be considering taking legal action: for these companies it would be legitimate for them to want to understand Ofcom's view of the matter, BT's representations in defence and, if in the end Ofcom did not take enforcement action against BT, how this might influence or affect private legal proceedings.
- 6.2 The processes set out in section 14 are quite separate from enforcement machinery in the EA (s.167). The legislation itself provides for court proceedings to be taken by Ofcom and also for any person to claim loss or damage sustained as a result of the breach. It is to be noted that in relation to any such private proceedings by any person, BT is in principle allowed to put forward the defence that it "took all reasonable steps and exercised all due diligence" to avoid contravention. (We note also that the Undertakings are anyway conditioned by reference to BT not being prevented from complying because of a matter outside its reasonable control (section 19.3).)

In the light of these various qualifications it seems to us unlikely in practice that if Ofcom decide not to pursue BT for alleged breach of any Undertaking, there will be much interest in private proceedings under EA s.167.

In any event, to avoid any doubt, we suggest there should be included in section 14 a caveat to the effect that its provisions are without prejudice to the ability for either Ofcom or any affected party to take action directly under the EA irrespective of whether any action has been taken under section 14 of the Undertakings.

7. **Miscellaneous**

7.1 ***Continuing application of Equivalence of Inputs***

IBMC dates are not provided for each specific product to which the obligation to provide that product is on an EoI basis. The continued application of this obligation is expressed to apply following the respective IBMC date (section 3.1 of the Undertakings). If this is intended to clarify for the avoidance of doubt that where there is an IBMC date, Equivalence of Inputs continues to apply, specific wording to this effect needs to be included.

7.2 ***Additional products or timetable only?***

Section 3.3 of the Undertakings states that where Ofcom and BT agree an Eol timetable for a product other than one listed in section 3.1 and which does not use BT's NGN, that timetable applies. However, the principal obligation actually to provide product X on an Eol basis would not itself be included as an undertaking capable of enforcement, unless BT and Ofcom agreed to amend the Undertakings under section 17. We reiterate the points made at section 1.1 above: the Undertakings need somehow to be a "living document". The same point can be made here as with all other Undertakings that provide for Ofcom and BT to agree. No provision is made for transparency of discussions between Ofcom and BT on such a timetable nor for the views of Communications Providers to be sought or taken into account or for the opportunity for representations to be made by them.

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