

Dougal Scott
Ofcom
Riverside House
2a Southwark Bridge Road
London
SE1 9HA

12 August 2005

Dear Dougal

Consultation on undertakings offered by BT plc in lieu of a reference under Part 4 of the Enterprise Act 2002

THUS welcomes the opportunity to comment on Ofcom's Notice under Section 155 of the Enterprise Act 2002, in which Ofcom proposes to accept undertakings offered by BT plc in lieu of a reference under Part 4 of the Act.

We agree that the undertakings represent a significant commitment on BT's part toward fair competition, and if honoured fully by BT should address many of the systemic problems highlighted in section 4 of the Notice, particularly with regard to existing wholesale products. We have three main concerns:

- a) We are sceptical that the undertakings will be sufficient to constrain BT's behaviour in respect of new products and interoperability requirements emerging from next generation networks. These products and interoperability requirements will relate to the network layer and above, and will therefore fall within BTW (or BT Group) rather than ASD, for which the behavioural and structural safeguards are considerably weaker. As annexes G to K demonstrate, BT has a record of obstruction and procrastination to protect the interests of its vertically integrated business, and we see little to persuade us that the new BT Wholesale will behave in a radically different manner.
- b) We do not believe the undertakings will address the current problem whereby BT exploits its position of SMP to impose commercial terms on its customers which are less favourable than would be negotiated in the absence of SMP. We note that BT has committed to participate in a mechanism for efficient resolution of disputes over commercial terms, and that Ofcom has issued new guidelines on non-discrimination. However, we observe that BT Group Finance and BT Group Legal still exercise a powerful influence over commercial and payment terms, and even if individual product lines within BTWS and BTS are now incentivised to treat Communications Providers more like customers, this intention may still be blocked at Group level.
- c) We are concerned at the degree of emphasis placed within the undertakings and other TSR measures on supporting the business case for local loop unbundling. There have been substantial write downs in the value of network assets over the last few years (indeed THUS is somewhat unusual in not having made any write downs to its core network investment). If Ofcom's measures lead to further inefficient infrastructure investment, this will ultimately weaken investor confidence and be to the long term detriment of the industry.

We are conscious of the risks and uncertainty involved in a reference to the Competition Commission, and support Ofcom in its wish to accept undertakings in lieu of a reference, but believe that there are still certain key changes which should be required of BT before the undertakings are accepted. **THUS recommends that Ofcom accept the undertakings in lieu of a reference conditional on BT making the changes identified in section A below.** We also list a number of additional suggestions and comments in section B which we believe would strengthen the undertakings, but which should not necessarily prevent Ofcom accepting the undertakings if agreement cannot be reached with BT.

The move to next generation networks will cause significant upheaval for the telecommunications industry and create unprecedented opportunities for BT to extend its dominance into new markets. The safeguards contained in the undertakings are for the most part contingent on there being a finding of SMP, which raises the serious concern that BT's behaviour will only be constrained after a lengthy market review process. This could take several years, by which time prospects for competition may have suffered irreparable harm. We urge Ofcom to put substantial additional resources into proactively analysing and identifying markets in which BT may enjoy SMP (including insisting on greater disclosure to Ofcom by BT of its strategic plans), in order to provide early guidance to both BT and its competitors. We would also urge Ofcom to plan for an early review of the undertakings, to be conducted 2 to 3 years after they take effect, and focused on the effectiveness of the undertakings in respect of next generation application and service markets.

We urge Ofcom not to look on these undertakings as a justification for further deregulation, particularly in respect of markets downstream from PPCs, CPS and DataStream. We are disappointed that the principle of 'equivalence of outcome' has been dropped from the settlement, (other than a rather weak commitment in section 4 to use reasonable endeavours to resolve outstanding issues with these products) and believe that continued efforts will be required to achieve fairer competition. We also urge Ofcom not to regard the EAB as a substitute for effective and (where necessary) intrusive policing by Ofcom.

A) Items which we believe must be addressed if Ofcom is to accept the undertakings

1. The definition of 'Equivalence of Inputs' in section 2.1 describes a situation in which all products are sold on the same basis to all communications providers. This is inconsistent with the situation envisaged by the undertakings where some products would be sold on an Eol basis and some not, and consequently leaves open the possibility of 'regulatory bypass products', where BT downstream businesses purchase upstream product variants that are not available to competing CPs. We therefore consider it essential that the definition is amended to define Eol in the context of specific products and services and explicitly to preclude 'bypass' products. Our suggested wording for the first paragraph is as follows:

"Equivalence of Inputs" means, in relation to any product or service to which Equivalence of Inputs is applicable pursuant to these Undertakings, that such product or service is provided by BT to all Communications Providers (including BT) on the same timescales, terms and conditions (including price) by means of the same systems and processes, and that the same Commercial Information about such products, services, systems and processes is provided by BT to all Communications Providers (including BT's own downstream businesses). In particular, all BT downstream products shall use the same systems and processes

as other Communications Providers and obtain the same degree of reliability and performance as other Communications Providers. For the avoidance of doubt, no substitute or variant of such product or service shall be used as an input to any BT downstream product or service that is not also available to other Communication Providers.

2. We are disappointed that section 7.1 does not make any reference to mediation and non-binding adjudication, both of which we believe should form part of the mechanism to deal effectively with disagreements over terms and conditions. We request that the following words be added.

“For the avoidance of doubt, if other Communications Providers and Ofcom wish the mechanism to include mediation and/or non-binding adjudication, BT will comply with this wish”.

We also believe there is a need to acknowledge that certain terms and conditions do not bite on BT's downstream businesses in the same way as on other Communications Providers (because of BT's vertical integration), and that there is a need to establish a principle of reasonableness which can act as a benchmark during negotiations and dispute resolution. We suggest a new section 7.2 as follows:

“Where the reasonableness of BT's contractual terms and conditions for purchase of SMP products (including terms and conditions relating to payment terms and credit vetting) is in dispute, BT shall accept that a factor in assessing the reasonableness, either by Ofcom or within the mechanism referred to in section 7.1, shall be the likelihood that such terms would have been agreed between parties negotiating freely in the absence of SMP.”

B) Items which it would be desirable to change and other comments on the undertakings

3. (Section 3.4) We have been told by BT that a single post code checking facility is being developed that will reduce the incidence of order failures due to postcode mismatch for LLU, WLR and CPS, and that this facility will provide access in some way to the actual postcodes held by BT (and used by BT for order validation) as opposed to the standard PAF file. We request that Ofcom confirm that this is the case, since conflicting interpretations have been given at industry meetings by other parts of BT.
4. (Section 6.1) We agree with the principle that product management of SMP and non-SMP products should be separated, particularly where one such product is upstream of the other. However, we note that separating IPStream and DataStream may be contrary to the interests of THUS and other Communications Providers who use IPStream for volume customers and DataStream for business customers. Currently, the differences between these product families (termination equipment, ordering mechanisms etc) lead to significant inefficiencies which could be removed if such attributes of the products were allowed to converge – a requirement which will be harder to meet with separate product management. In the medium term this difficulty may be overcome if IPStream is designated as SMP enabling both products (or their future incarnations) to be product managed within BTWS. In the short term, we trust that the code of conduct will not prevent such harmonisation where it is in the interests of BT's customers.
5. (Section 6.6) We understand that there will be at least one level in the management chain

between the BT Wholesale Board member referred to in section 6.2 and the product management organisations referred to in section 6.1. The individuals filling these intermediate roles do not appear to be caught by any of the incentive arrangements in sections 6.6 to 6.9. We suggest that wording is inserted to indicate that such individuals fall within the definition of 'BTWS people' and 'people working within BTWS' so that they are caught by sections 6.7 to 6.9.

6. (Section 8.1) We do not understand why section 8.1 is limited to sales functions when section 6.10.1 imposes similar obligations that are not limited to sales. We request that section 8.1 and its subsections be amended to delete the words 'sales functions of' or similar wherever they occur.
7. (Section 11.2) It is unclear to us what section 11.2 is intended to achieve. The obligation "to supply Network Access on terms and conditions which allow other Communications Providers to compete effectively with end-to-end services which BT provides over its NGN" is presumably intended to be additional to the obligations in sections 11.6 and 11.7 to provide network access on an equivalence of inputs basis. This additionality could either be intended to deal with unforeseen circumstances in which EoI was not sufficient to enable effective competition with end to end services, or to deal specifically with the types of terms and conditions referred to above which do not bite on BT's downstream business and are therefore not affected by EoI. If the latter, we believe that allowing effective competition is too weak a test and should be replaced by 'compete effectively and without discrimination'.
8. (Sections 11.3, 11.4 and 11.5) We agree with the thrust of these sections, but are concerned that the process of consulting with other Communications Providers is ill-defined and could lead to dispute and uncertainty unless clear standards are established. We would suggest that, in order for BT to rely on this exemption:
 - (a) BT's consultation should be adequately publicised, have a defined response deadline, and be clearly flagged as pursuant to the relevant section of undertakings;
 - (b) consultees should have access to sufficient information to make an informed response (and if not, the consultation and design decision should be delayed until they do); and
 - (c) BT should make public the outcome of the consultation.

If there is a material change to the information on which consultees base their decision, and BT has not yet made a design decision reliant on the consultation, then BT should be obliged to repeat the consultation..

9. (Section 11.18) Section 11.18 sets out the principles that BT must use in making compensation to a Communications Provider for network costs necessarily borne as a result of notified planned changes to access and interconnection arrangements. We do not understand why the word 'network' has been inserted, and request that it be removed. If it has been inserted in order to exclude costs such as changes to billing/mediation or customer communications, then that would be contrary to the position set out in paragraphs 3.27 and 3.29 of Ofcom's further consultation on NGN. The intent of this section is to record BT and Ofcom's agreement of the principles by which the amount of compensation will be assessed, and there is no reason why these principles should not apply equally to non-network costs necessarily borne by Communications Providers.

10. With regard to bullet 11.18(a), why is the absence or presence of industry agreement relevant to the amount of damages? This could complicate negotiations, not least by creating artificial incentives on Communications Providers to withhold agreement. Why not say 'caused by BT'?
11. (Section 14) We agree that there is a need for a process by which Ofcom can issue non-binding directions, rather than go straight to the High Court in every instance. We request that Ofcom also give consideration to defining an associated complaints process to be used by Communications Providers who believe that BT has breached the undertakings.
12. (Annex 2) We are concerned at the breadth of functions listed in Annex 2 that are excluded from prohibitions on commercial and customer information sharing, many of which create opportunity for influence and information flows contrary to the intent of the undertakings. We understand that the Code of Practice is viewed by BT and Ofcom as key to preventing abuse of these exemptions, and request that Communications Providers be consulted fully on the content of the Code of Practice. We also suggest that BT be required to supply Ofcom with an up to date list of named individuals who occupy the posts listed in Annex 2.
13. (Annex 3) There appears to be a typo in paragraph 4: "those Communications Providers' customers" should read "those Communications Providers".

Yours sincerely

Richard Sweet
Director of Government Affairs