

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: A Notice Under Section 155(1) of The Enterprise Act 2002
Consultation on undertakings offered by British Telecommunications plc in lieu of a reference under Part 4 of the Enterprise Act 2002

To (Ofcom contact): Dougal Scott

Name of respondent: Frans Lijnkamp

Representing (self or organisation/s): T-Mobile (UK) Ltd

Address (if not received by email): Hatfield Business Park, Hatfield Herts. AL10 9BW

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing

Name/address/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

Note that Ofcom may still refer to the contents of responses in general terms, without disclosing specific information that is confidential. Ofcom also reserves its powers to disclose any information it receives where this is required to carry out its functions. Ofcom will exercise due regard to the confidentiality of information supplied.

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, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name Frans Lijnkamp

Signed (if hard copy)

Notice under section 155 (1) of the Enterprise Act 2002- Consultation on undertakings offered by British Telecommunications plc in lieu of a reference under Part 4 of the Enterprise Act 2002

Executive summary

As a significant customer of BritishTelecommunications Plc ("BT"), T-Mobile welcomes the opportunity to respond to Ofcom's consultation on undertakings offered by BT in lieu of a reference under Part 4 of the Enterprise Act ('the consultation').

Ofcom is consulting on whether, subject to stakeholder views on effectiveness, it should accept the detailed undertakings offered by British Telecommunications plc (BT) set out in Annex E to the consultation. Ofcom is entitled to accept such undertakings in lieu of a reference provided they remedy, mitigate or prevent any adverse effect on competition concerned in the relevant market, or any detrimental effect on customers so far as that results from the adverse effect on competition.

T-Mobile agrees with Ofcom's suspicion that competition is being restricted in the wholesale access and backhaul network services markets because of a combination of the characteristics and conduct of BT in these markets and BT's vertically integrated structure. These are areas in which BT has a substantial degree of market power, and which may also be enduring bottlenecks in regulatory terms. T-Mobile agrees with the markets which Ofcom has identified as affected

While the mobile industry may not have been affected by the issues addressed in this consultation to the same degree as BT's fixed network competitors, the entire telecommunications industry and - by virtue of the importance of the telecommunications industry for the UK economy - the UK economy as a whole, has been negatively affected by the way competition in these markets has been addressed thus far. Over the course of the past decade the regulatory issues around fixed line competition have concentrated on the dominance of BT. The regulator has, rightly, addressed these issues by means of regulation, which over time has become more and more detailed. The history of the enforcement of these regulations has, however, shown that the effectiveness of regulatory approach chosen is limited. We have seen the emergence of a culture of raising complaints in order to arrive at better competitive positioning, using regulation to create delays, etc. It can be argued that the more detailed the regulations, the more opportunity exists for what is often referred to as regulatory gaming: a situation in which regulation starts to play an important part in the competitive positioning of those regulated and where it replaces commercial considerations as the main driver for competitive decisions. It is T-Mobile's impression that the UK fixed line telecoms market has in many respects suffered from this phenomenon.

T-Mobile suspects that as a result of this the market was stalled from developing as fast as it otherwise would have done. It is important to acknowledge the limitations of certain regulatory solutions. It is evident that the regulatory solutions applied to address these issues in the past have not led to the achievement of the intended objectives.

T-Mobile is of the opinion that the proposed undertakings offer a very valuable opportunity to move away from this practice, and by addressing the issue by means of undertakings under Enterprise Act, return to a position in which market forces are the decisive instrument for achieving optimal competition. However, this can only be achieved by fully enforcing the undertakings. In delivering full equivalence of access for their access services BT stands to regain the industry's trust that where BT's dominance exists, the relevant parts of its network are managed in such a way as to avoid its dominance negatively impacting the market. The proposed undertakings may therefore provide the opportunity for a 'fresh start' in the affected wholesale access and backhaul markets.

Whilst recognizing that a reference to the Competition Commission was not a viable alternative for BT and that this may therefore have represented a very strong incentive to

propose these undertakings, T-Mobile nonetheless commends BT for the full engagement it has shown in addressing the issues raised and for its willingness to implement very significant structural changes to its organisation. The commitment expressed by BT in these undertakings is encouraging, particularly to the extent that the undertakings are backed up by serious timescales and financial penalties where the timescales are not met.

Suitability of the undertakings as a means to remedy the problems in the identified markets

T-Mobile acknowledges that the undertakings offered are not and cannot provide a perfect solution to the problems identified in the affected markets of themselves. However, T-Mobile agrees with Ofcom that the proposed undertakings will offer a more comprehensive solution than would otherwise be achieved by separate interventions. In addition, T-Mobile is of the view that the undertakings ability to achieve a satisfactory result will in large part be based on the effectiveness in enforcement of those undertakings.

Although organizational safeguards such as the Equality of Access Board have been proposed, T-Mobile is somewhat concerned by Ofcom's comment in paragraph 5.9 of the Notice under section 155(1) where Ofcom identifies that there is "a significant asymmetry of information between itself and BT which makes it difficult to identify non-price discrimination and act in a timely manner". This will be a continuing problem in the enforcement of the undertakings and may be a reason for their lack of efficacy. Ofcom cannot consider that its duties under the Enterprise Act will have been absolved by acceptance of these undertakings alone. While the undertakings provide for a transparency and reporting agreement between the Equality of Access Board and Ofcom, there may not be sufficient information to conclude that there is absence of discrimination. Irrespective of whether such conclusion can be based on the application of the undertakings, it remains Ofcom's duty to continue to monitor and apply the Competition Act and the Communications Act 2004 in case of breaches under EU and UK competition law. Ofcom should remain actively engaged in monitoring the market and continue to work to overcome the asymmetry of information between BT and Ofcom. It is clear that BT's competitors alone cannot ensure that BT complies with the undertakings, nor is it their responsibility to do so.

T-Mobile's specific concerns

T-Mobile has specific concerns relating to the way in which the proposed undertakings might impact on current and future products and services on which T-Mobile is reliant on BT.

One such current product, Siteconnect is a major long term contract that T-Mobile has with BT for backhaul supply and services. T-Mobile understands from discussions with BT that the services provided to T-Mobile under this contract will come in part from BT's wholesale division and in part from the new Access Services Division with components sitting within ASD being acquired and sold together by BT Wholesale. Given recent price increases from BT, which T-Mobile is continuing to dispute on contractual and other grounds, there are concerns that the new structural arrangements may in time lead to higher prices despite the undertaking and potential for greater transparency in pricing, because of duplication of staff, systems and the internal division of the product components translating into different prices being charged for components of what has been provided to date as a single product.

Ongoing technological changes in both fixed line and the mobile networks make it difficult at this point in time to understand the possible access issues which may arise in the context of interconnection between BT's 21st century network and future mobile networks. T-Mobile acknowledges that some of the future issues relating to access may be revealed through the process of consultation with BT around BT's 21st century network. However, Consult21, the current process of consultation on the 21st century network by BT is very resource intensive due to the number of working groups and breadth of subject matter on which the consultations centre. For T-Mobile has found, and no doubt other mobile network operators

have found, that many of the consultative sessions on BT's 21st century network are focussed on points of interest to fixed network operators. It is therefore difficult for mobile operators to provide the required resource to attend these sessions in case there are issues of particular relevance. BT must therefore recognise that although Consult21 is an integral process for migration to the next generation network, mobile operators feel overburdened with more than can be accommodated given their resource limitations in comparison to those available to BT. In order to address this, T-Mobile considers that BT should develop a means of highlighting areas where it is seeking views on critical issues from those not as involved in these discussions as the fixed network operators and perhaps provide work groups/sessions to deal with these issues from a mobile operator's point of view. There is a risk that the current consultation process may not deliver the desired results for the mobile market participants

Conclusion:

Even though BT might not have been willing or able to propose the current undertakings to address the issue covered in this consultation other than as a result of an implicit threat to refer such matters to the Competition Commission, the efforts made by BT to come to the conclusions set out in the undertakings are commendable and are welcomed by T-Mobile. It agrees with Ofcom's acceptance of them, and urges Ofcom to ensure that the regulatory and enforcement aspects remain closely watched in future.