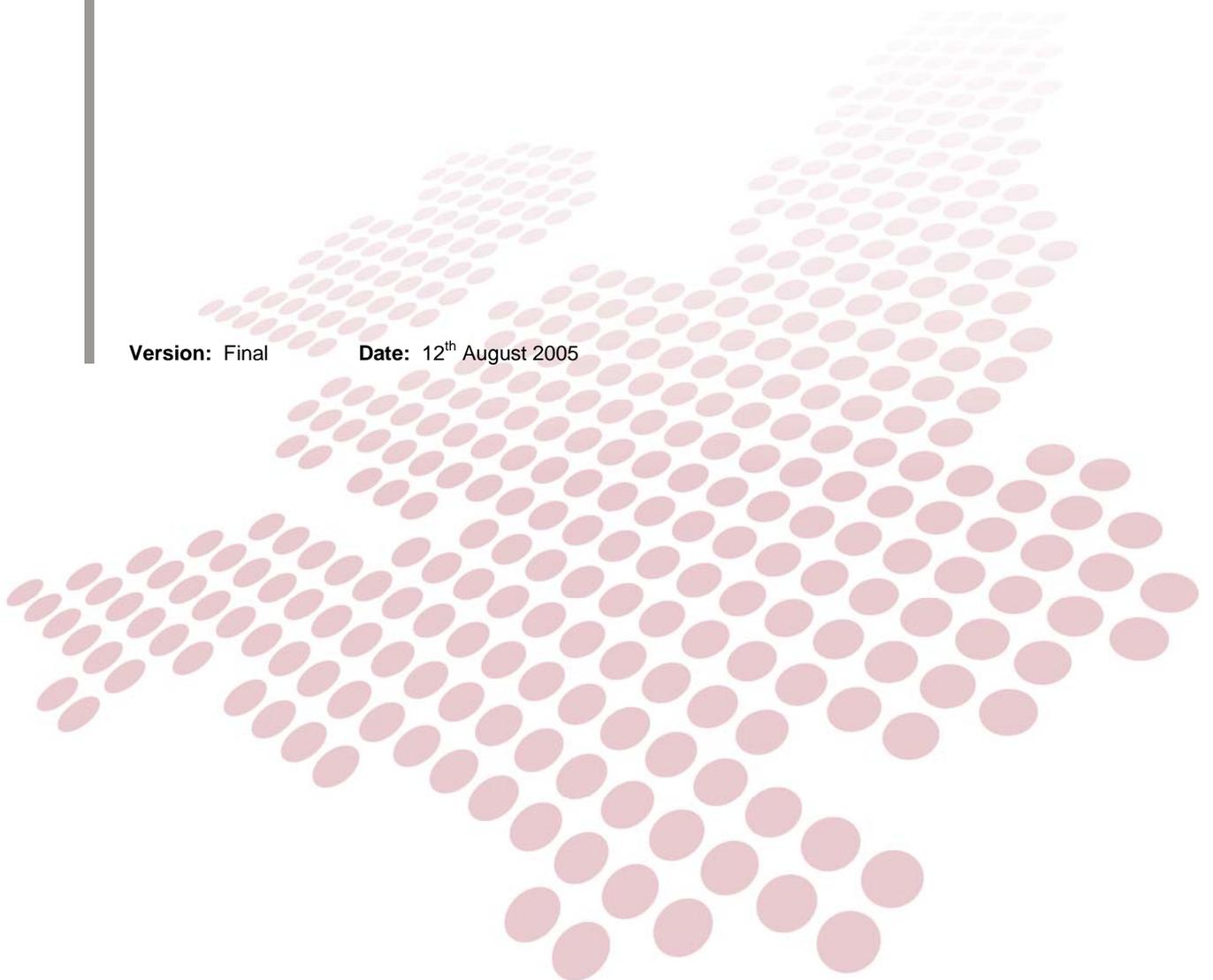


UKCTA Response to Consultation
on undertakings offered by British
Telecommunications plc in lieu of
a reference under Part 4 of the
Enterprise Act 2002

Version: Final

Date: 12th August 2005



Response submitted by UKCTA – 12th August 2005

Introduction

Ofcom has published details of the undertakings it proposes to accept from BT, which it believes are comprehensive and effective enough to avoid the need for a reference to the Competition Commission under the Enterprise Act. The consultation to which UKCTA responds in this submission is intended to give stakeholders the opportunity to comment on the undertakings and Ofcom's plans.

Although Ofcom would like a simple yes or no answer to the question posed about the undertakings offered by BT, UKCTA as a trade association is not in a position to respond to this question as posed. We have identified a number of areas for clarification and expansion that will be mentioned below. UKCTA members will be submitting individual responses, which will deal with particular areas of concern in greater detail. UKCTA urges Ofcom to consider this response in association with member responses to gain as much constructive input as possible.

That said, UKCTA believes that a reference under the Enterprise Act would result in a slow and costly process of industry review that could very easily result in less ability to implement change and a less effective solution to competition problems than is possible with undertakings in lieu of reference offered by BT. For this reason, it is especially important that the undertakings agreed are the best they can be and it is with this aim that UKCTA responds with this series of concerns. What Ofcom and BT have achieved in negotiation so far is potentially groundbreaking and the advances made must not be compromised or lost.

Detail follows on key areas of concern and issues UKCTA has with the substance and nature of the undertakings offered by BT. These are grouped into subject headings and are necessarily brief. As suggested above, reference should be made to UKCTA member submissions for more detail on issues raised below.

1. Product Equivalence

- Products to which input equivalence will apply are named in the undertakings, along with broad timetable goals for implementation. Much more detail on product, process and system changes will have to be added to implementation plans as time progresses and these details should become a part of the undertakings themselves, as appropriate. This addition could occur as apart of the review mechanism recommended in sections 3 and 5 below.
- Certain key wholesale products are not eligible for input equivalence (DataStream, CPS, PPCs etc). Some UKCTA members will have specific issues with this, based on business priorities, and UKCTA is concerned at the disappearance of the concept of 'outcome equivalence' and lack of definition of how these other key products will be dealt with (section 4 of the undertakings makes brief mention of 'transparency' requirements).
- WLR is to be sold by ASD and will be an equivalent input to BT downstream. LLU will not be an input to WLR, although there will be a significant degree of vertical integration in this arrangement.
- LLU will be an equivalent input to IPStream within BT, but there is as yet no detail in the undertakings to clarify how such an internal trade will occur. This is especially difficult when one considers the nature of BTS, theoretically purchasing LLU and selling IPStream, although it is little more than a product management function. Such examples bring the potential for true realisation of input equivalence into question.
- In relation to LLU and IPStream, the settlement relies on promises by BT to maintain margins for a temporary period. This situation is inherently risky for certain UKCTA members; confidence in the undertakings would be increased by the inclusion of such informal promises as solid commitments.
- For operators to compete fairly on an equivalent basis with BT's upstream businesses, the option to lease all relevant access products from ASD should exist. However, there is no obligation on BT to permit a penalty free migration from retail terms to the equivalent ASD products and the only way to achieve such migration is for the BT customer to cease the retail circuit and order a new installation of the wholesale equivalent. The operator is locked into the continued uneconomic purchase of BT Retail circuits which themselves are obtained as Wholesale Access equivalents.
- The undertakings include very little on BT internal trading and transactional mechanisms, which must be developed to underpin the system of input equivalence and transparency. This should extend through product and process design to billing and financial reporting.

2. Organisation and Governance

- Arrangements for asset ownership between ASD and the rest of BT will mean that an internal transfer charging mechanism will be needed, by which the ASD will recover its costs from the rest of BT. UKCTA is concerned that ASD should be given the incentive and means to keep both its infrastructure-related costs and its overheads to a minimum; cost allocation and attribution methodologies must be clarified as part of implementation.
- Although the lack of change to arrangements for Northern Ireland makes sense, there will be real risk of breach of information-sharing rules there and undertakings should be more specific in dealing with this issue.
- UKCTA believes that the undertakings should make clear the fact that one-off BT organisational changes (the creation of ASD and EAB, for example) will be paid for by BT and not charged to industry by any method of cost recovery or allocation.
- BT has said that an informal commitment has been made to Ofcom not to extend the scope of ASD into downstream markets. This should limit ASD scope to upstream network access products, which is essential for the protection of the fundamental principles of equality of access, but this commitment should be included in binding undertakings to give it real credibility.
- The undertakings are silent on the potential of ASD products being sold by BT Wholesale and BT intends to give wholesale customers the option to purchase ASD products through BT Wholesale, if preferred. More clarity is required on the exact nature of the transactions arising in this scenario to ensure that principles of equivalence and separation of incentives are not diluted by them in any way.
- The undertakings proposed fall short of the organisational changes previously recommended by UKCTA. In particular, the internal changes to BT Wholesale are much less significant than UKCTA believes necessary to support behavioural and cultural change in this area. BTWS and BTS are little more than product management functions, yet they are supposed to have trading capability that underpins product equivalence and organisational separation.
- Along with the point made above, UKCTA is concerned that the list of functions that are to be excluded from prohibitions on commercial and customer information sharing (Annex 2) is broad and not developed to a sufficient level of detail. Some of the functions included appear to have a direct strategic influence on the upstream and downstream divisions or units they support. There should be safeguards to ensure that the principle of separation is not compromised.

3. Next Generation Networks

- Sections 11.6 and 11.7 of the undertakings attempt to ensure that input equivalence will be built in to NGN for the future, but 11.9 then undermines that

attempt by disapplying the statements where building in would not be ‘reasonably practicable’. There is no definition behind this and the open ability of BT to invoke 11.9 gives cause for concern, given the importance attached to input equivalence for 21CN products and service.

- We agree with the thrust of section 11.3, 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 clause 11.3 of undertakings;
 - (b) Those consulted 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.
- 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 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 in new markets 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 analysing and identifying markets in which BT may enjoy SMP (including insisting on greater disclosure by BT to Ofcom 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, focused on the effectiveness of the undertakings in respect of next generation application and service markets.

4. Engagement and Implementation

- The need for effective engagement between BT, Ofcom and industry is clear as proposals enter the implementation phase. Industry representatives qualified to assist should be able to work with BT to ensure success and UKCTA can facilitate this. Milestones for achievement should be set and measured against as the implementation takes place.

- UKCTA also believes that, although the work involved in changing organisation, products and processes is significant, it should not be used as an excuse to avoid or delay normal business requirements by any party to the project. The industry will not stand still during the months and years of change to come and the new tasks created must be integrated with business as usual. These tasks can be divided between changes that BT must make without practical involvement of other parties, such as internal organisational alterations, and changes and developments that will depend on the active engagement of other parties. The latter category will include product, process and system changes and these will involve detailed planning and implementation. The two types of task can be dealt with separately: the first requires communication and reporting of achievement and completion by BT, the second project-level interaction with representatives from the industry group who can provide specific input and action change on the customer side.
- After the implementation of the undertakings, assuming that Ofcom has accepted them, a system of positive monitoring and review should be put into action. This should go together with a set of codes of practice for BT and active engagement of industry with EAB and EAO, beginning with the opportunity for UKCTA to review and comment on terms of reference for EAB. Ofcom must be able to measure performance in a way that assesses the effectiveness of the settlement as a whole, as well as monitoring of compliance. Metrics that measure market outcomes, as well more traditional KPIs, are an essential part of this.
- This links with points made by UKCTA above in respect of continuing review and development of the undertakings, as they become real changes. Any review of performance and compliance by Ofcom will be so much more powerful if it can lead to modification of commitments and implementation that furthers the causes championed by BT and Ofcom in making the settlement. This flexibility would also serve to minimise the potential for future disputes under traditional regimes and support Ofcom's belief that this method is more effective than existing regulatory powers in addressing competition concerns.

5. Basis and Nature of Undertakings

- It is vital that Ofcom can really enforce the undertakings. If High Court action by Ofcom or third parties were the only effective recourse on alleged breach of undertakings, this would be expensive and difficult to prove. And if the final sanction available to Ofcom on breach of the undertakings is reference to the Competition Commission (after at least one year has elapsed), that course of action will be no more desirable than it is today.
- The provisions in sections 14 to 18 of the undertakings appear weak, as BT can refuse to accept Ofcom directions, and many of the undertakings are worded in a way that could make enforcement difficult. We note (in Section 10) that they rely

to a large extent on self-policing by BT (BT informs EAB of breaches and EAB informs Ofcom if they are 'non-trivial').

- In discussions to clarify the content of the undertakings, BT and Ofcom have made reference to their agreement to stick to the spirit and intentions of the regulatory settlement. This is welcome but may prove problematic to rely on. Wherever possible, this agreement should be converted into words attached to the undertakings.
- We note that there seems to be little ability for effective ongoing review of the undertakings. Building such a potential in at this stage could ensure that detail of implementation plans is drawn into the commitments as it appears and greatly improve the ability for all to measure compliance.
- Our concern is that if issues with the basis of the undertakings and their enforceability are not adequately addressed at this stage, the risk is that the UK industry will have to rely on existing regulatory regimes and powers to deal with every issue that arises. This would undermine the promise of the TSR settlement.
- Ofcom believes that the settlement may create an environment where deregulation is appropriate. However, this may not transpire. Ofcom must take the same rigorous, analytical approach to deregulation it would take if there were no settlement and should not relax assessment criteria in future market reviews.

Conclusion

If Ofcom can accept undertakings in lieu of an Enterprise Act referral from BT that are constructed to maximise effectiveness and give confidence to stakeholders that real change will occur and be sustained, the most important advance in telecommunications regulation since BT privatisation will have taken place. UKCTA is optimistic that it will be possible to reach a set of proposals that Ofcom can accept, and is putting forward these concerns with the current undertakings with the aim of ensuring that the undertakings are as effective a basis as possible for future regulation of the sector.

A broad summary of UKCTA member concerns has been presented above and Ofcom should consider this in conjunction with detailed responses from individual members as the consultation process draws to a close. UKCTA will work with Ofcom and BT to produce a revised set of undertakings that will meet the purpose and enable a new competitive future for the UK telecommunications industry.