

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: Undertakings offered by BT plc in lieu of reference under Part 4 of the Enterprise Act 2002

To (Ofcom contact): Dougal Scott

Name of respondent: Louise Lancaster

Representing (self or organisation/s): Viatel (VTL (UK) Limited)

Address (if not received by email):

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?

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Name Louise Lancaster

Signed (if hard copy)



Introduction

Ofcom's aim is *"to create a regulatory framework which seeks to encourage and incentivise sustainable, scale infrastructure competition at the deepest extent possible"*¹. Consequently, most of the undertakings are designed to make it easier for Communications Providers to gain "equivalent" access to BT's local loop or "Access Network"².

However, "equivalence" alone is not sufficient to deal with the problems CPs face in the wholesale markets identified. Those problems concern not only the design of the products and their fitness for purpose, but also the day to day provision and service management of those services.

Although equivalence may mean that CPs will have greater influence over the design of new products that are to be provided over BT's 21CN, CPs will continue, between now and 2010, to rely to a large degree on "legacy" products. These draft undertakings would not adequately ensure that BT's "reluctance to supply"³ certain existing products becomes a "desire to supply".

In its response to the Phase 2 consultation, Viatel advocated a reference to the Competition Commission, since we believe that full structural separation of BT is the only way completely to remove the incentives for anti-competitive behaviour. In Viatel's view, the operational separation described in these draft Undertakings does not adequately reduce those incentives.

Equivalence of Inputs and Transparency

We agree with Ofcom that BT's downstream operations should not receive preferential treatment in terms of the timescales, terms, systems and processes that it is offered by its upstream divisions (such as BTW or ASD). We also agree that requiring BT's retail products to use certain upstream products as inputs (those products that other CPs have no choice but to use) helps to create a level playing field for BT's retail competitors.

However, we are not clear that the draft Undertakings go far enough in order to deliver a meaningful improvement. Firstly we are concerned about the treatment of existing products such as PPCs and Datastream. Whilst we could debate whether or not it is appropriate or desirable to apply Equivalence of Inputs to these products, it seems clear, at least, that the provisions of paragraph 4 regarding "transparency"

¹ Telecommunications Statement, Ofcom, June 23, 2005

² We use the same abbreviations and definitions throughout this response as those used in Definitions section of the Undertakings

³ As described, for example, in paragraphs 4.16 onwards of Ofcom's Notice under Section 155(1) of the Enterprise Act 2002

provide little help to CPs who continue to experience problems with these SMP products. The undertaking to use "reasonable endeavours ... to resolve issues"⁴ gives CPs no more than they have already.

We hope that Ofcom will recognise that many CPs will have no choice but to use products like Datastream for a further three to five years (based on BT's timescales for building 21CN). We will therefore need to rely on the effectiveness of the organisational changes referred to below to ensure the provision of fit for purpose SMP products and to produce an improvement in responsiveness and customer service. Datastream will need to be updated and improved to keep up with technology changes (such as incorporating ADSL Max towards the end of this year) and it is unclear that the Undertakings provide BT with sufficient incentives to undertake that work. In the absence of additional undertakings in relation to Datastream, further disputes regarding fitness for purpose are likely to be referred to Ofcom.

Even existing IP Stream, to which Equivalence of Input applies, may suffer from the fact that all of the focus will be on developing a new IP Stream product that will use the new IP Bitstream product as an input. The fact that BT Retail will suffer the same frustrations as other CPs will be of little comfort to anyone. This raises another problem with the concept of equivalence. It is not clear from the undertakings whether it is the upstream products, or the downstream products (or both) that will be modified in order to achieve "equivalence". So BT's customers have no sense from the undertakings whether the wholesale products they will buy once equivalence has been implemented will be better or worse than those they buy now. All we know is that they will be "equivalent". The assumption in most cases is that BT's downstream products will be modified to use the upstream inputs, but this is not required by the undertakings as written.

Finally, the timescales set out in Annex 1 are completely inadequate, especially given that the main reason given for not making a reference to the Competition Commission is that it would take "many months at least". Delays in implementation have a serious impact on smaller operators whose financial backers expect to see a speedy return on their investments.

Of particular concern is the date of March 2007 for completion of the migration of BT's LES customers to the Eol WES product. We believe that these two products are already sufficiently alike and comparable that applying Eol should not be a time- or resource-intensive process. It would be helpful if BT could provide more visibility of what is involved in the application of Eol for all of the products concerned. An Ofcom determination already requires BT to offer a wholesale equivalent of LES and any delay in the delivery of such acts as a critical barrier to competition.

Organisational Changes

Our concerns over the proposed organisational changes fall into three main categories: management structure, operational issues and the E.A.B..

Management Structure

The CEO of ASD should have been recruited from outside of BT Group in order to ensure the necessary cultural change. Moving to a separate physical location will have limited effect if the CEO of ASD is required to spend much of his time at BT

⁴ paragraph 4.1.2, Annex E

headquarters because he reports to the CEO of BT Group and he's on the board of BT Group.

All Communications Providers should have equivalent access to the CEO of ASD. Under this proposed structure, the CEOs of BT Retail, BT Wholesale and ASD will see each other once a month at board meetings at the very least, during which meetings they will have the opportunity to raise any commercial issues they have with each other's products or service management.

Paragraph 5.35 requires that only ASD employees can formulate Commercial Policy of ASD or have access to Commercial Information of ASD. However, this is subject to a long list of exceptions in Annex 2, including any member of the board of directors of BT Group plc. Since the board of BT Group includes the CEO of BT Retail, this effectively means that BT Retail can influence ASD policy and have access to its commercial information. This of course puts them at a competitive advantage over all other CPs.

Whilst ASD and BTW may be required to deal with all CPs on equal terms, it remains an issue that there is little incentive for the organisation to speed up its processes and reduce the degree of bureaucracy so that CPs who rely on network access are not hampered in terms of their speed to market. It is not just access that is needed - *speed of access* is absolutely vital if new entrants are to gain a competitive edge over the incumbent.

Operational Issues

ASD is to provide "in-life service management for those SMP Products which are predominantly provided using the Physical Layer and/or Transmission Layer of BT's Access Network and/or BT's Backhaul Network"⁵. And yet ASD will "not control or operate the assets contained within the Transmission Layer of BT's Access Network [or] Backhaul Network"⁶. This is likely to make fault management more complex and less effectual and is likely to have a negative impact on escalation paths, speed of delivery and SLAs.

Moreover, the presence of two new divisions (caused by the formation of ASD and the split in BT Wholesale) could make ordering and provisioning more complicated for CPs (irrespective of whether or not the CP chooses to use a single point of contact in BTW). This extra layer of complexity would be a pill worth swallowing if the structural changes effectively removed the market distortion caused by vertical integration; but we do not believe they will. Whilst Viatel would support BT's proposals to allow CPs to purchase ASD products from BTW, more detail needs to be provided in terms of the mechanisms and economics of such cross-border transactions.

Viatel believes that the timescales (up to five years) for migration to the new brand for ASD⁷ are too slow and as such will act as a brake on the cultural change discussed above. We believe that one year would be more appropriate.

We note that incentive remuneration of ASD employees should reflect the "objectives of the ASD ... to deliver EoI and fair access to its products and services..."⁸. There

⁵ paragraph 5.3, Annex E

⁶ paragraph 5.12, Annex E

⁷ paragraph 5.43, Annex E

⁸ paragraph 5.33, Annex E

is currently an unwillingness to supply certain products (such as WES in all its forms) on the basis that they are not (we are told) commercially attractive. Given that many of ASD's products are likely to be low margin, staff should be incentivised according to measures such as the volume of sales made.

The undertakings at 5.5 mention certain future products that BT will be required to offer through ASD. We note that there is no mention of "naked DSL" or bare copper access and we expect that such a product will become available either through ASD or through BTWS in the future, following appropriate negotiations between communications providers and BT.

Equality of Access Board

The provisions of paragraph 10.1 regarding "no material conflict of interest" imply that the EAB should include a BT non-executive Director, a BT senior manager, but no executives from other Communications Providers or employees of Ofcom. But, arguably, a conflict of interest comes from the presence of personnel associated with BT, so a representative from industry would provide a useful counter-balance to this one-sided starting point. Otherwise, the EAB is no more likely to be effective in delivering equality of access than the CEO of ASD.

Directions

We believe that the terms of Undertaking 14 are unreasonable. The undertakings as a whole are already a "last resort" in lieu of a reference under the Enterprise Act. Section 167 of the Enterprise Act 2002 gives Ofcom the right to bring civil proceedings in the event of non-compliance. Therefore to give BT "at least one month"⁹ to make representations regarding an alleged breach makes a mockery of the direct effect of the undertakings.

At most, BT should be given two weeks to remedy a breach that has, in the considered opinion of Ofcom, been committed. If it is not remedied within those two weeks then Ofcom should initiate proceedings (unless it has been persuaded within those two weeks that there has been no breach). It would then be the duty of the court to hear BT's "representations".

It is a crucial departure that Ofcom has secured legally binding and enforceable undertakings on the part of BT and that operators have the right to pursue damages for breach of the undertakings through the courts themselves. That said, for most operators, relying on the outcome of litigation is not a practical way of doing business, so a culture change within BT will be vital from the outset.

Conclusion and Related Regulatory Policy Initiatives

Ofcom believes that the measures it and BT have adopted will "help to ensure that ISPs who are not investing in LLU have a greater range of better priced wholesale services in the future"¹⁰. We hope that Ofcom will secure undertakings that fully restrict the ability of BT to leverage its upstream market power and vertical integration, with timescales that improve CPs' access to useful wholesale services in the near future, rather than the distant future.

⁹ paragraph 14.1.2 Annex E

¹⁰ Paragraph 17, Ofcom Statement on Broadband Regulation, 30 June 2005

Ofcom proposes to delay the launch of a WBA market review until "there is more evidence of how LLU-based competition will evolve over the medium term"¹¹. It is the short term that is of concern to Viatel and we therefore urge Ofcom not to delay the launch of the WBA market review beyond the second half of 2005.

We note that there is no mention in the statement or the Undertakings of new voice services or voice over IP. This is perhaps understandable given the lack of a conclusive statement from Ofcom regarding treatment of NVS. However, it is Viatel's view that any VoIP service (with PSTN break-out) that BT launches would likely fall within existing market definitions for voice calls so that, where BT currently has SMP, it will continue to have SMP in relation to VoIP products.

Our concern is that, in marketing its own VoIP services, BT has the motivation, means and opportunity to engage in predatory pricing in an effort to stifle competition from VoIP operators and foreclose the market. We therefore urge Ofcom to conclude its work on the appropriate regulatory regime for new voice services as soon as possible and initiate the relevant market reviews as a matter of urgency.

About Viatel

Viatel provides innovative retail services to SMEs (such as DSL, bonded DSL, Ethernet, voice over IP and managed hosting) and residential customers (such as via the virtual ISP service provided to football clubs). We also provide wholesale services such as leased lines, co-location and wavelength.

Viatel's has operations in France, Germany, Belgium, The Netherlands, and owns an ISP in Switzerland, but its main business focus is in the UK. Viatel has invested €1.4 billion in a pan-European network & data centres which are supported 24 hours a day by a fully redundant Network Operations Centre. We have 10,000 business customers of all sizes across Europe, four data centres & 43 points of presence in 21 key European cities.

¹¹ Paragraph 18, ditto.