



BT's response to Ofcom's consultation paper:

"Ofcom's draft annual plan 2009/10"

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Comments should be addressed to:

Antony Clark, BT Group Regulatory Affairs

e-mail: antony.clark@bt.com

Introduction

Ofcom's draft Annual Plan for 09/10 sets out Ofcom's workplan for the year ahead and identifies its priority programmes. Next year's plan is the final year of the existing three-year strategic framework to regulate for convergence and focuses on 4 priority areas:

- driving forward a market-based approach to spectrum;
- promoting competition and innovation;
- delivering public interest objectives; and
- improving empowerment, protection and enforcement for citizens and consumers.

BT has reviewed the draft Plan and, given the confirmation that Ofcom will also review the net costs of BT's current universal service requirements, we are broadly satisfied that Ofcom has identified the key project areas for the coming year. However, we are also keen to ensure that Ofcom's overall regulatory approach in working on these projects aligns with what we consider to be the key principles of good regulation at this time.

Ofcom's Strategic Review of Telecoms resulted in BT committing to functional separation and equivalence. The Undertakings given in 2005 aimed to address concerns with access to enduring bottlenecks by providing a clear framework to deliver equivalence in fixed telecoms markets between competing downstream players moving forward. This should mean that regulation can rapidly be removed in the relevant downstream markets as barriers to effective competition are addressed. However, we have been frustrated at the overall speed of this downstream deregulation since 2005 and believe this has unfairly moved the playing field against BT as we face ongoing constraints on our downstream activities. At the same time, and as Ofcom is aware, we believe that in some key areas current regulation of our wholesale charges does not allow us the opportunity to fully recover the costs of provision including a fair return on our investments.

Therefore, we believe that Ofcom's high level objectives for the year ahead should be:

- To deliver a truly **level playing field** on which communications providers can compete effectively by:
 - only intervening where justified and rapidly withdrawing from regulation where competition is effective; and
 - enabling fair access to all communications market bottlenecks and avoiding a disproportionate focus on fixed line telecoms markets;

- Where charges are regulated, to ensure that BT can earn a **fair return** on its investments, reflecting risk as necessary;
- To ensure regulation **stimulates timely investments** in next generation networks and services to meet customer requirements.

There is real opportunity in 2009/10 for Ofcom to deliver against these objectives. The narrowband market reviews provide clear means of significant withdrawal from unnecessary regulation and Ofcom will be concluding charge controls on LLU, wholesale line rental, wholesale leased lines and wholesale interconnect services during the year. Ofcom will also continue its assessment of regulatory frameworks applying to next generation access and core networks and to the provision of pay TV and mobile services. This response sets out high level comments on Ofcom's key projects. We will continue to provide detailed input to Ofcom on each of these projects during the course of the year.

Comments on Ofcom's projects

Conclusion of ongoing charge control projects

In the first month of 2009/10, Ofcom is expected to conclude two critical wholesale charge control projects:

- **Leased lines charge control:** The controls set for both traditional and alternative interface wholesale leased lines must provide BT with opportunity to make fair commercial returns on our investments and should not unduly constrain our ability to provide new and existing products in the manner demanded by CP customers.
- **Openreach Financial Framework review:** again, final decisions in this project have to ensure that the current under-recovery of costs does not continue and that the future framework sends a clear signal that BT will be permitted to make fair returns.

We will be shortly submitting detailed comments on Ofcom's draft proposals on these controls as part of the ongoing consultations.

Retail Narrowband Market Review

The narrowband markets have undergone a period of massive change with significant numbers of users of CPS, BT Wholesale calls, WLR and LLU creating widespread narrowband competition to BT Retail's business. In addition, there is the existing competition from cable and 46 million mobile users. BT believes the narrowband market is highly competitive and current regulation is therefore not relevant for today's market place and hinders BT Retail's ability to compete effectively on a truly level playing field. BT Retail has little freedom to price, bundle and cross-sell. In recognition of the developments in the

underlying wholesale markets generally, the EU has removed retail markets from the recommended list of markets for SMP.

BT believes that now is the time to remove all retail level narrowband SMP regulation on the provision of calls and lines (PSTN and ISDN) to both business and residential customers.

Wholesale Narrowband Market Review & Network Charge Control

BT would expect to see deregulation of all transit markets at the conclusion of the wholesale narrowband market review on the grounds that, amongst other things, all the relevant markets are competitive, customers can choose alternative transit operators and BT's market share has declined significantly. There has also been a step change in fixed-mobile convergence since Ofcom previously conducted a wholesale narrowband market review.

Any ongoing Network Charge Controls (NCC) running from 2009 must allow BT to make a commercial rate of return on its investment in providing the regulated interconnect services to other CPs, based on a sustainable business model.

Mobile termination rates

Ofcom acknowledges the need for a debate about mobile termination rates in time for when the current regime ends in 2011. BT agrees with Ofcom that the regulatory regime for mobile call termination needs to change. The convergence of fixed and mobile communications points strongly towards the direction this change should take: regulation of fixed and mobile termination needs to be more closely harmonised. This means that Ofcom should not use different methodologies for addressing termination in fixed and mobile networks.

Enabling clear regulation for next generation access and core networks

NGA

BT announced in July last year that it was prepared to spend £1.5bn on deploying NGA, reaching up to 10 million homes in the UK by the end of 2012. This is a major priority for BT. However, despite the announced plans to begin to deploy NGA, demand remains uncertain. We have not yet seen the new applications that will drive people to want very high bandwidth nor do we yet know how much premium people will be prepared to pay for very high speeds. We do not believe this will start to be proven until several years into NGA deployment, emphasising why decisions to invest in NGA are bold and carry risk.

BT believes that the response from Ofcom to these developments needs to be practical and enabling and reflect the need for pragmatism and flexibility. In particular, the regulatory framework needs to recognise the economic realities of NGA investments. Getting the right

regulatory conditions in place for NGA is essential given its importance and need to reflect the investment risks and provide regulatory certainty as well as pricing freedoms.

NGN

BT continues to invest in its Next Generation Network and needs as much regulatory certainty as possible to ensure that adequate returns can be achieved on this investment. Focussing regulation on enduring bottlenecks is an essential element of this certainty; wherever there is effective competition, particularly in the core and increasingly in backhaul parts of the network, we would expect the trend towards deregulation to continue. We recognise that IP-oriented NGNs give opportunities for new, converged approaches to voice, broadband and data services, but it is vital that the market is able to define the best future structures. Ofcom should avoid any regulatory intervention which could artificially influence the development of what might turn out to be uneconomic or inefficient solutions.

Universal Service

Although not referenced in the draft Plan, we understand from Ofcom's comments at the London stakeholder meeting that a review of both the scope of the USO and net burden will be reviewed next year. This is a priority for BT due to the significant changes in the provision of the relevant services over recent years. The scope and funding arrangements for the USO should reflect new technology such as next generation access and competition including the near universal ownership of mobile handsets. We believe this project should become one of Ofcom's designated priority workstreams when the final plan is published.

Digital Britain report

Ofcom should be clear in its final Plan what regulatory issues it will be taking forward as a result of outputs from the government's "Digital Britain" work which has clear overlaps with the above projects on NGA, NGN and Universal Service among other things.

End-user driven migrations

Ofcom is planning to publish two consultations on end-user driven migrations before the end of March, with responses due in the first quarter of the 2009/10 and regulatory changes coming into effect later.

The first consultation will focus on consumer protection from mis-selling in voice and broadband. We believe Ofcom's aim within this consultation should be to deliver a level playing field where mis-selling is minimised and effectively addressed and where all CPs have equal obligations - for example those currently applying to BT via the 'Cancel Other' direction' - to ensure consumers are sufficiently protected.

The second consultation should in our view be guided by the principles for migrations processes that BT has advocated in earlier responses. That is:

- a clear and straightforward process for customers to follow which applies to all transfers between a defined set of products;
- that recognises that transfers between products using separate platforms are inherently more complex; and
- that is driven by the customer and not the industry.

A single process should also provide adequate consumer protection by ensuring that the process:

- raises the presumption that the customer has consented to the transfer - i.e. "opt in", with effective validation;
- allows customers to understand the full implications of any transfer (e.g. termination charges payable to losing providers) before it is affected so that they have an opportunity to consider alternatives; and
- fully reflects consumers' cancellation rights, particularly under the distance and doorstep selling regulations.

Ofcom's regulatory approach in mobile

Ofcom's aim is to adapt regulation as convergence occurs and we believe it is now right to recognise that the convergence between the fixed and mobile services now requires access on cost orientated terms to the mobile networks as well as retail-level narrowband deregulation. We look forward to participating in the proposed debate on deregulation, competition and innovation in the mobile sector. However, we remain sceptical whether there is any scope for deregulation in a sector which already has a very low level of regulation, certainly when compared to the fixed sector and particularly in view of increasing convergence.

Promoting competition in Pay TV

It is very difficult for BT to compete effectively with telephony, Broadband and Pay TV bundles. This is partly because we do not have sufficient access to the premium Pay TV content such as live sport and first-run movies which are a crucial part of triple play offerings. Ofcom has carried out a market review and in September 2008 proposed that Sky make available at wholesale level designated premium channels on regulated terms. We believe the market definition for premium sports content should be widened to cover more than Premier League Football. In addition, we believe Ofcom's remedy must ensure that content from Sky is available at a fair price, which will enable other Pay TV providers to compete fairly.

BT also strongly urges Ofcom to allow competition to develop before Sky launches its Picnic service on Freeview, by applying ancillary conditions on Sky such as establishing periods of time for developing brand awareness and minimum subscriber numbers before Sky's launch on Freeview. BT's proposed ancillary conditions are contained in submissions made to Ofcom in December 2008 and January 2009.

Spectrum

We strongly support the approach to liberalise spectrum. The release of spectrum, as set out in Ofcom's plans, is an important means of delivering innovative services. However, we are keen to ensure Ofcom is able to proceed with planned key auctions with the minimum of delay.

Harmonised approach across the EU

At international level, multinational business customers require advanced ICT solutions across the EU and their needs include having the same products with the same quality provided in different jurisdictions. Currently the lack of regulatory consistency across the EU does not allow multinational CPs such as BT to provide their customers with competitive offers. To improve services to EU businesses, more effective EU-wide regulation is required and we believe an equivalence of inputs approach to the provision of upstream wholesale inputs is required across the EU to create an appropriate EU-wide level playing field. We urge Ofcom to support this approach.

We note that Ofcom intends to maximise its impact in the EU and seek to have a strong global outlook. Although BT supports this objective, we believe that with finite resources, Ofcom should keep its focus within the EU rather than on their intentions to share best practice with regulators outside the EU.

Gaps in Ofcom's draft Plan

- **Dispute Guidelines:** There is no mention of the revised dispute guidelines, which Ofcom has previously promised to produce. They have been in the drafting stage for several years. In August 2008, following the CAT judgment on mobile termination rates, Ofcom put out an update saying they would revise the guidelines, but they still have not been produced. BT believes that this is a priority in the light of the CAT judgment, not least to provide greater regulatory certainty.
- **0845 Review:** In April 2006, when Ofcom published their Statement on NTS and 0870, they promised to conduct a review of 0845 within 18 months. This has yet to happen and appears not to be in the draft plan. We believe there should be a firm commitment from Ofcom to review 0845 next year due to the material changes in the market, leading to the current rules becoming increasingly outdated.

- **Number Portability:** Ofcom is using statutory powers (section 135) to collect data on Number Portability following Vodafone's successful appeal to the CAT against Ofcom's plans for a central porting database. However, there is no mention of a consultation in the draft plan.