

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation Title Strategic Review of Telecommunications – Undertakings
in lieu of a Reference under Part 4 of the Enterprise Act
2002
<http://www.ofcom.org.uk/consult/condocs/sec155/>

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Deadline: 12 Aug 05

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DECLARATION

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www.thecma.com CMA is an association of ICT professionals from the business community who have a professional interest in communications, in both private and public sectors. It is a registered Charity over 45 years old, totally independent and without supplier bias. It is run by the members, for the members and aims to Influence regulation and legislation, provide education and training and disseminate knowledge and information, for the public good. CMA's contribution to public consultations is generated via the process described in a footnote to this document.

Consultation on the Undertakings in Lieu of a Reference under part 4 of the Enterprise Act 2002

Response of the Communications Management Association

This response is in two parts:

- A summary,
- CMA's remaining concerns

Summary

In our response to the TSR Phase 2 we:

- Reiterated our long-held stance that the unsatisfactory performance of the market is due to continued dominance of a vertically integrated BT and that accounting separation between BT's wholesale and retail activities was not enough - we had previously advocated structural separation between retail and core, and between core and local access businesses.
- Welcomed Ofcom's analysis set out in TSR2 but caveated that endorsement with an overarching concern that the search for equivalence might not be successful or, if initially successful might not be enduring, thus resulting in an increasing amount of 'ex-post' regulation to sustain it, thus generating delays in resolving conflicts and uncertainty in the market.

We therefore welcome the undertakings offered by BT as being "appropriate and proportionate to address the competition concerns and the detrimental effect on customers". We endorse Ofcom's view that they represent "as comprehensive a solution as is reasonable and practicable" and that "they would deliver real benefits to businesses and consumers in the UK through the lower prices, wider choice, and faster access to new services that would result from increased competition". For those reasons we endorse Ofcom's proposal to accept them.

Some 20 CMA members were briefed by BT's Director Equivalence on 10 Aug 05 and have a better understanding of the progress to date and work still to be done. We retain some concerns, however, and these are explored below.

CMA's Concerns

Business Customer Influence

We understand that both Ofcom and BT intend that input equivalence will be offered only to those network owners providing "publicly available communications services". We are concerned that this will mean that business customers having significant investment in private networks will have little or no influence or input to the processes that will shape 21CN design and roll out. The impact on legacy installations could be considerable and in some cases seems likely adversely to affect safety-critical systems. While both BT and Ofcom have held briefings and seminars for representatives of those affected by the inter-related programmes of equivalence and 21CN (principally the suppliers), as far as we know there has been no attempt by either (other than the briefing on 10 Aug referred to above) to hold briefings specifically for business customers. This omission must be rectified – the creation of the ASD will result in the primary customer interface being at retail level with the service provider, not the network or access operator. We note that BT's undertakings do not cover the responsibilities of BT to the customer and this suggests that the customer interest is in danger of being overlooked. Business

customers, including SMEs, need to know what preparatory and precautionary measures they should be taking now, ahead of events.

It is suggested (admittedly based on limited information) that if special arrangements are to be put in place for the establishment and support of networks and systems in the national security space, these might be extended to include all critical telecoms infrastructure, including safety-critical systems used within the Utilities.

Audit and Independence

In the interests of enduring competition, and thus the consumer, it will be essential to ensure that the equivalence targets are measurable, time-bound and will be monitored in detail and the results published. In particular, if equivalence is to work BT's cost allocations must be comprehensible, transparent, and subject to regulatory challenge.

Sections 5.9 and 5.10 of the consultation (asymmetry of information and difficulties of detection and proof) justify Ofcom's preference for accepting the undertakings rather than invoking the Competition Act. However, those same reasons might be adduced as illustrations of future difficulties in coping with the volume of detailed negotiation and policing work that will be required for a successful outcome.

For those reasons we welcome the creation of the Equivalence Access Board. However, we harbour serious concerns that it can be as independent as is being claimed. It will be set up as a formal sub-committee of the BT Board, its members will be responsible to the BT Board and they will be paid by BT. While we would not wish to doubt the integrity of the appointed independent directors, they will carry a fiduciary duty to BT. The office supporting the work of the EAB will be funded by BT. This is not "independence". The Minutes of the EAB will be provided to Ofcom, but there is no formal requirement for Board Minutes to reflect nuances of debate – only the decisions reached. At very least there must be an Ofcom "observer" present at each meeting of the EAB – at the Board but not of the Board.

Withdrawal from Regulation

The consultation focuses on BT's proposed undertakings and we assume that a future document will reaffirm Ofcom's commitments to BT in return, including a pledge to roll back regulation downstream.

Ofcom's unequivocal commitment to the withdrawal of regulation once certain conditions have been met has caused some alarm among CMA members. It is important that Ofcom should state clearly that regulation for fair competition and regulation for consumer protection are qualitatively different, and that rollback of the first does not imply any weakening of the second. Inadequate 'ex ante' rules will delay the benefits of competition, foreclose markets and deter competitors, while too much regulation might falsely direct investment, constrain market activities of players and distort the market unnecessarily.

That leads to a strong recommendation, regardless of the complexities of market analysis required under the Framework Directive, that any withdrawal of regulation should be reversible. In particular, it must be made clear that any forbearance by Ofcom is to be conditional upon BT's continuing to apply equivalence in practice and that Ofcom will not hesitate to re-apply 'ex-ante' regulation and to apply appropriate sanctions if BT's behaviour in practice falls short of genuine equivalence.

CMA asks that the 'triggers' and procedures for forbearance should be laid down explicitly and applied in a transparent and judicious way by Ofcom.

Flexible Regulation

Ofcom has suggested it might develop varying regulatory solutions for different products and, where appropriate, different geographies. We see this in the context of bundled services for business users and CMA has recently completed a survey of its membership on this issue. The report on the findings contains this summary:

“In terms of deregulation of BT, the views held by the CMA members were similar irrespective of organisation size, turnover, activity and respondent’s job titles.

There was general agreement regarding the following statements:

- “greater flexibility to negotiate with BT on prices for inland calls, exchange lines and low bandwidth leased lines, would lead to increased **price competition** (69% of respondents agree or strongly agree) and **service competition** (65% agree or strongly agree)”
- However, regarding deregulation, there was no clear agreement or disagreement to the following statements. It would:
 - “give BT an unfair competitive advantage”
 - “have no effect on the company’s purchasing”
- Furthermore, there is some indication that respondents from rural locations, 21% of the sample, were more likely to be concerned about the effects of deregulation since there is less competition in those areas. A greater proportion of organisations based in rural areas also disagreed with the statement: “BT is unfairly disadvantaged”.
- To conclude, respondents are in favour of BT being allowed to offer bespoke prices in areas where there is significant competition (83% of the respondents agree or strongly agree) but believe BT should continue to be regulated in areas where there is no other competition (82% agree or strongly agree)”.

Any implementation of this approach will be a non-trivial matter and before Ofcom initiates any move towards geographically variable regulation we hope that important, associated issues such as the impact on businesses in rural areas and geographic averaging of prices will be thoroughly explored.

Fixed-Mobile Convergence

The recent launch of BT’s Fusion phone (uncertain as the concept might be in the Skype era) highlights a need to ensure that any strategic alliance between major fixed and mobile players can be provided for within the existing regulatory framework. We are concerned that Ofcom continues to focus on BT and the markets for fixed network services. We have consistently complained over many years that the mobile market does not behave as a user would expect from a truly competitive market. This is an area that we believe requires regulatory intervention from Ofcom and the Commission, particularly in relation to international roaming charges, call termination costs, and lack of transparency of tariffs.

BT Retail Pricing Transparency

It is acknowledged that even after equivalence becomes effective BT Retail will still be the biggest, and probably the dominant, provider of services to all market segments at the retail level. To facilitate pricing transparency, it is proposed that BT Retail be required to advise its business customers annually or biannually, on a specific not general basis, drawing attention to how much would be saved by moving to the latest pricing package, assuming the call profiles of the previous 1 or 2 years. Such proposals have some similarities with those used in the financial services sector eg: endowment policy pay outs, and with those used by some mobile providers.

Footnote - CMA's Internal Consultation Process on Regulatory Issues

Any consultation document (condoc) received by or notified to CMA is analysed initially by the appropriate Forum Leader for its relevance to business users based in the UK. (The majority of CMA's members are based in this country, with a third of them having responsibility for their employers' international networks and systems).

If the document is considered to be relevant to CMA, it is passed, with initial comments, to members of both the appropriate Forum and the 20 or so members of CMA's "Regulatory College" – ie: those members who have experience in regulatory issues, either with their current employer, or previously with a supplier. The CMA Chairman and CEO are also members of the College. The detailed comments from the College are collated by the Forum Leader in the form of a draft response to the condoc. Note: if the condoc has significant international import, the views of the international user community are likely to be sought. This is done through the International Telecoms User Group (INTUG).

The draft response is sent to all 1500+ user members of the Association, with a request for comment. Comments received are used to modify the initial draft. The final version is cleared with members of the appropriate Forum and Regulatory College (and, if the subject of the consultation is sufficiently weighty, with the CMA Board).

The cleared response is sent by the CMA Secretariat to the originating authority. It might be signed off by the Leader of CMA's Regulatory Forum, and/or by the CMA Chief Executive and Chairman.