Notice under Section 155(1) of the Enterprise Act 2002

Ofcom consultation on undertakings offered by British Telecommunications plc in lieu of a reference under Part 4 of the Enterprise Act 2002

Comments by The Carphone Warehouse Group PLC

12 August 2005

Don't trust the person who has broken faith once."
William Shakespeare, 1564-1616

1. Introduction

We welcome the opportunity to comment on the undertakings offered by BT in lieu of a reference under Part 4 of the Enterprise Act 2002 ("**Draft Undertakings**").

We agree that effective competition remains the best means to deliver benefits to businesses and consumers in relation to telecommunications services. Despite over 20 years of telecommunications liberalisation and regulation, BT retains dominant control over key access and backhaul network components which alternative providers require as inputs in order to compete on fair terms in the UK. There is little doubt in our mind that a new and fresh approach to regulation is urgently needed to provide new impetus to the competitive process in this country.

We note that Ofcom considers that the undertakings are:

> "*appropriate and proportionate to address the competition concerns and the detrimental effect on customers which it has identified*."

Ofcom has asked for comments and representations as to the effectiveness of the undertakings. We understand this to mean that Ofcom is looking for comments as to whether we believe that the undertakings would provide a sufficiently effective remedy to resolve the identified competition problems in the telecommunications markets concerned.

Our analysis of the draft undertakings has concluded that it is not possible to provide a straightforward yes-or-no answer to the question whether we believe that Ofcom should accept or decline the undertakings. We believe that the undertakings suffer from significant deficiencies that may well render them inappropriate in relation to the objective Ofcom is seeking to achieve.

It is also necessary to view the undertakings in the context of the overall outcome of the Strategic Review since there are several other strands to the new regulatory regime. For instance, there is a host of deregulatory measures that Ofcom intends to take, notably in the voice markets, in parallel with the implementation of the Draft Undertakings. We do not believe that the Draft Undertakings can be considered in isolation from those other measures.

This is main document of our submission which sets out our general views on the Draft Undertakings. Annexed to the submission is a more detailed provision-by-provision analysis of the Draft Undertakings.

2. The need for urgent regulatory reform

The Draft Undertakings mark the final phase of the Strategic Review. We believe that it is useful at this stage to remind ourselves of the competition problems that Ofcom originally identified at the second phase of its review and what BT is now proposing to remedy those problems.

Ofcom noted in its Phase 2 consultation document:

> *"[t]he fixed line market […] remains fragmented. In terms of revenues, market capitalisation and investment, BT Group plc remains larger than most of its competitors put together. […] There is little appetite for new investment to compete with BT Group plc at the local access level, and in some areas even in backhaul from the Local Exchange to the core network. This is a challenge."*[1]

We generally agree with this conclusion. However, we do not believe that it accurately reflects the sense of urgency among BT competitors that Ofcom swiftly adopts and implements a strong regulatory framework to encourage and protect efficient investment in the market. For this reason, we are very concerned that the Draft Undertakings would not lead to the required changes being enjoyed in the market swiftly enough.

We have made a significant investment in entering the CPS and WLR market with some remarkable results to date. In March 2005 our residential telephony brand TalkTalk had acquired over 900,000 CPS customers in just over two years from its initial launch. We have recently launched a residential line rental product and expect to see a similar take-up for this service. TalkTalk prides itself on providing excellent customer service and on being a genuinely cheaper and better alternative to BT.

There is a sense that the market is at a critical point at which quick and determined action by the regulator is needed to ensure that the competitive process does not slow down or even stall. Failure by the regulator to take such action would mean that the climate for telecommunications investment would rapidly deteriorate. From our company's commercial perspective, the WLR (and LLU) markets need to see material change in BT's behaviour in the immediate future, and not in two or more years' time.

By way of illustration of our concerns, it is not sufficient in our mind for BT to offer input equivalence for WLR only in two years time (or possibly, without any guarantees, by the end of 2006). We do not believe that BT has put forward a credible case as to why input equivalence could not be implemented sooner. We remain

[1] Ofcom Telecommunications Strategic Review, Phase 2 Consultation Document, p. 5.

concerned that BT has not made sufficient efforts to prove that the timescales could not be improved. We believe that input equivalence once implemented will have significant benefits for competition and that any delay can only serve to harm consumer welfare.

By the same token, BT has a strong incentive to delay input equivalence as much as possible and we are concerned that the timeframes set out in the Draft Undertakings regretfully reflect the fact that Ofcom has failed to extract the necessary concessions from BT in this and other critical areas. In short, this time frame plays neatly into BT's hands in that there is a real danger that customer inertia becomes very prevalent during such two-year period.

It is worth elaborating on our concerns by using as an illustration the manner in which BT has delivered the WLR product to date (we believe a similar example could be made with the LLU market). Ofcom published their final determination on 11 March 2003 requiring BT to offer WLR to a reasonably clear product specification. BT and industry subsequently went through a tortuous year of product development discussions that resulted in BT's launch of the first version of WLR on 29 March 2004, over a year after the Ofcom determination. Amazingly, there are already concerns in the market that BT's WLR ordering gateway will actually hit its capacity ceiling in the near future with no obvious plan from BT to resolve this issue.

It is important also to remember the commercial aspects of WLR. Despite repeated requests from prospective residential WLR operators, Ofcom in our view chose to ignore during product launch the fact that BT Retail was selling its line rental below the wholesale price. It was only much later through the Strategic Review that Ofcom finally acknowledged that:

> *"a significant margin increase for the service provider is required for WLR to be a viable commercial proposition, and would prefer to see this delivered through a reduction in wholesale charges than an increase in retail charges[…].*"[2]

Put simply, we strongly believe that BT has got away with too much already with regard to the WLR product. BT knows very well that WLR is of significant strategic importance as it severs the final link between BT and its incumbent customer base. In an already shrinking voice market, this is a real commercial threat to BT's traditional revenue base, which they will go to any length to protect. What is more, in the current regulatory climate, BT knows that the best protection is to delay the inevitable liberalisation of this market.

Against the above background, we genuinely find it hard to accept the Draft Undertakings when considered in parallel with Ofcom's proposed agenda for deregulation of the voice markets. As observed above, BT would only implement

[2] Ofcom Strategic Review of Telecommunications, Phase 2 consultation document, Policy Annexes (F-L), p.38.

input equivalence for WLR in June 2007 (or possibly by December 2006 but there is no guarantee). Simultaneously, Ofcom has already commenced their fit-for-purpose assessment of WLR and our distinct impression is that Ofcom considers it almost self-evident that WLR would be awarded fit-for-purpose status by the end of 2005. This means that BT would benefit from full deregulation in the retail markets concerned as early as January 2006, a whole year ahead of the earliest date by which input equivalence for WLR might happen.

When January 2006 arrives, there is no doubt in our mind that there will still be a substantial residential CPS customer base in the market for which CPS operators will have no protection against BT tariff rebalancing (we believe it is fair to largely discount slow Competition Act investigations as a suitable remedy in this context). In summary BT has seemingly been able to negotiate a potential deal with Ofcom which gives it another year and a half's worth of delay during whichit will be able to earn supernormal profits as a dominant operator.

The delay in introducing effective competition in this market should be contrasted with the following Ofcom statement from an earlier point in the Strategic Review process:

> *"We are at a critical point. There is a genuine opportunity for players in this market, BT Group plc in particular, both to make progress and to benefit the consumer. But market structure and technology development make it a time-limited opportunity. The response of the key players in the market in the coming months will determine whether the sector generally can take advantage of this opportunity, for the benefit of consumers and citizens, and the UK as a whole."*[3]

We can only conclude that the sense of urgency to reform the regulatory framework which Ofcom optimistically expressed earlier in this process has not been reflected in the Draft Undertakings . This is highly disappointing and does put into question Ofcom's intention and ability to create a truly competitive telecommunications market.

3. Input equivalence

We believe that the concept of input equivalence on key wholesale products from BT is fundamental to the success of the new regulatory regime envisaged by the Draft Undertakings. We largely agree with the scope of products which would be subject to input equivalence. However the timescales for the introduction of input equivalence are too extended to adequately support a favourable investment climate in the telecommunications sector and to provide sufficient comfort to BT competitors in the short term.

[3] Ofcom Strategic Review of Telecommunications, Phase 2 consultation document, p. 6.

4. Access Services Division

We welcome the creation of the Access Services Division (ASD) to manage and sell a host of key wholesale products, in particular LLU and WLR. We have always maintained that it would not be consistent with the current market environment for the ASD to deliver simply LLU products.

Our main concerns around the creation of the ASD is whether the Chinese Wall safeguards put in place will be sufficient to give competitors the necessary degree of comfort that the ASD would be operating in a truly non-discriminatory fashion. Ultimately we believe our concerns would always remain as long as the ASD remains a business division within BT.

5. Equality of Access Board:

The Equality of Access Board is a useful tool to monitor BT's compliance with the undertakings. Again, however, we have concerns around the effectiveness of this body. It strikes us that the EAB does not have any real teeth when it discovers a breach of the undertakings (or even at an earlier stage when it might have concerns that an undertaking might be breached in the future). The EAB would not be able to prevent the BT business from making decisions in the first place that would potentially frustrate or breach the undertakings. This is a major shortcoming.

6. Next generation networks

The transition to next generation networks in the UK will pose significant challenges for all Communications Providers. As the operator of a network with identified enduring bottlenecks, it is expected that BT's next generation network will inherit and display similar bottlenecks as well as create further bottlenecks in the future. For this reason, it is essential that BT make specific undertakings to guarantee equivalent access to other Communications Providers and otherwise treats Communications Providers in a fair manner.

We believe that the Draft Undertakings relating to BT's next generation networks seek to express the correct principles that should apply in order to achieve this objective. However, we believe that the Draft Undertakings are poorly drafted and do not offer the necessary degree of comfort and certainty to other Communications Providers that BT will behave in the intended and promised manner. We set out proposed drafting changes in the Annex to overcome this problem.

7. Enforcement

A critical component of the Draft Undertakings is the means by which they can be enforced against BT. We understand there are three routes to enforcement:

(i) Ofcom could initiate an investigation against BT and adopt a decision that BT has been found in breach of one or more undertakings;

(ii) Ofcom could apply to the High Court for a ruling that BT is in breach of one or more undertakings; or

(iii) A competitor could apply for the High Court to award damages for the financial loss it has suffered as a result of BT being in breach of one or more undertakings.

We agree that this arsenal of enforcement tools is more extensive than that available for enforcing existing SMP obligations applicable to BT.We appreciate that it will be within Ofcom's discretion on a case-by-case basis to determine whether to enforce an undertaking through the first or second route.

One may of course envisage a delineation in principle that relatively minor breaches would be dealt with by Ofcom alone whereas Ofcom would seek to take BT to court in case of a more serious breach. However we believe that Ofcom must exercise extreme caution in making this decision. It is not obvious to us that the High Court would be best placed to determine whether BT has breached a particular undertaking given that the Draft Undertakings would have been given within the context of a significant shift in Ofcom regulatory policy and hence must be interpreted within this context.

It is also very likely that a court procedure would be far less transparent and more costly to third parties than Ofcom's own tried-and-tested consultation procedure. Finally it appears to us that a court procedure might in more complex cases take longer than an Ofcom investigation which would risk causing further harm to competition.

8. Compliance incentives on BT

The Draft Undertakings set out an extensive list of changes that BT would be required to make in terms of organisation and product delivery. Taken together, these changes would be implemented over the next five years. We are concerned that BT will find ways of delaying or otherwise frustrating the proper implementation of the undertakings.

As described above, Ofcom will surely be aware that competitors have had a pretty poor experience from BT's ability to deliver products on time and in a required format. As mentioned above it is sufficient here to refer to the problems surrounding BT's delivery of WLR which over two years after Ofcom's final determination, is still subject to significant product development necessitated by proven shortcomings.

We appreciate that Ofcom has sought to construct the enforcement regime to be as effective as possible. Nevertheless, we find that BT should be able to back up the

Draft Undertakings even further by committing to a regime of automatic penalties for failure to comply with individual undertakings. We believe that Draft Undertaking 3.2 is a good example of this according to which BT undertakes to compensate WLR and LLU providers where they fail to meet certain stricter deadlines for input equivalence. This principle of automatic penalties should be applied more widely across all Draft Undertakings. By way of example there should be automatic penalties on BT if they fail to set up the ASD on time or implement input equivalence according to the timescales.

In the absence of automatic penalties, we believe that there will always be an incentive on BT to take calculated cost-benefit risks by weighing the cost of non-compliance against the commercial or financial benefit of delay. Even in the case of an Ofcom investigation into non-compliance we believe that a first line of argument from BT would be that the delay would not have any real impact on competition and that Ofcom therefore does not need to find against BT and certainly not impose a fine. On the contrary, the principle must be that any breach of an undertaking must be considered serious and warrant an automatic penalty on BT. Only in those circumstances can competitors be absolutely sure that BT does intend to comply with its regulatory obligations.

In addition to automatic penalties, it seems to us that competitors will be faced with a knowledge vacuum in terms of when BT considers that it has complied with a particular undertaking. For instance, it is not immediately clear to us how competitors would be able to know that BT considers it has created two separate product management organisations within BT Wholesale (refer to Draft Undertaking 6.1). For this reason, there should be a specific reporting obligation on BT according to which BT would have to notify Ofcom and competitors when it considers to have met an obligation set out in a specific undertaking. The precise details of such reporting obligation would obviously have to be tailored to be consistent with the contents of individual undertakings. In addition BT should be required to state the reasons why it considers it has met the obligations in a particular undertaking.

9. Conclusion

We have concluded that the Draft Undertakings suffer from a series of significant shortcomings:

- The timeframe for implementing input equivalence on key wholesale products is too lengthy and offers no comfort in the short term to operators and investors in the telecommunications sector.

- There are also uncertainties around the organisational safeguards around the Access Services Division and we are concerned that the Equality of Access Board will have no real teeth to underpin its compliance work.

- We strongly doubt that the Draft Undertakings would be able to stimulate and facilitate effective competition in declining voice markets where margins are coming under increasing pressure from BT's aggressive pricing policies. The Draft Undertakings do not paint an attractive investment picture for new entrants.

- The actual wording of the Draft Undertakings is unclear and ambiguous in several places and we are not convinced that Ofcom as a result would be able to "pin down" BT to specific obligations in all instances.

- We are concerned that Ofcom will not be able to adequately enforce the Draft Undertakings. Absent automatic penalties for failure to comply, there will always be an incentive on BT to find ways of delaying the implementation of the Draft Undertakings.

Given the above concerns with the Draft Undertakings, we are frustrated by the way in which they have been presented to industry. We do not accept that this is a take-it-or-leave-it offer and that if we do not like the Draft Undertakings, the only other option is to encourage Ofcom to refer BT to the Competition Commission. In our previous submissions in the context of the Strategic Review, we have already set out our view that a referral is unlikely to be a preferable option for various practical reasons.

Our position with regard to the Draft Undertakings is therefore that they require significant amendment to provide an effective remedy to the identified competition problems in the UK telecommunications market. Accepting the Draft Undertakings as they stand would not achieve Ofcom's objectives with regard to the Strategic Review. BT should consequently be required to improve the Draft Undertakings in the areas we have identified in this submission before Ofcom accepts them.

ANNEX

Detailed comments on the Draft Undertakings

Definitions and interpretation

We believe that the definition of Equivalence of Input needs to be tightened to ensure that it achieves its objective. There can be no justification for any differences whatsoever between the way in which BT offers a product to which Equivalence of Input applies, to its downstream divisions and other Communications Providers. Our amended definition seeks to achieve greater clarity in this respect:

> "Equivalence of Inputs" means, in relation to any product or service to which Equivalence of Inputs may be applicable pursuant to these Undertakings, that BT provides such product or service to all Communications Providers (including BT) on the identical timescales, terms and conditions (including price, methods of payments and service level guarantees) by means of the identical systems and processes, and that BT provides simultaneously to all Communications Providers (including BT) the identical Commercial Information about such products, services, systems and processes. In particular, BT shall use for its downstream products the identical (and no other) systems (including interfaces into such systems) and processes as other Communications Providers and with the identical (and no better) degree of reliability and performance as experienced by other Communications Providers.

Provision of equivalent products and services

3.1 As explained in our submission, we believe the timescales for implementing input equivalence are unacceptably long, in particular for WLR and LLU. An overall radical improvement of these timescales is vital.

3.2 As explained in our submission, this compensation principle (although not based on BT's good faith) should be extended to apply generally across several of the Draft Undertakings, in particular the timescales for input equivalence, to ensure that BT has strong incentives to meet the relevant deadlines.

3.4 BT should be required to incorporate the work on providing access to the postcode address file used by BT into the CPS/WLR development plan with due technical change notice of how Communications Providers should access and use the file. In addition, BT should guarantee that if CPS and WLR orders use the postcode in the BT postcode file, the rejection rate should be no less than 99.9% with a suitable service level guarantee for failure to meet such target.

3.5 The wording of this Draft Undertaking ("improved", "better and faster") is really too vague to give adequate reassurance to other Communications Providers. BT should guarantee (without exception) access of equivalent level to that enjoyed by BT's downstream divisions.

3.6 We do not understand the reason for the caveat "where that customer is not already a BT customer for any other retail service". The caveat should at least be restricted to "any other voice retail service" to the exclusion of other products and services, such as broadband.

3.7 We are concerned about the restriction that the Draft Undertaking would only apply "[t]o the extent that the migration processes are either internal to BT or are otherwise within BT's control, [...]. For instance would this cover a migration of a broadband customer from one LLU operator to another LLU operator? The Draft Undertaking should make clear that it covers any migration process which involves a BT product to which input equivalence applies.

In addition there should an obligation on BT to ensure that communications providers do not incur any costs from moving from existing products to corresponding Equivalence of Inputs products.

3.8 We would argue that BT is not able to require that Ofcom only imposes "reasonable and practicable" targets. This would bind Ofcom to do something and cannot therefore be the subject of a BT undertaking. Ofcom has an overriding statutory duty to act in a proportionate manner which would also apply to its responsibility to supervise BT's compliance with the Draft Undertakings

Transparency

4.1 This is a very vague requirement on BT and does not go far enough to ensure any level of equivalence of outcomes for these wholesale products. Specifically with regard to section 4.1.1, communications providers should at least be able to "quantify in economic terms" the difference between BT wholesale and retail products. BT should also undertake to work with Communications Providers with a view to identifying where these wholesale products fall short in terms of equivalence of outcomes and to ensure that equivalence of outcomes is achieved within 6 months after the entry into force of the Draft Undertakings.

Access Services

5.3 This Draft Undertaking should additionally state that the ASD should exercise full ownership and control over the relevant wholesale products without the influence of any other division of BT.

5.5 The Draft Undertaking should clarify what is meant by "a request" from a Communications Provider. Does this mean a formal statement of requirement from a communications provider? The Draft Undertaking should also give a target timescale within which the ASD has to offer the product following such request.

5.7 For the sake of clarity, does this Draft Undertaking cover both geographic and non-geographic fixed line numbers?

5.9 There should a requirement on the ASD to follow the same SoR process as BTW currently does in SMP markets. Also the ASD should be required to treat BT and other communications providers in a non-discriminatory fashion.

5.18 Does this mean that BT would move out the relevant staff and other relevant resources from the ASD if the product no longer has SMP status?

5.23 The EAO should also be notified why it was considered appropriate for the ASD CEO to attend the BT Group Operating Committee meeting in question. The ASD CEO should have full voting rights at any meeting they attend in relation to matters affecting the operation of the ASD.

5.24 The terms of reference should be published.

5.25 What exactly does "shared with the EAB" mean? The Draft Undertaking should make clear that the EAB should have full visibility of the operating plan and have a right to ask questions and obtain adequate answers to questions regarding the plan.

5.26 Any curtailing of the £75 million capital expenditure ceiling would have a detrimental impact on the ASD's ability to act in an independent fashion. BT Group should be required to show strong business reasons why this ceiling should be lowered and if so why BT considers that it would not have a detrimental impact on the ASD's business.

5.27 The fact that the "charges will be calculated on the same basis", does this mean that any differences prior to input equivalence would also show? The Draft Undertaking should clarify that <u>all</u> charges would be calculated in this manner.

5.29.2 The reconciliation should be published.

5.32 There should be a separate undertaking to stipulate minimum gardening leave periods for staff that may move between BT divisions, including the ASD.

5.33 There is an obvious risk that some people working for the ASD will for some reason remain with share options under the existing BT Group plan. The ASD

should therefore provide some kind of progress update to Ofcom regarding the success ratio for converting the ASD people to the new plans.

5.35.2 Commercial Information is defined as information of a commercially confidential nature. It seems to us that this definition rhymes poorly with this Draft Undertaking that talks about information that would be provided to communications providers in the ordinary course of business.

5.36.4 The Draft Undertaking should also state that the dedicated training should be provided on a continuous basis with refresher training at regular intervals.

5.38 In light of Ofcom's current consultation on the non-discrimination guidelines, the explicit separation of "non-discrimination" and "not undue discrimination" is perplexing. The Draft Undertaking should explicitly state that all SoRs relating to input equivalence products would be treated in equivalent manner.

5.39.1 Does this Draft Undertaking refer to new OSS designed specifically for ASD? If so it should also that that the OSS should be implemented in the same manner. Also, what does the "principle of separation" mean? These issues must be defined or clarified in the Draft Undertaking.

5.40 This Draft Undertaking does not seem to give any reassurance that BT downstream divisions would never have access to commercial or customer information relating to another communications provider. Actually the no undue discrimination requirement seems to imply that BT downstream divisions might in some instances have access to this information as long as it does not have any material effect on competition.

5.41 Why is the word "generally" used in this Draft Undertaking when there is a seemingly exhaustive list of exemptions already? What other exemptions are envisaged?

5.42 Ofcom should be consulted on the brand BT intends to adopt for the ASD.

Management and structure of BT Wholesale

6.1.2 Given that IPStream will be provided on an input equivalence basis and thereby in many important aspects be treated as an SMP product, it would seem much more logical to place the product in BTWS for which the BTW internal Chinese Walls are higher and thicker.

6.4 What would happen in practice if BT and Ofcom cannot agree to add a new product to BTS? Where would that product be managed within BTW? The Draft Undertaking must be clear on this point.

6.4.2 What is the significance of the word "generally"? We would find it peculiar if BT could circumvent this Draft Undertaking through such a straightforward loophole.

6.4.2(b) How would the assessment of whether there is "reasonable demand" be made and by whom? We would argue that BT would have to agree with Ofcom on a case-by-case basis whether this requirement has been met.

6.5 There should be some wording in this Draft Undertaking around the need to ensure that BTWS and BTS people are not hindered in their work by undue capital expenditure restrictions.

6.8 Please refer to our comments above regarding Draft Undertaking 5.34.

6.9 Ofcom should publish the fact that consent has been given.

6.11 The term "material competitive disadvantage" will obviously always contain an element of discretion. Is it intentional to use this phrase here rather than "undue discrimination"? Either way, the terms should be defined or clarified in the context they are being used.

6.12 It seems to us that there will always be a need to prioritise capital expenditure in any commercial organisation. BT would therefore be required to develop some guidelines, which Ofcom should see and approve, and show how they have complied with them over a specific period of time. Also, what happens if there are products which do not fall in any of the specified divisions (seemingly a result of the wording of Draft Undertaking 6.4)?

6.13 This Draft Undertaking seems to suggest that BTR people can currently access BTW customer information. We thought this was not the case and would be very concerned if it was true(!). In any event, we would like to understand how this provision relates to Draft Undertaking 5.40. Why is BT able to give a specific timeframe in Draft Undertaking 5.40 but not in Draft Undertaking 6.13?

6.14 With regard to the "relevant external advisers, sub-contractors and agents" – will these always be people external to BT? If so, this should be clarified. If not, these persons must also work within the BT areas or functions listed in Annex 2.

6.15 What happens to the product if it is not added to the BTS? According to Draft Undertaking 6.1.1, it should no longer be product managed from BTWS.

6.16.1 How would the members of the Communications Provider Property Users Group be appointed?

How would a communications provider know what type of equipment breaches BT's agreement with Crown Castle as per Annex 4?

6.19 BT should be required to act in a non-discriminatory fashion with regard to all interested communications providers when negotiating exchange space.

6.23 How could a communications provider agree to indemnify BT without reviewing the agreement with Telereal? This issue needs to be clarified.

Contract management mechanism

7.1 The wording is not very clear. What provisions would the contract management mechanism deal (or not deal) with? This should be clarified in the Draft Undertaking.

Separation of upstream and downstream businesses

8.1.1 This provision should require that no functions of the downstream divisions are in a position to influence, not just the "sales functions."

8.4 We presume that there would be two logical separations: one between the ASD and BT upstream divisions and another one between BT upstream and downstream divisions. The Draft Undertaking should make this absolutely clear.

8.5 With regard to the exception for information or provision of expert advice: how will BT ensure that such information exchange does not result in a BTWS/BTS commercial policy that favours BT downstream divisions over other Communications Providers?

Code of practice

9.2 There should be individual codes of practice for the different divisions given that the content of the codes ought to differ between them.

9.3 What happens if the unions have objections to disciplinary offences being introduced to ensure compliance with the code of practice? BT should have an obligation in such cases to consult with Ofcom as to how to achieve the same objective but possibly through other measures.

9.5 Communications providers have very little confidence in the ability of BT's existing compliance programme, including compliance training. It is therefore difficult to see how this provision would make any difference in this context. What is needed is a radical overhaul of BT's compliance programme and should be one of the stated priorities of the Equality of Access Board.

The establishment of an Equality of Access Board

10.1 We fail to see how an employee or former employee of BT would ever fail to have a material conflict of interest if considered for EAB membership. Appointing any such person would put into question the credibility of the EAB, the appointment process and indeed the Draft Undertakings taken together. The Draft Undertaking should make it clear that a BT employee or former employee could never become an independent EAB member.

10.11.6 The EAB should have an obligation to carry out a regular programme to monitor BT's compliance with the Draft Undertakings. This programme should ensure that all undertakings are regularly reviewed and how BT is complying with them.

10.22.2 The EAO must also inform the communications provider of the outcome of the complaint investigation.

10.24 The EAO should have its own lawyer or legal department and should not need to rely on the office of BT's Company Secretary, except for in exceptional circumstances.

10.31 Why does BT want to use the term "reasonable endeavours" here? It is our understanding that BT's regulatory accounts auditors have already accepted such duty so there should not be any major problem extending this requirement to EAB's auditors.

10.32 Why is this general exclusion hidden away here in the Draft Undertakings? In any event, it would be necessary to define the term "confidential information" so that the Draft Undertaking does not clash with information that BT may be required to publish elsewhere in the Draft Undertakings.

10.36 The replacement must be subject to the criteria laid down in 10.2.

10.37 There should be a specific obligation on BT to accept reasonable changes proposed by Ofcom to improve the operation of the EAB following the identification of proven shortcomings.

Next Generation Networks

11.2 We do not understand the purpose of this Draft Undertaking. It is Ofcom's role and not BT's, to determine appropriate conditions of access to BT's next generation network in accordance with the Framework and Access Directives. This Draft Undertaking can never influence that process and should therefore be deleted.

11.3 We support what we believe this Draft Undertaking seeks to achieve namely that BT should not design its NGN network so as to prevent Network Access.

However the wording of the Draft Undertaking is ambiguous. The wording suggests that BT would first take a view as to whether it thought that a particular network design would prevent Network Access provision. Only if it thought that was the case would it consult with other Communications Providers. We would suggest this is the wrong way around. On the contrary, BT should always consult with Communications Providers on any network design to ensure that the outcome of such consultations did not suggest that a particular network design would not prevent the provision of Network Access. We are not convinced that Draft Undertaking 11.4.2 achieves the same objective which only says that Draft Undertaking 11.3 does not apply at all when BT consulted with industry and Ofcom.

Furthermore, we are concerned that during negotiations over a specific form of Network Access, BT would be able to implement design decision which in its own view would not prejudice the outcome of the negotiations. BT should at least be required to explain to the negotiating Communications Providers that it has taken particular design decisions and why it considers that those design decisions do not prejudice the outcome of the negotiations.

11.4.3 We do not see how Ofcom could accept this Draft Undertaking which effectively fetters its discretion by requiring it to initiate regulatory action within two months of receiving notice from BT. It is entirely within Ofcom's discretion when it initiates an investigation and we are very concerned that this Draft Undertaking would effectively prevent Ofcom from investigating BT's refusal to provide a particular form of Network Access at a later stage. Ofcom must retain this power.

11.5 It should be clarified that the application of this principle may mean that BT might actually incur a loss if the implemented network design is sub-optimal.

11.5.2 We do not understand the purpose of this provision. If Ofcom has already determined that charges for Network Access should be on a cost-orientated basis, we do not see how BT could subsequently make an assessment that there is no demand for the particular form of Network Access. For example, if Ofcom has concluded that BT should offer WLR on NGN as a form of Network Access, why should competitors then have to go through negotiations with BT to prove that a demand exists for that product?

11.5.3 Please refer to our comments above regarding Draft Undertaking 11.4.3.

11.8.2(b) We do not believe that Ofcom specifies as a result of market reviews that some kinds of SMP are of an "enduring nature". We believe this Draft Undertaking should therefore be deleted since it is meaningless.

11.9 The term "reasonably practicable" is very vague and gives BT far too much leeway to categorise particular network design issues as preventing the provision of Equivalence of Inputs. The exception should be restricted to

"exceptional technical circumstances" which prevents BT from providing Network Access on an Equivalence of Inputs basis.

11.10 The Draft Undertaking should clarify that the Network Access provided to other Communications Providers should enable them to provide competing products or services with equivalent functionality. Similarly, the second sentence of the Draft Undertaking should make clear that the charging regime and functionality should be equivalent.

11.11.2(b) Please refer to our comments above regarding Draft Undertaking 11.8.2(b).

11.10 BT should be required to use its best endeavours to ensure that a multilateral industry group is set up. Otherwise there is an obvious risk that such a group will never materialise.

Furthermore, the Draft Undertaking states that BT agrees that the group "may" have authority to do a specified number of things. The word "may" should be replaced by "will" to guarantee the remit of the industry group.

11.13 We are concerned that there is a discrepancy between this Draft Undertaking and Draft Undertaking 11.3. The latter provision does not refer to any requirement based on material delay.

11.18 Regarding point (a), we do not understand why the fact that changes have been agreed by industry would negate the need for BT to compensate Communications Providers. If that were the case, the industry would surely not agree to any changes whatsoever. If the intention is to ensure that BT can refer to an industry agreement merely as a factor that would mitigate BT's liability to compensate Communications Providers, we believe that the Draft Undertaking should make this fact clear.

Regarding point (b), we do not understand the relevance of the principle of distribution of benefits. It seems to us that BT could use this principle unduly widely and effectively say that all End-Users will benefit overall from the transition to NGN and hence compensation to individual Communications Providers should be limited or non-existent.

The Draft Undertaking should also specifically require BT to compensate Communications Providers for management time and disruption caused by the migration to BT's NGN.

11.19 The term "material competitive disadvantage" is very unclear and leaves too big a scope for interpretation for BT. The advantage of broadband dialtone was presented by BT to the industry as a means by which End-Users could order broadband online from a selection of providers and that the broadband facility could be switched on almost instantaneously. In a growing broadband

market, it seems to us that a failure by BT to provide an equivalent facility to LLU operators would automatically have a detrimental impact on competition.

11.20 We are unclear as how this Draft Undertaking aligns with those other Draft Undertakings specifically designed to prevent inappropriate information flows within the BT organisation. For instance, Draft Undertaking 5.35 refers to information flows between the ASD and the rest of BT. It would be necessary in our mind to specifically state in Draft Undertaking 11.20 that the guarantee of free flow of information in the context of the development and deployment of BT's NGN can never take precedence in case of conflict with other Draft Undertakings.

Information requests

12.1 This Draft Undertaking strikes us as being odd. Ofcom has a statutory obligation to always act in a proportionate manner. It can never be up to BT to assess whether a particular request for information from Ofcom is proportionate or offers a reasonable period of time to respond. Any concerns that BT might have would have to be raised with Ofcom (or appealed if necessary) in accordance with normal legal procedures. This Draft Undertaking should therefore be deleted since Ofcom will have sufficient powers anyway under the Communications Act 2003 to issue suitable information requests to any Communications Provider, including BT.

Co-operation

13.1 The term "reckless" has in our view a limited legal meaning and should be replaced by "negligent".

Directions

14.1 Any timescales set out in this Draft Undertaking can never fetter Ofcom's discretion in carrying out investigations and issuing any directions against BT as it deems necessary. BT cannot bind Ofcom to specific timescales through the offering of undertakings. The timescales should therefore be deleted from this Draft Undertaking.

Breach of these Undertakings

15.2 BT cannot request that Ofcom fetters its discretion by committing to respond within a reasonable period of time. This is a statutory duty on Ofcom any way under general principles of administrative law. This Draft Undertaking should therefore be deleted.

Expiry and termination

18.4 This Draft Undertaking should clarify that there is no obligation on Ofcom to initiate any review as a result of BT representations.