

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

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

To (Ofcom contact): Mr Dougal Scott

Name of respondent: IDT Global Limited

Representing (self or organisation/s): self and IDT Direct Ltd t/a "Toucan".

Address (if not received by email):

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Name/address/contact
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Organisation

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If there is no separate annex, which parts?

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Name

Yosef Weinstock

Signed (if hard copy)



Response to Consultation Document

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

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

12 August 2005

Comments or inquiries regarding this document should be directed to Yosef Weinstock at yweinstock@idteurope.com

Introduction

IDT welcomes the opportunity to comment on the final stage of the Telecoms Strategic Review and in particular the undertakings offered by BT in lieu of a reference to the Competition Commission.

IDT submitted to the first and second stages of the Strategic Review and our views on future regulation of the telecommunications industry have not changed.

We see the consultation on the undertakings offered by BT as an important step and it is critical to ensure that the terms of the undertakings maximise the likelihood that BT will deliver real equality of access to necessary products and services for its downstream competitors. However, notwithstanding the importance of this step, even more important is how comprehensively and how quickly BT delivers on the promises that it is making.

In our Stage 2 submission we advocated that Ofcom must retain the option of making a reference to the Competition Commission if equivalence could not be demonstrated within limited timeframes. In fact, we took the view that the pre-determined course should be a reference to the Competition Commission unless equivalence could be demonstrated. We remain of that view.

Time frames for equivalence of inputs

Annex 1 to the Undertakings sets out the Equivalence of Inputs Timetable. That timetable allows BT to continue to provide the wholesale line rental service in such a way that it does not permit competitors to provide a truly equivalent service to BT Retail until 30 June 2007 (recognising that if equivalence of inputs is not provided by 31 December 2006 BT will need to make an allowance of 25p per month per line to service providers).

As Annex G to the consultation documents sets out, BT was required to provide WLR, as a result of an amendment to its licence conditions in August 2002.

BT Retail has had the benefit of BT Wholesale providing a substandard line rental product to its competitors for 3 years so far and they will be permitted to continue doing that for just short of a further 2 years. That is unacceptable.

We do not have the knowledge of BT's systems that would allow us to make a reasonable estimate of how long it should take BT to provide equivalence of input in respect of analogue WLR. However, we believe it is incumbent on Ofcom to impose a requirement which gives BT the absolute minimum time that it would take to provide equivalence of inputs bearing in mind the period that industry has already waited and the unfair advantage that that has provided to BT Retail.

Clearly BT believes that it can be in a position to offer WLR on a equivalence of inputs basis by 31 December 2006 (see clause 3.2.1). That should be the final deadline, not a date 6 months subsequent.

BT's incentive to comply with the undertakings

The purpose of the undertakings is to achieve the promotion of effective competition in telecommunications in the UK.

To achieve that end, Ofcom and industry are putting their hopes in BT complying with both the letter and the spirit of the undertakings which have been offered.

The consultation documents note that in the circumstance of a breach of the undertakings Ofcom would be able to seek enforcement through the Courts. It goes on to talk about third parties being able to seek damages in the Courts to recover losses incurred as a result of the breach.

The industry wants wholesale products and services of a standard equal to those provided to BT Retail, which will allow it to deliver competitive retail products and services. In IDT's view, the types of remedies contemplated in the consultation document are not the types of remedies that the industry is seeking.

It is very easy to write that a remedy for a breach can be pursued in the Courts but the reality is that, in practice, very few breaches are clear cut and Court processes take many months or years to reach finality and are very resource intensive.

The Courts will look only at the specific words of the undertaking as against the conduct which is alleged to have breached those words; it is unlikely that they will consider BT's general conduct or its past conduct in relation to a product.

Compliance with the undertakings needs to be assessed by Ofcom looking at both compliance with the letter and spirit of the undertakings – something which the Courts cannot do. If BT is not complying with the spirit of the undertakings, IDT does not want just an award of damages or an order for BT to take specific action in relation to one product – which is the nature of judicial remedies. In that circumstance, IDT will want lasting structural change – again, something which the Courts cannot order.

It must not be the case that industry is forced to forebear with BT for a matter of years while it prevaricates and fights allegations in the Courts of breaches of the undertakings. That behaviour must be swiftly adjudged and met by a reference to the Competition Commission.

Specific comments on the terms of the Undertakings offered by BT

Clause 2 – Definitions and Interpretation

The definition of "Equivalence of Inputs" should require Ofcom to consult with industry before agreeing any differences between what BT provides to BT Retail and what it provides to competitors.

Ofcom should amend the definition of "Equivalence of Inputs" at paragraph b), after the words "Ofcom in writing" by adding the words "after consultation with industry".

Clause 3.5 – Equivalence of inputs for certain products and services

Access to appointment books for booking appointments and reappointments is very significant. Currently, in practice, BT Retail has a superior ability to book reappointments (needed because of a failure of a BT engineer to meet the first appointment) than other service providers. We understand that this is because BT Retail customer service staff are able to directly "persuade" BT Wholesale staff (who manage appointment books) of the urgent need for a new appointment. In contrast, service providers must first persuade an often less than enthusiastic BT Wholesale

staff member of their need for urgency and that person must deal with the appointment book staff.

Clause 3.5 obliges BT to provide “improved access” to engineering appointment books by 30 June 2006. It must be the case that with the implementation of equivalence of inputs for WLR, that access to the appointment book is on a truly equal basis from 31 December 2006. This point should be made clear in clause 3.5.

Clause 5.9 – The establishment of ASD

This clause obliges BT to use a Statement of Requirements Process where non-SMP products or services are requested. Those requests are subject to EAB oversight. The clause provides that ASD may treat the requests in the same way as any other commercial organisation.

Two points need to be made clear:

- that this process applies to requests for products and services by BT’s downstream divisions as well as its competitors.
- that ASD should not be influenced by any possible impact that making the service available would have on any products or services offered by BT’s downstream businesses. To cover this point, the following words should be added at the end of the clause:

When making a decision to accept or reject a request made by anyone other than BT, ASD must not be influenced by any possible impact that making the product or services available would have on any products or services offered by BT’s downstream businesses.

Clause 5.24 – The composition and duties of ASD

This clause requires that the ASD Management Board manage ASD in a way to secure compliance with the undertakings and to operate within the terms of reference “agreed by the BT Group CEO following consultations with Ofcom”.

The drafting is unclear. It is not clear whether the BT Group CEO must agree the ASD terms of reference with Ofcom or merely consult with Ofcom. If it is only a matter of consultation with Ofcom, then with whom must the BT Group CEO agree the terms of reference? Does he agree the terms of reference with himself?

IDT believes that the terms of reference within which ASD operates will be a critical pronouncement. Those terms of reference should be agreed with Ofcom before they take effect and any changes should be agreed with Ofcom.

Clause 5.40 – Governance of the ASD

BT is obliged to partition its management information systems so that they run separately for ASD and the rest of BT “such that they do not lead to undue discrimination against other Communications Providers”.

ASD is charged with providing certain products and services on an equivalence of inputs basis. Equivalence of inputs means “the provision of **same** products and services by BT to all communications providers (including BT)...” (emphasis added).

With that in mind, it is not sufficient to set the standard for the partitioning of management information systems at the level of “no undue discrimination”. There must be no discrimination as between BT’s downstream divisions and BT’s competitors as a result of the partitioning of these systems. The word “undue” should be deleted from clause 5.40.

Clause 5.41 – The products and service supplied by the ASD

This clause provides that “ASD will not **generally** supply” (emphasis added) any product or service to any other part of BT unless it also offers that product or service to other communications providers on a equivalence of inputs basis. The clause provides a number of exceptions. The word “generally” must be deleted and it must be clear that the only exceptions to the obligation are the ones enumerated at the end of the paragraph.

Clause 5.42 – ASD Brand

BT is obliged to develop a separate brand name for ASD which does not incorporate the elements “BT” or “British Telecom”. We support that requirement on the basis that customers of service providers should not be provided with service by staff who bear the same brand name and logo as the major competitor of the service provider.

Our concern with this clause is that the ASD brand name will be used in proximity to the words “Part of the BT (and Corporate Division) Group”. We do not understand why that reference is necessary and believe that ASD should stand alone and develop a name of its own, independent of BT.

The development of ASD as a brand name distinct from BT will be rendered pointless, from a service provider perspective, if the public perception becomes that ASD is just the new service division of “good old” BT.

Clause 6.15

This clause provides that where a product or service which is being supplied by BTWS no longer falls within a market in which BT is notified as having SMP, then the provisions of section 6 cease to apply in respect of that product or service unless the product or service is added to BTS.

In IDT’s view, all products managed by BTWS should be subject to the provisions of section 6. If BT is no longer regarded as having SMP in relation to a particular product or service then that product or service should be moved out of BTWS and only at that point should the provisions of section 6 cease to apply to it. The culture of BTWS should include the principles in section 6 and it should not be the case that those principles are only applied by the BTWS division in respect of some products and not others.

Clause 10.18 – The Equality of Access Board

The EAB is obliged to report regularly to the BT Group Plc’s Board on BT’s compliance with the undertakings with particular focus on the operation of the ASD and the provision of products and services on an equivalence of inputs basis.

The two identified issues will be critical in determining whether the equality of access approach to regulation, that Ofcom has chosen the pursue, delivers the results that Ofcom, consumers and the industry need.

The regular reporting obligation should be extended by obliging BT to report not only the Board but also to Ofcom. It will be absolutely critical, particularly in the early stages of implementation of equality of access, that Ofcom has visibility of how ASD is operating and how it is approaching the delivery of products and services on an equivalence of inputs basis.

Under the current draft of the undertakings it appears that a comprehensive report on the compliance with the undertakings is only provided by the EAB to Ofcom on an annual basis (under clause 10.27). It is appropriate to mandate that a comprehensive annual report be provided to Ofcom, however Ofcom must be kept updated on the operations of ASD and the delivery of equivalence of inputs much more frequently than that and in IDT's view the regular reports to the BT Group Plc Board should be copied to Ofcom.

Conclusion

IDT supports the equivalence of inputs approach that Ofcom has chosen, however, the success or failure of the approach will be substantially determined by BT's commitment to its implementation.

We reiterate our concerns that the mere potential for legal proceedings against BT for failure to comply with the undertakings is a weak aspect of the settlement. BT has the experience and resources to defend allegations of non-compliance for many years, during which time competition suffers. Ofcom should continue to be prepared to make an assessment based on a broad consideration of BT's implementation of the undertakings that the undertakings have not advanced competition if that is the case. The consequence of such an assessment should be a referral to the Competition Commission for a consideration of structural remedies.

12 March 2005