



Response to Consultation: A Notice under Section 155 (1) of Enterprise Act 2002

Submitted to:

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

Ofcom has correctly concluded that BT's dominance in local access infrastructure lies at the heart of the problems currently faced by the competitive telecoms industry. The explicit acknowledgement that BT has both the opportunity and the motivation to leverage this dominance into 'downstream' markets is perhaps the most significant announcement by the telecoms regulator in the 20 years since liberalisation. The settlement between BT and Ofcom, which has resulted in these undertakings, represents a material step forward in the development of competition in the UK telecoms sector.

ntl, in responding to this consultation, has confined its comments to a review of the undertakings. However, it should be noted that the success of this settlement will depend, ultimately, on how these undertakings will be applied to everyday business.

In order for the undertakings to be effective:

- Ofcom will need to be prepared to enforce them; a process which is as yet untried and untested under the Enterprise Act. It is therefore imperative that Ofcom provides the industry with guidance on how it proposes to address enforcement of these undertakings.
- It is critically important that these undertakings facilitate the relationships and processes which will underpin the rollout of next generation access and core infrastructure. Such investment will be hindered if, despite the behavioural undertakings, it is perceived that undue discrimination can continue without the safeguard of timely redress.
- We believe that guidance similar to that provided on the undue discrimination conditions, as applied to operators with SMP, will be required to support the interpretation of equivalence of inputs in the context of these undertakings. The examples provided in the undue discrimination guidelines significantly enhance understanding, and therefore we recommend that Ofcom publish similar examples explaining equivalence of inputs in the context of non-price transaction conditions.

Developing competition in fixed network telecommunications

- 1.1. It is evident that throughout Ofcom's Strategic Review of Telecommunications obstacles to the development of competition have been analysed with great rigour. The findings of this research have been presented clearly, leaving all stakeholders with a much better understanding of the reasons for the failure to achieve a truly competitive telecommunications sector.
- 1.2. The need to reduce the competitive advantage BT gains from its ubiquitous local access infrastructure is combined with an understanding that truly effective competition will only arise when firms match, or at least start to approach BT's scale. It is abundantly clear that self-sustaining effective competition will never consist of a multitude of smaller firms chipping away at a single overwhelmingly dominant BT.
- 1.3. The achievement of this scale and ultimately the achievement of sustainable and effective competition requires two things:
 - that the solution to the problem of BT's dominance in local access be sustained at least until competitors have grown to a sufficient scale that BT's inherent advantages no longer impede the competitive process; and,
 - that investors have confidence that the solution will be sustained.
- 1.4. The comments and recommendations made in the remainder of this response relate to these two requirements.

2. Regulatory certainty and investment

- 2.1. A key theme in ntl's previous submissions regarding the Telecoms Strategic Review has been the reduction of uncertainty created by the regulatory regime, and the creation of an environment conducive to investment in a capital intensive industry. In this regard we recommended that Ofcom:
 - ensure that there is stability in the regulatory regime for at least as long as the investment lifecycle.
 - offer a clear description of the market structure that supports effective and self sustaining competition.¹

¹ ntl response to Ofcom's consultation on Strategic Review of Telecommunications Phase 2.

- 2.2. Given our desire for regulatory certainty, we believe that acceptance of the undertakings is preferable to a reference under the Enterprise Act. With this in mind, our concerns are focused on a number of challenges that may arise due to lack of precedent when the undertakings are put to the test.
- 2.3. We believe that Ofcom should publish a full regulatory impact assessment of the adoption and implementation of the undertakings as soon as is practicable. This would help stakeholders understand how Ofcom believes the market will develop in the presence of the undertakings, and would therefore assist the creation of business plans and help reduce uncertainty around investment decisions.
- 2.4. We also request that Ofcom publish guidelines explaining the procedure for complaints regarding suspected breaches of the undertakings. These must include guidance on Ofcom's choice of legal instrument in situations where behaviour may represent a breach of the undertakings, a breach of an SMP condition, or be prohibited by the Competition Act. Although it is tempting to delay publication of such guidance until more is known about the implementation of the undertakings, we believe very strongly that Ofcom should provide any information as soon as it becomes available, even if it is incomplete, and then update this as and when experience dictates that the guidance should be changed.
- 2.5. We welcome Ofcom's statement that acceptance of the undertakings will in no way affect the application of either the Communications Act or the Competition Act. This removes lingering uncertainty that the focus on implementation of the undertakings could impinge on the successful application of ongoing regulation.
- 2.6. Finally, Ofcom must ensure that the solution to today's problems is sufficiently flexible to cope with those of tomorrow, whilst balancing this against the need for stability of the regulatory framework. As we are all aware, the next 18 months will see dramatic changes from the adoption of next generation network architecture. In view of the fact that Ofcom will be constrained in its ability to make a reference under Part 4 of the Enterprise Act for a significant part of this period, should it accept the undertakings, Ofcom should seek to reassure industry that existing powers will be used, if necessary, to ensure that the migration to next generation networks does not damage the continued development of competition.

3. Sustaining the solution

- 3.1. ntl believes that the undertakings offer as comprehensive a solution as is reasonable and practicable to the challenge of developing competition in today's fixed network telecommunications market. However, it is vital that this solution be sustainable. Ofcom's ultimate goal is the creation of self-perpetuating competition, which as discussed above, will almost certainly require alternative operators not that dissimilar in scale to BT. Growing to reach this size requires time, and therefore Ofcom's solution must be sufficiently robust to endure the migration to next generation technologies.
- 3.2. While we recognise that the current proposals create a viable opportunity for business models based on local loop unbundling (LLU), it is an opportunity that is entirely dependent on BT's current network architecture. It is, for example, difficult to see how such a business model would survive in an environment where fibre is extended beyond the local exchange. While the development of such next generation access networks will not change the fundamental problem of dominance in the local access network, it will significantly weaken - and perhaps invalidate altogether - the commercial logic for LLU. Considered in this context, the current proposals look more like a short to medium term arbitrage opportunity than a platform for the development of sustainable competition.
- 3.3. The level of uncertainty it creates undermines the case for investment in LLU. However, given Ofcom's overwhelming support for LLU, one can only expect that this business model will be afforded some form of protection. By inference, therefore, the uncertainty also damages the case for investing in next generation access networks.
- 3.4. As a company actively considering investments to bring next generation access capability to the UK, ntl urges Ofcom to address this issue as an urgent priority.