

ANNEX B

BT's detailed comments on Chapter 1 of Part 2 of the draft Communications Bill, including aspects relating to the implementation of the new EU Directives

OFCOM's duties for the purpose of fulfilling Community obligations

1. Clauses 4(3), 4(4) and 4(5) implement the requirements of Framework Directive Articles 7 and 8 relating to regulatory policy objectives and principles. However, these subclauses as currently drafted do not include the expanded text in Articles 7 and 8 which indicates how national regulatory authorities should pursue these objectives and principles.
2. For example, Clause 4(4) simply states that “the second Community requirement is a requirement to secure that OFCOM’s activities contribute to the development of the European internal market”. The corresponding sections of Articles 7 and 8 together specify a number of ways in which this should be achieved, including the requirements fundamental to the new Directives for co-operation between national regulatory authorities and the Commission to ensure the development of consistent regulatory practice and consistent application of the Directives.
3. We believe it would help to ensure full UK compliance with the Directives if Clauses 4(3), 4(4) and 4(5) were reworded to incorporate the illustrative points in Framework Directive Articles 8.2, 7.2 and 8.3, and 8.4 respectively.

Meaning of “electronic communications networks and services”

4. The definition of electronic communications networks in Clause 22(1) differs from that in Framework Directive Article 2(a) in a number of respects. It would be useful if explanations were provided for these departures from the wording of the Directive, which include the transposition of the general term “other resources” in Article 2(a) into the specific “software and stored data” in Clause 22(1)(b)(iii), and the use of the two subclauses 22(1)(b)(i) and (ii) to cover the term “switching or routing equipment” in Article 2(a).
5. The definition of “electronic communications service” in Clause 22(2) does not include the qualifications in the corresponding definition in Framework Directive Article 2(c) that the services covered must normally be provided for remuneration and that they do not include information society services as defined in Directive 98/34/EC. Again, this departure from the Directive should be explained.
6. “Associated facility” is defined in Clause 22(3) so broadly that it may include, for example, ducts, trenches and masts on the one hand, or apparatus, such as e-mail servers, used to provide value-added services on the other. There is a danger that this could result in regulation being extended to cover services not intended by the Directives to be subject to regulation. We believe that “associated facility” is intended to refer only to integral facilities of an electronic nature. This view appears to be supported by the fact the definition in Framework Directive Article 2(e) gives

conditional access systems and electronic programme guides as examples of associated facilities. We think that ‘associated facility’ needs to be much more tightly defined. As a first step, it would be helpful to understand what types of facilities are intended to be covered.

Notification by providers

7. Clause 23 permits OFCOM to designate networks, services and associated facilities. Having regard particularly to the EU principles of non-discrimination, transparency etc., we do not believe that OFCOM should be able to use this power in a provider-specific way which would allow it to discriminate between providers of the same type in what it requires to be notified. We would welcome clarification on this point.

8. Notifications systems are intended to form part of what Authorisations Directive Recital 7 describes as “the least onerous authorisation system possible”. However, the notification system described in the draft Bill appears potentially heavy-handed. For example, in principle, providers of designated networks, services or associated facilities might be required to make notifications down to a very detailed degree of granularity and then give notice of any modifications to all those matters which they have been obliged to notify. The system may represent an unnecessary burden on OFCOM, who would have to monitor compliance and take enforcement action, and it could certainly impose an onerous burden on providers. This would not be consistent with the Directive. It may also require an over-complex system for the setting of administration fees.

9. In any event, to avoid unnecessary bureaucracy, we suggest that the draft Bill should make provision for a migration process by which existing PTOs should be deemed to have notified by virtue of their having been granted licences under the existing framework.

10. Clause 25 allows OFCOM to determine the format in which the register of designations and providers is to be made available, the hours during which the register is to be available and fees payable for access to the register. In the interests of transparency, and consistent with the “e-government” vision, the Bill should instead require that the register be publicly available on-line at no charge.

Administrative charges imposed on providers

11. In line with the Authorisations Directive, Clause 29 limits the activities for which OFCOM’s costs may be recovered through administrative charges. To support these principles, OFCOM will be obliged to adopt a statement describing the principles according to which it will fix charges and to publish an annual statement setting out the costs of recoverable activities and information about aggregate charges received and outstanding. In addition to the points in para 6.3.4 of the main Submission, we believe that there should be an obligation for separate audited accounts, structured and presented such that providers can be satisfied that they are only funding the appropriate OFCOM activities. We suggest that this requirement be incorporated in Clause 29.

Conditions of entitlement to provide network or service etc.

12. The effect of Clause 35(9)(d) is that persons other than OFCOM may be given the power to make directions or determinations under conditions of entitlement. In these circumstances, such persons would in effect be acting as the national regulatory authority for the purposes of the Directives and should therefore be required to follow the principles and duties set out in Part 1 of the draft Bill. This should be made explicit in Clause 35.

13. Clauses 36(1) and 36(2) both refer to notifications relating to the setting, modification or revocation of conditions. The text could usefully make it clearer that the former refers to final notifications and the latter refers to proposals issued for consultation.

14. As currently worded, Clause 36(8) gives OFCOM complete discretion as to whether in their opinion a condition would affect trade between Member States. Articles 7.3 and 7.4 of the Framework Directive, on the other hand, make it clear that the test is objective, i.e. whether the measure ‘would affect trade between Member States’. While we consider that OFCOM will probably be obliged to follow jurisprudence on this question, so that inconsistency with case law would afford grounds for appeal under Clause 140 against any relevant decision, we believe that to make the position clear a requirement for consistency with case law should be added to Clause 36(8). Section 60 of the Competition Act 1998 provides a precedent for a requirement of this nature.

General conditions: subject matter

15. Clause 38 describes the matters to which general conditions apply. In the interests of transparency, references to the underlying conditions in the Annex to the Authorisations Directive should be included in the text.

16. Clause 38(3) implies that OFCOM may decide that certain conditions relating to service interoperability or network access which would normally be considered to be general conditions should instead be access-related or SMP conditions. Clause 38(3) should be expanded to require OFCOM to publish its reasoning for such decision.

General conditions: customer interests

17. Clause 39(1) permits OFCOM to limit the application of consumer protection conditions to “such descriptions of [public communications providers] as OFCOM consider appropriate”. We believe this could potentially be harmful: it could lead to irrelevant considerations of economic regulation being introduced into the field of consumer protection, and to the obligations set out in Clause 39 being imposed in a manner discriminatory as between providers, so that certain consumers were denied appropriate protection. We suggest that the phrase “such descriptions of them as OFCOM consider appropriate” be excised from Clause 39(1).

18. Clause 39(6)(b) defines a small business customer as a person who is a customer in respect of an undertaking with up to fifty employees. This threshold is unsatisfactory as it would result in well-resourced small firms with small numbers of

employees benefiting from protections designed for consumers and less well-off small businesses. It could also result in a person being classified as a small business customer when he carries on a number of undertakings each with up to fifty employees. Eligibility based on annual turnover or electronic communications expenditure could be considered as alternative tests for eligibility, however policing would be unduly bureaucratic and expensive. We believe that a test consistent with that employed under the Telecoms Ombudsman Scheme should be adopted: current indications are that this will be based on the value of each dispute rather than the identity of the complainant.

19. We do not understand what Clause 42 is aimed at, and in what circumstances it may not be possible for OFCOM to achieve the desired results by means of general conditions of entitlement. OFCOM's ability under this clause to make orders outside the authorisation system amounts to the introduction of a new category of condition of entitlement which is not required or sanctioned by the Directives. In addition, Clause 42 does not provide for a consultation period as would be required under Framework Directive Article 6 or Authorisations Directive Article 14.

General conditions: telephone numbers

20. Clause 43(6) defines the phrase "telephone number" in such a way that it could refer to IP addresses and any other electronic address not generally understood to fall within the definition. Clause 43(8) allows the Secretary of State to exclude certain types of "number" by order, and we understand that such an order is planned which will exclude e-mail addresses, IP addresses and domain names. We would welcome early confirmation of this intention.

21. Clause 44(1)(h), by making communications providers responsible for securing compliance by their customers, imposes on them a regulatory enforcement function which is properly the function of OFCOM, and an unnecessary burden. We suggest that this clause should follow the approach taken in Clause 45(4) and confer this responsibility directly on end-users.

22. Clause 44(7)(b) allows discrimination between categories of provider and between different types of telephone number in relation to general conditions concerning numbers. We would welcome clarification as to the intentions behind this provision. We do not believe it should be used for economic regulation.

Universal service conditions

23. Clause 50(1) requires the Secretary of State to publish a notice specifying the scope of universal service. We suggest that to ensure that the UK does not deviate from the scope of the universal service as set out in Chapter II of the Universal Service Directive, this subsection be reworded as follows:

*"The Secretary of State shall publish a notice setting out the extent to which the things falling within subsection (2) must, for the purpose **only** of securing compliance with Community obligations, be provided, made available or supplied throughout the United Kingdom."*

24. The effect of Clause 50(2)(b) is that “facilities capable of being made available as part of or in connection with any electronic communications service” may be included in the scope of universal service. It is not clear what type of facility is envisaged, in particular in view of the fact that “facility” is not a defined term within the draft Bill. We suggest that Clause 50(2)(b) should be changed to refer to “relevant associated facilities necessarily and directly incidental to the provision of the networks and services referred to in sub-paragraph (a)”. The definition of associated facility in Clause 22(3), which we have earlier suggested should be amended, would then apply.

25. Clause 51(4) states that OFCOM “may” review universal service designations and conditions from time to time. In the light of OFCOM’s duty to secure light touch regulation, and as a safeguard for designated providers, review should be a requirement rather than an optional exercise. We understand that in practice, a review of designations and conditions in the UK would be triggered by an EU-level review of the scope of the USO. However, universal service designations and conditions could become out-of-date irrespective of changes to the scope of USO, for example as a result of market developments.

26. The intended meaning of Clause 53(2)(b) is not clear. If it is intended to refer to special tariffs as referred to in Chapter I of the Universal Service Directive, we believe it would be clearer if the clause were reworded to “the use, in such cases as may be specified or described in the conditions for the purpose of compliance with Community obligations, of such special tariffs...”.

27. Clause 55(1) states that OFCOM “may” review the extent of any financial burden resulting from the USO. This does not appear to be an accurate reflection of Article 12.1 of the Universal Service Directive, which provides that where the NRA considers that the provision of universal service may represent an unfair burden, it shall calculate the net cost of provision. Further, consistent with the duty to keep the carrying out of their functions under review, OFCOM should be required to update any calculations of net cost periodically.

SMP conditions: market power determinations

28. Clauses 64(2) and 64(3) state that OFCOM “shall have regard, to such extent as they consider appropriate, to all applicable [Commission] guidelines and recommendations” when carrying out market definition and analysis. This does not correctly implement the far stronger requirement in Framework Directive Articles 15 and 16 that national regulatory authorities must take “the utmost account” of the Commission’s Recommendation on relevant product and service markets and Guidelines for market analysis and the assessment of significant market power. These clauses should be changed to use the wording of the Framework Directive. The fact that the term ‘utmost account’ may not have been used previously in a UK statute is of no relevance. It will be the task of the courts to interpret it in due course if necessary, which they are, of course, well equipped to do.

29. Article 16.1 of the Framework Directive requires Member States, where appropriate, to ensure that market analysis is carried out in collaboration with the national competition authorities. This requirement is not, however, carried into the draft Bill. As indicated in the main submission, we consider that collaboration

between OFCOM and the OFT would be highly desirable and appropriate, and would be consistent with the movement towards *ex post* competition law featured in the Directives. We suggest that the draft Bill be revised accordingly by means of an amendment to Clause 64.

30. Clause 65(2) as currently set out is confusing, because OFCOM has already been required by Clause 64 to identify markets for analysis and carry out the analysis. However, the clause requires that SMP conditions be proposed before the market concerned in each case has been defined and before the making of a market power determination. This does not seem entirely logical, as one would expect the market to be defined and analysed before the SMP conditions are proposed. The intention appears to be that an opportunity should be provided to make representations before final decisions are made. We suggest that in order to remove any possible doubt, Clause 65(2) should be reworded along the following lines:

“In order to allow representations to be made as described in section 36(2), the notification must be given before OFCOM, having carried out the market identification and analysis required by section 64, has reached final decisions on the market identification, market analysis, and market power determinations referred to in that section .”

31. Clause 65(3) lists the things which must be set out in a notification. We suggest that the reasons referred to in subclauses 65(3)(b) and (d) should specifically include a description of the analysis carried out under Clause 64 and its results.

32. Clause 67(2) states that OFCOM may carry out further market analyses from time to time. However, Article 7.3 of the Access Directive and Article 16.3 of the Universal Service Directive require that NRAs carry out further analyses “periodically”. We believe that Clause 67(2) must be revised to implement correctly these requirements of the Directives. In addition, the rights of providers should be safeguarded by the incorporation in Clause 67(2) of an obligation on OFCOM to carry out further market analyses and review SMP conditions when requested to do so by a person to whom a relevant SMP condition applies. In line with the principle of proportionality, analysis should be carried out to a level of detail commensurate with the scope of the proposed regulatory modification.

SMP conditions about network access and network access pricing (i.e. SMP conditions imposed under the Access & Interconnection Directive)

33. At a number of points within Clauses 68 and 69, the draft Bill uses wording which differs from that in the Access & Interconnection Directive in a way that appears to sanction lower thresholds for the imposition of regulation or the imposition of wider obligations than envisaged in the Directive. We believe these clauses should be amended to bring them fully into line with the Directive. The main areas of concern are outlined below.

- (i) Article 12.2(b) of the Directive gives as one of the factors that National Regulatory Authorities must take into account when considering whether to impose access obligations “the feasibility of providing the access proposed, in relation to the capacity available”. Corresponding Clause 68(4)(b) omits the

reference to available capacity and simply reads “the feasibility of the provision of the proposed network access”.

- (ii) Article 12.2(c) refers to “the initial investment by the facility owner, bearing in mind the risks involved in making the investment”. Corresponding Clause 68(4)(c) refers to investment but omits the reference to risk.
- (iii) Article 12.2(d) reads “the need to safeguard competition in the long term”. In the draft Bill, however, Clause 68(4)(d) uses the phrase “the need to secure effective competition in the long term”, which has a different meaning.
- (iv) Article 11.1 of the Directive only allows National Regulatory Authorities to impose obligations for accounting separation “in relation to *specified activities* related to interconnection and/or access”. Clause 68(7) refers to separate accounts for “*different matters*” relating to access to the relevant network or the availability of “relevant facilities”. This is less specific and therefore potentially wider in application than the wording in Article 11.1, particularly as the definition in clause 68(12) of “relevant facilities” refers back to the definition in clause 22 of “associated facilities”, which we have previously commented on. Clause 68(7) needs to be amended to implement the Directive correctly.
- (v) Article 13.1 refers to price controls for “the provision of *specific types* of interconnection and/or access”. Again, the corresponding provision in the draft Bill set out in Clause 68(9) refers to a more general and therefore wider obligation for price controls “*in relation to matters connected with the provision of network access...*”.
- (vi) Article 13.1 requires that in setting price controls, National Regulatory Authorities “shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved”. This requirement has been omitted from the corresponding Clause 69. Again, the Clause needs amending to reflect accurately the wording of the Directive’
- (vii) Article 13.2 obliges National Regulatory Authorities to ensure that any mandated cost recovery mechanism or pricing methodology serves inter alia to promote sustainable competition. In Clause 69(1)(b)(ii), the concept of promoting sustainable competition has been rendered as “sustaining competition”. This implies that OFCOM will be expected to maintain competition in its current state rather than, as the wording in the Directive suggests, create an environment in which competition can develop, and therefore deals less than adequately with market developments and dynamics. Again, the Clause should be amended, as it confers on OFCOM a purpose not mandated by the Directive.

Conditions about network access in exceptional cases

34. Clause 70(2) states that OFCOM “may” submit any conditions of this type to the European Commission for approval. In fact, this procedure is mandatory: Article 8.3 of the Access & Interconnection Directive places an obligation on National Regulatory Authorities to obtain authorisation from the Commission before taking such measures.

Conditions about carrier selection and pre-selection

35. Clause 71(5) attempts to define carrier selection and pre-selection by giving a definition of the term “relevant connection facility” used in the preceding subclauses. Clarity and accuracy would be improved if the wording in Article 19(1) of the Universal Service were used instead of this definition. Currently, for example, Clause 71(5)(b)(ii) does not refer to the facility to override a pre-selected choice on a call-by-call basis, which is required by Article 19.1(b) of the Universal Service and Users’ Rights Directive, and thus does not accurately implement the Directive.

Conditions about regulation of services etc. for end-users

36. Clause 72(5) appears to be the equivalent of the final subparagraph of Article 17.1 of the Framework Directive which states that “national regulatory authorities shall impose appropriate regulatory obligations on undertakings identified as having significant market power on a given retail market...”. However, Clause 72(5) does not reproduce the qualifications on these conditions set out in Article 17.2, i.e. that the conditions must be “based on the nature of the problem identified and be proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive)”. In view of the broad nature of the wording in Clause 72(5), we believe that these qualifiers should be incorporated in the draft Bill.

Conditions about leased lines

37. For clarity and for consistency with the Universal Service Directive, clause 73(1)(b) should refer to “a market relating to the provision of part or all of the minimum set of leased lines as identified...”.

38. The following definition of the term “leased lines” is given in Clause 73(4):

“an electronic communications service the provision of which consists in the reservation of a fixed amount of transmission capacity between fixed points on the same or different electronic communications networks”.

This definition is not taken from the new Directives, which do not define “leased lines”, and in our view it is not a viable definition. The existing Leased Lines Directive uses the definition reproduced below, and we would welcome an explanation as to why a new definition has been used in the draft Bill:

“telecommunications facilities which provide for transparent transmission capacity between network termination points and which do not include on-demand switching (switching functions which the user can control as part of the leased line provision)”.

Enforcement of conditions – notification of contravention of condition

39. Clause 74(1) states that OFCOM may give a notice of contravention “Where OFCOM determine that there are reasonable grounds for believing that a person is contravening, or has contravened, any condition...”. This wording implies a lower threshold for enforcement action than that in Article 10.2 of the Authorisations Directive, which states that enforcement action may commence “Where a national regulatory authority finds that an undertaking does not comply with...conditions...”, and does not correctly implement the Directive.

40. Similarly, the tests set out in Clause 78(1) for determining whether OFCOM may take urgent action refer to “reasonable grounds for suspecting that the case is an urgent case”, whilst the equivalent provision in Article 10.6 of the Framework Directive states that a National Regulatory Authority must have “*evidence* of a breach...that represents an immediate and serious threat...”.

41. Clause 78(8) obliges OFCOM to provide a person to whom an urgent notification or determination is addressed “with an opportunity of making representations about the effect of the notification or direction and of proposing steps for remedying the situation”. The requirement of Article 10.6 of the Authorisations Directive is that the undertaking shall have a reasonable opportunity to “state its views”. We believe that the sub-clause is too narrow and, in order to implement the Directive properly, should be brought into line with clause 74(3), which addresses the same situation with regard to non-urgent cases and requires that OFCOM give the notified person the opportunity simply to “make representations about the matter concerned”. Unlike clause 78(8), this allows the person to make a case that he has not been in breach at all.