



2 May 2003

**BT'S RESPONSE TO OFTEL'S CONSULTATION
"NOTIFICATION OF PROPOSALS FOR THE
DESIGNATION OF UNIVERSAL SERVICE PROVIDERS
AND SETTING OF CONDITIONS"**

BT would welcome any comments on its position as laid out in this document which is available electronically at <http://www.btplc.com/responses>

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BT's response to the Oftel consultation document "Notification of proposals for the designation of universal service providers and setting of conditions".

Summary

Funding of Universal Service obligations

- The costs of providing universal service are substantial.
- A re-assessment of the cost of providing universal service should be undertaken as soon as practicable and before additional obligations on BT are considered.
- The review of costs and introduction of funds should be done service-by-service, rather than overall. The payphones USO is discrete and clearly identifiable. It represents a significant burden on a declining business and should be considered for funding in its own right.

Functional Internet access

- We agree with Oftel that it is not appropriate to mandate a minimum rate.
- There should be consistency throughout Europe - it would be inappropriate to impose a higher requirement on UK operators than elsewhere in Europe.
- Our analysis shows that 97% of lines already achieve modem connection speeds of 28.8kbit/s or better, demonstrating that Oftel's proposed guidelines are not necessary and that there is no need for additional regulation with regard to line speed.
- Oftel's proposed guidelines will have a potentially significant cost impact on BT. BT is concerned with the open endedness of the proposals. It is reasonable for BT to expect its potential financial exposure to be capped.

Provision of call box services

- The social role and economics of call boxes have fundamentally and permanently changed. Payphones are no longer the primary method of making "away from base" calls. It is not appropriate to look at UK payphones as a single network without defining which boxes make up the USO. The scope of the call box obligation should reflect this.

Funding of textphone relay service

- We welcome the proposal that BT should be able to recover costs associated with the textphone relay service.

Maintenance and supply of a directory information database and directories

- There is no legal basis under the Directives for Oftel placing an obligation on BT at the wholesale level in respect of its phonebooks and search engine (Pathfinder). BT is however supportive of open access to OSIS – the core database.

1] Introduction

BT has always and will continue to support the concept of universal service. We have a number of detailed comments we wish to make on the content of some of the proposed conditions. These range from suggestions for clearer wording and requests for clarification through to outright concern over the practicality of Oftel's proposals or, in some cases, their consistency with the Directives.

Article 7.2 of the Framework Directive requires that national regulatory authorities shall co-operate with each other and with the Commission in a transparent manner to ensure consistent application of the Directives. In view of this, we believe it is essential that Oftel monitors the development of specific conditions applying to USO designated operators across the EU to ensure that the UK is not over regulated relative to elsewhere.

2] General comments

(i) Funding

We support the principle of universal service. BT appreciates its wider responsibilities in the provision of commercially unattractive services with significant social benefit. But the market we operate in is highly competitive. Over 250 companies now offer service provision and more will enter the market. As BT's share of the market diminishes, its capability to fund loss making services diminishes too. The challenge for the regulator is to disentangle universal service from the regulation of particular carriers. This means recognising that universal service is an industry issue.

The Universal Service Directive states that "When a universal service obligation represents an unfair burden on an undertaking it is appropriate to allow Member States to establish mechanisms for efficiently recovering net costs." We believe that the wording of the Directive makes the assessment of whether funding is justified entirely conditional on the costs of the universal service obligation (USO) offset by any benefits from it. We have provided evidence in earlier consultations which strongly challenge Oftel's claim of substantial benefits accruing to the designated USO provider. We continue to believe that this evidence is sound and that the USO represents a significant net cost on BT which should be funded by industry. It is not appropriate to link the funding of universal service to market shares or profits in other parts of the retail market. In particular, BT should not be left in a position where it increasingly loses profitable market share to carrier pre-selection, and Wholesale Line Rental etc. and be increasingly left with a USO "rump".

Oftel is effectively seeking to extend the USO obligation on BT through its proposed guidelines on functional Internet access. Whilst Oftel has not mandated a minimum data speed on BT the guidelines nevertheless could have a significant cost impact which we explain in more detail further on. This "creep" of the burden of USO is further compounded by the imposition on designated providers of additional obligations relating to itemised billing. Oftel should not seek to extend the USO without first carrying out a thorough appraisal of its net cost.

The services covered by the universal service obligation are quite distinct, benefiting different user groups and therefore separate calculations of net cost and separate funds would be appropriate, to ensure that cost messages are directed accordingly.

The payphones USO is discrete and clearly identifiable. The people with neither a mobile nor fixed line phone are more highly concentrated in younger users and those aged over 65. It is these most vulnerable sections of our community who rely most on payphones and deserve special protection.

These unique characteristics of payphones, along with the extraordinary changes to their usage, justify special treatment of the delivery and funding of social payphones. Social provision is a major cost on the payphone business. In the past, very profitable public call boxes (PCBs) could fund this. The dramatic reduction in the usage of and demand for public payphone service means this is no longer the case. The current cost of the universal service obligation is a significant burden on the payphone business and the outcome of the current consultation on definition of a 'site' could have a further adverse impact on the cost of the payphones USO.

The payphones USO must be looked at as a distinct entity in its own right, standing apart from the rest of the USO. It is time for Oftel to create a separate industry fund with the sole purpose of funding the significant costs of the payphones USO. Only then will the interests of the most needy members of our society be protected.

Disparity between fixed and mobile regulation

Oftel is required by the Directives to be technologically neutral. However, in its dissimilar treatment of fixed and mobile operators in intervention to correct for network externalities it is in breach of this requirement.

Writing to the Competition Commission in May 2002¹, Oftel said that termination charges for BT were set at cost, based on long run incremental cost plus equal proportional mark-ups. However, Oftel's proposal for mobile networks included a mark-up for network externalities, of circa 50% on costs, the equivalent of which is not found in the setting of termination charges for BT.

Oftel said that network externalities do exist on fixed networks in that access to more subscribers brings benefits to the existing subscribers. Rather than propose a mark-up on termination charges however, instead it imposed universal service provisions, such as targeted tariffs: the Light User Scheme (a rebate on rental charges for low call usage) and In Contact Plus.

Oftel said that the "externality subsidy" (universal service net cost) is currently funded through BT's excess profits on calls. "It would have been possible to adopt a similar approach as that proposed for mobile termination, i.e. by funding some form of subsidy through a levy on call termination charges (and indeed this is one possible theoretical mechanism for future funding of universal service costs). However, Oftel has estimated the net cost of the (targeted) subsidy on the fixed network to be relatively small as some brand value benefits accrue to BT from being seen as the universal provider."

BT would like Oftel to explain why there is a hypothetical brand value for a fixed supplier in being seen as the universal provider, i.e. the firm with specific regulatory obligations, but not to a mobile operator with the same or similar obligations.

We would also like to understand why Oftel consider that it is technologically neutral for fixed suppliers to pay a network externality surcharge on mobile networks (i.e. a subsidy to reflect the same objectives as the fixed USO) but mobile suppliers make no such contribution to fixed networks when these operators benefit in the same way from the size of the fixed networks.

(ii) 100 Man Hours Rule

¹ "The Setting of Fixed and Mobile Termination Charges", on Oftel's website at http://www.oftel.gov.uk/publications/mobile/ctm_2002/term0502.pdf.

We note that Oftel intends to issue draft guidance later this year on what comprises a “reasonable request” for service. We believe the “100 man-hour rule” (now expressed as the equivalent monetary value) should stay. It is a sensible compromise between balancing the interests of the majority of our customers in keeping costs down and addressing the needs of those customers in the remotest of areas. It is necessary that a limit should exist and we believe this is a reasonable one. This is consistent with the European Directive. We look forward to letting Oftel have our detailed comments later in the year.

3] Functional Internet Access

(i) Factors outside of BT’s control which limit data rates

The customer’s Internet experience is dictated by several factors such as data network bottlenecks, far end server loading, as well as modem connection speeds. Modem performance over a telephony line cannot be guaranteed as it in turn is subject to influences, usually beyond the control of any single organisation, such as its electrical environment, line length and degree of modem compatibility. Actual download speeds are further affected by the type of modem, how it is configured, the Internet Service Provider (ISP) it is connected to and congestion on the Internet backbone. Modem *connection speed* is not the same as *download speed*.

Download speed, which is what the user experiences when waiting for the screen to fill, is determined by the slowest link in this end to end chain. *Connection speed*, which is the speed at which data can be sent to the customer over the access line if, and only if, the data can be pulled from the Internet fast enough, is just one of these links. Download speeds therefore cannot be guaranteed on any switched telephony product.

Download speed is frequently significantly slower than the modem connection speed. This is due to bottlenecks elsewhere in the Internet connection path, which could be anywhere in the world depending on the location of the Internet site or at the far end server itself. To add further confusion, the download speed displayed by one of the most common web browsers (Netscape, bottom left corner) is shown in kbyte/s not kbit/s, a factor of 8 smaller. This situation creates the perception that the modem connection is slow when in fact the problem is caused elsewhere on the Internet.

(ii) Oftel’s Proposals

The BT network is built to comply with international standards for voice transmission. In order to determine the performance of a range of modem types over the BT network we measured actual performance achieved. Data on the modem type and its initial performance were logged for 1.6 million calls nationally to BT Internet over a 7 days period in June 2000. 93% of calls used a V.90 capable modem.

Of all the calls that used a V90 capable modem, those that were least successful at achieving V90 speeds were then excluded from the subsequent analysis. This ensured that only calls from “good quality” V90 modems were considered for detailed analysis. The percentage of lines (not calls) that met a particular modem speed was then calculated from the data. 98.4% of lines obtained modem connection speeds of 24kbit/s or better, whilst 97% of lines achieved modem connection speeds of 28.8kbit/s or better. The most common modem connection speed achieved with a V90 modem was 44kbit/s. We do not have comparable figures based on other ISPs nor OLO access/termination in conjunction with BT but we believe that the data is representative of these cases as well. The analysis does demonstrate that, where BT services are used, the line speed is more than adequate to ensure workable Internet access in the vast majority of cases.

The cost of meeting a minimum data speed of 28.8 kbit/s would be substantial and would not bring about commensurate benefits to justify it, considering that line speed is already adequate in most cases as shown above. Additionally, a guaranteed minimum speed could become the de facto network standard and thus act as an inhibitor to further network investment by the industry as a whole. Moreover, as download speed is determined by the slowest link in the end to end chain, imposing a minimum connection speed will very often not have significant impact on the actual customer experience. The costs involved in network upgrades in order to be able to commit to a minimum data speed make this an unrealistic option.

We conclude that the imposition of a minimum data speed on the PSTN network therefore would result in no noticeable benefit to the majority of Internet users but in an over engineered network for those requiring voice applications only. It is therefore right that Oftel does not intend to mandate a minimum data rate. We further question the need for any regulation at all in this area. The market, acting alone without regulation, has already delivered a line speed in excess of that suggested by Oftel in its guidelines to the vast majority of our customers as demonstrated above. We believe the network is best left alone from regulation to evolve further in line with what the market dictates rather than the Regulator. The objective of the Directive with regards to functional Internet access, we believe, is to enable the NRA to take action on what constitutes functional Internet access when a market, left to its own devices, has clearly and demonstrably failed to deliver what is reasonable when set against customers' rising expectations. As has been demonstrated above this is not the case with the BT network and so the guidelines are not necessary.

In the short time allowed us by this consultation we have modelled the cost impacts of dealing with and reacting to the expected complaints about line speed which will be prompted by the proposed guidelines coming into force. We would expect a substantial increase in the number of complaints from customers, both achieving line speeds above and below that proposed in the guidelines. A number of these complaints will be prompted by ISPs and or web hosts themselves which will seek to suggest that the designated operators are at fault rather than their own technical configuration when dealing with their own service complaints. Some may even feel it is in their interests to encourage their own customers to complain to BT, regardless of the line speed they are achieving.

We believe that approximately 3% of lines would not support 28.8kbit/s. These lines are not spread evenly throughout the country so we have assumed a level of bunching or concentration. We have further assumed that Internet penetration will rise to around 50% of households over the next 5 years period and that 50% of customers experiencing line speeds below 28.8kbit/s and 10% of customers experiencing line speeds above this will complain over the same period. We have not included repeat complaints nor have we had time during the consultative period to include the impacts of what the guidelines propose for second lines. Based on these assumptions we estimate that the reactive costs of handling complaints generated by the guidelines, carrying out relevant tests and taking action wherever needed or possible will be in the range £53millions and £235millions over a 5 years period with an expected cost of £121 millions. The uncertainties involved mean that the potential costs could approach the £235 millions, or more if our assumptions prove to be too conservative. Were the costs of repeat complaints, development and training costs and the impacts of what is proposed for second lines included then the costs would significantly increase.

Taking into consideration all available alternative network access technologies with higher bandwidth, investment in the fixed network required to comply with the guidelines would not be justified either commercially or economically. Upgrading the copper infrastructure along the lines required by the guidelines will need significant investment. However, access over the PSTN may not necessarily be demanded by customers when more attractive Internet services are already

available over alternative broadband technologies and there are even more to come in the near future such as 3G. Price reductions make these services increasingly affordable.

BT's concern is to achieve what is reasonable with regards to functional Internet access whilst trying to put a cap on potential financial risk.

The Oftel analysis concentrates on the issues associated with the use of Digital Access Carrier Systems (DACS). However this is not solely a DACS issue. For example, it is expected that in around 45% of cases new cable would need to be pulled in and that this would account for around 80% of the costs, but which may often provide only limited increases in possible modem connection speeds. Removal of DACS from lines used for Internet access by far has the most immediate impact on the customer experience in most cases and the impacts on BT are much more predictable. Indeed our use of DACs has been diminishing and we have no plans to deploy any new types of pair gain device in the network. Our concern with the guidelines as written, should Oftel proceed with them, is the open endedness of a commitment to make "reasonable effort". We believe that explicit costs limits need to be applied.

We recognise that some of our customers do not have a satisfactory Internet experience due to slowness of interaction, for whatever reason. We are keen to help them where we can exercise control over the problem and where the benefits outweigh the costs and offer advice where we cannot. However, it makes no sense to spend large amounts of money upgrading a customer's line where the problem lies elsewhere such as with the ISP configuration.

(iii) Elsewhere in Europe

Our understanding of the implementation of the Universal Service Directive elsewhere in Europe is that no other country is seeking to define functional Internet access in terms of mandating a specific data rate on designated operators or proposing guidelines along Oftel's lines on the designated operator or any other such measure. The reasons cited for such positions are generally that taking into consideration the pace of technological development and the market dynamics it is important that the regulatory framework is sufficiently flexible and applicable. We believe that Oftel's proposals are gold plating of the EU requirements, they will hamper innovation in the UK and be an added burden on BT relative to designated operators in the rest of Europe.

4] Specific comments on the proposed conditions to be applied to BT.

Condition 1: Provision of telephony services on request

Condition 1.1 requires BT to provide "Telephony Services, including the ability to make and receive calls employing facsimile and data communications, at data rates sufficient to permit functional internet access". The term "Telephony Services" is defined as "either or both a single narrowband connection at a fixed location to the Public Telephone Network and Access to Publicly Available Telephone Services'. We presume that this formulation is intended to reflect the definition of this aspect of Universal Service, more limited than that in the current BT licence, in Art. 4 of the Universal Service Directive, where the obligation is set out as follows:

"1. Member States shall ensure that all reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location are met by at least one undertaking.

2. The connection provided shall be capable of allowing end-users to make and receive local, national and international telephone calls, facsimile communications and data communications, at data rates that are sufficient to permit functional Internet access.....”

We welcome this change in the definition of 'Universal Service', which we think is pro-competitive and does not disadvantage consumers or competitors. We think, however, that the Condition would more accurately reflect the requirements of the Directive if it was amended to read as follows :

"1.1 At the reasonable request of any End-user, BT shall provide Telephony Services to that End-user at any place in the UK except for the Hull Area, and BT shall ensure [as drafted]", and if the definition of 'Telephony Services' was amended to read as follows :

""Telephony Services' means either or both a single narrowband connection at a fixed location to the Public Telephone Network and access at a fixed location to Publicly Available Telephone Services. The connection provided shall be capable of allowing End-users to make and receive local, national and international telephone calls, facsimile communications and data communications at data rates sufficient to permit functional Internet access."

The distinction is that the ability to make calls etc. is not a direct obligation of Universal Service, but a description of one element of the obligation, namely the connection that has to be provided. Oftel's proposal for the obligation which will be imposed on BT confuses the issue of what is comprised in the Universal Service Obligation, and may lead to unfounded expectations as to what it comprises.

Condition 2: Schemes for consumers with special social needs

Condition 2.3 states “Unless the Director consents otherwise, where BT proposes to introduce a new scheme, or amend an existing scheme, BT shall not bring that new scheme or amendment into effect unless it has provided written evidence to the Director of its proposals at least three months in advance.” The benefit that accrues to LUS customers is a function of standard line rental pricing and standard call charges. Changes to these may result in a change to the LUS thresholds. Therefore it is not appropriate to impose, as this Condition does, an obligation to provide Oftel with three months notice to changes in LUS as this would in effect impose the same notice period to changes in the standard line rental and standard call prices. The notice period for changes to LUS needs to correspond with that currently in place for standard line rental pricing and standard call charge pricing and to any changes to these which come as a result of Oftel's review of fixed narrowband retail markets.

We note that Oftel intends to conduct a consultation on the attributes of these schemes before 25 July 2003 and presume that any resulting direction will replace the existing “guidelines” associated with the current Condition 41. We look forward to making a full and detailed submission to this. Until then we have no further comment to make.

Condition 3: Provision of call box services

This Condition requires the designated provider to ensure that it meets the *reasonable* needs of end users in the provision of public call boxes. When considering the content of this Condition, it is important to understand the UK payphone market and current consumer demand for payphone services within the ‘away from base’ market.

BT believes that the provision of certain of our public payphones is an important part of our commitment to public services and our Universal Service Obligation. Our payphones are important

in providing access to telephony for communities and for those on low incomes and/or the socially disadvantaged. However, the almost total availability of fixed line phones within homes² and the rapid rise in mobile telephony has had a dramatic impact on the demand for public payphone service. People on the move and the youth/young adult market segments have migrated to mobile telephony in significant numbers leaving many previously busy payphones little used. In real terms, the past three years have seen payphone call minutes fall by 52%, and as a result over 40% of BT's public payphones no longer cover their costs. Mobile ownership is now a mass-market commodity at both ends of the social scale rather than a luxury item.

The traditional payphones business is in long term decline and whilst BT is committed to maintaining a commercially viable payphone business there is nothing we can do to halt this process. We have, however, taken significant action to optimise the sustainability of the business. This includes:

- Cost reduction. We have already reduced significantly the number of people we employ and staffing levels continue to be reviewed.
- Increased call charges. We increased the minimum call charge by 10p to 20p in October 2000 – the first increase since 1984. This price increase in isolation is not sufficient to sustain the payphone network.
- Development of other revenue streams. We have launched new initiatives, such as multimedia terminals offering public Internet access, and the use of our kiosk housings for advertising etc. designed to ensure that payphones continue to have a clear role within an evolving market. BT Payphones are continually working to identify new revenue opportunities for the future payphone network.

However, in isolation, these initiatives will not secure the future of BT's payphone network. Given this background, it is vital to ensure that regulation is not an additional burden on what is an increasingly fragile market and that it is limited to those issues that are essential for the protection of consumers.

BT believes that it is not reasonable to expect the same coverage in terms of the number of PCBs when there is clear evidence of declining payphone use. We remain committed to providing payphone service but firmly believe that unless the universal service payphone network is clearly defined it will jeopardise the future of the entire payphone business.

Our analysis of our payphone network in the UK has allowed us to segment boxes into these categories:

- boxes that form part of the universal service obligation (potentially uneconomic boxes that are essential to serve the needs of a community);
- commercially profitable boxes; and
- commercially uneconomic boxes installed to meet usage requirements that no longer exist.

The current absence of a universal service definition means removal of any public call box (where it is the last PCB at a site) requires BT to gain the permission of the relevant Local Authority and Parish Council if in England or the Community Council if in Northern Ireland or Scotland. BT believes this obligation places an unreasonable burden on BT and on local authorities as well as parish/community councils.

² Ofcom research of Feb 03 found that 92% of the UK population live in homes with a fixed line phone and additionally 7% of homes choose to have service provided by mobile only.

A proper, fully understood, definition of a USO box would remove this burden on all parties. The development of this definition would prevent the need for this complex, administratively costly, box removal process save for particular circumstances, for example removals at the request of a landowner. Given such a definition, BT would not seek to remove any 'USO' PCBs in future rationalisation plans, but would manage those PCBs falling outside the definition on a commercial basis. This would give customers confidence by ensuring those payphones that provide service to communities and to people on the move have a long term secure future. Continuing to look at UK payphones as a single network without defining which boxes make up the USO will have serious repercussions on the financial viability of BT's payphone service.

BT is of the view that the early development of a definition for USO PCBs is essential to the long term future of payphones in the UK and originally raised this issue with Oftel over two years ago. BT would urge Oftel to take action on this at the earliest opportunity and, given the commercial importance of this definition to BT, we would be very pleased to work with Oftel in this area.

The concept and definition of social need provision has proved useful in identifying gaps in the provision of public payphones. BT proposes that this concept should be expanded to create a definition of the USO that would clarify which existing PCBs constitute provision under the USO and would recommend that the provision evaluation criteria comprise:

- size of the community;
- type of accommodation in the area - whether private owner occupied, rented or social housing (a secondary factor to the size of the community that reflects the demographics of that community);
- levels (numbers of payphones serving that community) and locations - distance to existing payphones.

These should be augmented by an additional criterion relating to the annual box takings which could act as a measure of consumer use.

The fundamental objective in identifying USO PCBs is to define the payphones service required to meet the needs of a community.

Geographically averaged prices

Whilst BT is committed to maintaining a basic cost structure for payphone calls across the UK, it would wish for more autonomy in the overall pricing approach for payphones. The declining nature of the payphones business means that innovative methods of encouraging potential payphone users into boxes must be sought. From a commercial perspective, BT's payphone business splits into two business models with significantly different costs. For its future viability it is essential that BT's payphone business is not precluded from developing price promotions that would provide returns if offered to one of these business models by the need to offer such promotions ubiquitously.

Comments on Condition 3 specifics

BT notes that since the publication of this consultation document, Oftel has issued a separate consultation entitled 'Public Payphones: implementation of universal service obligations' that seeks views on paras 3.2 onwards of universal service Condition 3 and also on a proposed direction on the removal or installation of a PCB on social grounds.

BT welcomes this wider debate on the universal service Conditions for payphones. BT will be responding in more depth to this detailed consultation. BT would wish interested parties to note

that revised guidelines (attached at annex 1) for the removal and resiting of public call boxes have recently been agreed between BT and Oftel. BT believes that at minimum this Condition should be updated to reflect the content of these Guidelines.

Condition 4: Provision of Relay Service for Textphone Users

We are pleased that Oftel has taken action on the concerns we raised with it over the funding of the relay service. We welcome Oftel's introduction of a provision which will allow BT to recover a proportion of the funds it provides for the relay service from those communications providers that provide publicly available telephone services and whose customers make use of the service. We agree with the additional proviso that such recovery may only be required from other providers on terms that reflect BT's reasonable and efficiently incurred costs of providing the service. We believe these costs should include:

- standard PSTN conveyancing;
- access and connection to a TextDirect platform;
- access and connection to the relay service as appropriate;
- promotion to users of all applicable TextDirect services;
- support services for TextDirect;

We will be publishing a price and notifying Oftel of it in time for it to be applicable from when the revised Condition comes into force.

Condition 5: Tariffs for Universal Services

Although this Condition reflects Clause 65 of the Communications Bill, we believe that Clause 65 incorrectly implements the relevant provision in Article 10 of the Universal Service Directive. We understand that the Government accept this, and intend that Clause 65 should be amended during the Bill's passage through the House of Lords. We therefore do not propose to comment further on this Condition.

Condition 6: Itemised billing

We are pleased that Oftel considers the current level of itemisation provided by BT to be sufficient for the proposed Condition. The appropriateness of the basic level needs to be kept under review to ensure that it remains so, bearing in mind the changing needs and circumstances of our customers. For instance, more and more people with Internet access will wish to access such information electronically.

Condition 7: Maintenance and supply of a directory information database and directories

(i) Supply of Directories and databases for provision of directory services.

In paragraph 3.61 Oftel refers to the Universal Service Directive obligations on Member States to ensure that:

- At least one comprehensive directory is available to end users;
- At least one directory enquiry service is available to all end users including users of public pay telephones;
- All undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available for the purpose of the provision of publicly available directory enquiry services

and directories the relevant information in an agreed format on terms which are fair, objective, cost orientated and non discriminatory.

In its revised general conditions of entitlement Oftel has addressed these obligations through Conditions 8 and 22. However in paragraph 3.64 Oftel states that it is necessary to go further in order to ensure that the obligations under Article 5 and 25 of the Universal Service Directive are met efficiently and transparently.

Oftel therefore proposes placing a further universal service obligation on BT requiring it to provide access to its comprehensive (DQ) database to other DQ providers whether or not they are also providers of PATS. This specific Condition also requires BT to provide directories to other communications providers who will be caught by General Condition 8. Oftel argues without any supporting evidence that the Condition is objectively justifiable and proportionate and that it is not unduly discriminatory on BT.

There is no basis within the Universal Service Directive for the application of such a Condition. Article 5 of the Universal Service Directive is concerned with obligations at the retail level and this obligation is fulfilled through the requirements that Oftel has set out in the General Conditions. Similarly, while Article 25 is concerned with the exchange of information between operators this is also satisfied by Condition 22 of the General Conditions.

Accordingly BT disagrees that it is proportionate or necessary to go further and to place on BT an obligation at the wholesale level in respect of its search engine and directories. BT believes that by imposing regulation at the wholesale level, and especially for access to Pathfinder, Oftel will be distorting competition.

BT also notes that there is no basis for the imposition of these obligations under the other relevant Directives. There are no relevant markets of this nature defined in the Commissions Guidelines and accordingly Oftel could not undertake a market review in relation to these markets without first initiating the Article 7 procedure.

BT considers that Oftel is bound by the general limitations of the Directives as a package and is not permitted to simply impose regulatory obligations at will. The Framework Directive Art 15 makes clear that any obligations involving ex ante regulation outside the Commission Recommendation have to be undertaken within the Art 7 procedure. Furthermore, there is considerable doubt whether some of the services in Condition 7, specifically phonebooks and access to OSIS, are actually Electronic Communication Services (ECS) within the meaning of the Directives. The Commission Guidelines (paragraph 85) makes clear the limitations of the powers of NRAs to regulate outside these boundaries. If OFTEL believes that it has such powers, it should state them clearly with reasoned legal argument.

BT shows at annex 2 a communication from the European Commission which would appear to endorse our position that provision of access to Pathfinder would require recourse to the Art 7 procedure (answer to Question 3) and provision of phonebooks is not an ECS (see definitions).

In summary, the obligations at the retail level in the Universal Service Directive cannot be used as a pretext to enable Oftel to impose obligations at the wholesale level when this has not been mandated under the Access and Interconnect Directive (AID) or permitted in the Framework Directive.

Notwithstanding BT's comments above on Oftel's powers to impose Conditions 7.1 and 7.2 BT has the following comments to make on the drafting of those Conditions and a re-worded Condition 7 is attached at annex 3.

(ii) Condition 7

BT presumes that Oftel in Condition 7.1 is referring to OSIS. BT has two basic problems with this Condition which concern coverage (what is meant by 'comprehensive') and frequency of update of the database.

BT believes that as currently drafted, Condition 7.1 may be too broad. OSIS may be considered to be a comprehensive database in so far as it contains information where there is a demonstrable need to provide directory information services as required under current legislation. However, this is much more limited than the all encompassing definition suggested in Condition 7.1 which would imply the entire number range. The exact nature of 'comprehensiveness' in the Universal Service Directive Art 5.1 (a) does not appear to be defined which indicates that a degree of discretion exists in terms of precise coverage.

At a more practical level, BT considers that the nature of 'comprehensiveness' could usefully be considered in terms of the information contained within a data record held on OSIS and how that information is provided to BT for inclusion in OSIS. This issue is also important in facilitating a clear boundary between different service offerings and for example the provision of non-mandatory directory information services. BT proposes that this matter be progressed through industry discussion in the first instance.

Regarding frequency of update, there appears to be some confusion between the requirement at the retail level for update of the Directory at least once a year and of the database itself which of necessity requires continuous updating. We present a suggested modification to 7.1 in annex 3.

a) Provision of Directories

In relation to paragraph (a) of Condition 7.2 BT notes that the current definition of Directory means a printed document containing Directory Information which is made available to members of the Public. The Universal Service Directive Art 5 on the other hand permits such a directory to be in electronic form. BT is addressing the issue of electronic directories in more detail in its response to the revised General Conditions of Entitlement.

As stated above, BT does not believe that there is any legal basis for or any need for an obligation to be imposed on BT to provide other communications providers with its directories – either electronic or paper. By imposing such an obligation on BT, Oftel is effectively distorting the ability for alternative competitive solutions which would naturally arise facilitated by General Conditions 8 and 22. These could include for example different combinations of listings, 'badging' and delivery.

If an obligation along the lines of Condition 7.2 (a) were to be imposed, BT believes that Condition 7.2 (a) must be redrafted in conjunction with definitions in the Schedule in order to ensure that the obligation is proportionate. Our suggested re-draft in annex 3 would restrict the obligation to the provision of the Directory Information (the alpha listing) of BT's phonebooks alone. Note that this would not affect the obligation on PATS providers to provide a directory to consumers.

In addition, BT would also point out that in the consultation document Oftel do not place an obligation on Kingston to make directories available. Kingston has always produced its own directory and BT has never produced a directory for the Kingston region nor has any plans to do so.

b) Provision of OSIS

Notwithstanding BT's comments above on Oftel's powers to require the provision of OSIS, BT accepts that there are good grounds for ensuring that there is a reliable database which is open to all providers of directory services. We have proposed in annex 3 a modest drafting alteration to Condition 7.1 and 7.2.

c) Provision of Pathfinder

BT understands that Oftel's intention is that Condition 7.2 c is meant to refer to the provision of the product that is currently known as Pathfinder.

Pathfinder is not in any sense synonymous with a simple search engine facility limited to the OSIS database; the actual search engine is NDIS to which Pathfinder is the gateway, and its associated database is not OSIS in any case. Pathfinder represents a much more sophisticated product providing access to value added additional entries such as cross references, pseudonyms and special lists. These are value-added services which have been created through BT's own efforts and represent an important source of differentiation between BT's retail service and those provided by its competitors.

BT believes there is no legal or otherwise objectively justifiable basis on which an obligation to provide access at the wholesale level to Pathfinder or any similar product can be justified under the new regulatory framework. While BT plans to continue to offer access to Pathfinder we believe that an obligation to provide access at a controlled price represents unfair regulation, fettering competition and imposing undue control on BT.

Even if Oftel were to conduct a market analysis under the Art 7 procedure, there is no question that access to Pathfinder would not be justified under the criteria set out in the AID and indeed in Oftel's own Access Guidelines. Several DQ Service Providers have entered the market without taking up access to Pathfinder and in any case, the cost of the search engine is modest in the context of the provision of DQ services where call centre and marketing costs predominate.

BT's view is that the creation of a search engine can easily be achieved by either buying in systems or by developing systems in house. Suppliers who are active in this market include Varetis, Northern Telecom and Volt Delta who can develop a system that is scaled to the customer's call volumes.

BT perceives few strategic or other barriers to entry in the provision of DQ services and the widespread introduction following 118XXX introduction demonstrates this to be the case. Regulation of BT in such an innovatory market and which is not supported by the Commission would be wholly unacceptable.

Condition 8: Quality of Service

Among the quality of service parameters detailed within the consultation, reference is made to the need for 'Proportion of coin and card operated public payphones in working order' to be reported. BT withdrew pre-paid cards from service in 2003 and all BT payphones accept cash, calling cards including BT Chargecard, and a limited number also accept creditcard payment. This reporting requirement is therefore superfluous and should be amended to reflect the current position. BT and Oftel have recently agreed revised payphones quality of service reporting and BT will continue to report the 'proportion of PCBs working' as per this agreement.

Annex 1

BT guidelines for the removal and re-siting of public call boxes

BT Guidelines for the removal and re-siting of public call boxes

1.1 British Telecom ('BT') shall not remove public call box service from a site unless:

- a) local circumstances support the removal or re-siting of the public call box; or**
- b) BT has sought the consent (in writing) of the local Planning Authority and in the case of England, the local Parish Council (if one exists), and in the case of Scotland and Wales, the local Community Council; or**
- c) in the case of Northern Ireland, BT has, where applicable, sought the consent (in writing) of the appropriate local community groups; and**
- d) a notice has been displayed on the public call box in question (the 'notice') informing the public of the proposed change and informing them that representations may be made to:**
 - 1) the local Planning Authority;**
 - 2) in the case of England, the local Parish Council (if one exists), and in the case of Scotland and Wales, the local Community Council;**
 - 3) in the case of Northern Ireland, the local community groups;**
 - 4) the Director General of Telecommunications (the 'Director') and**
- e) a period of at least 42 days (or 70 days where a representation has been made to the Director within 42 days) after the date when the notice was first posted has elapsed; and**
- f) in the case of the local Planning Authority, if no response has been received after 35 days, BT shall send a follow up letter reminding the local Planning Authority of the need to respond. If either consent has been given or no response has been received 7 days after the reminder has been sent, then BT shall be entitled to remove the box(es) concerned, provided that both letters have included information on the time by which the reply must be received;**
- g) in the case of Parish and Community Councils and community groups, where, having made all reasonable efforts to do so, BT is unable to contact any of these bodies, BT may ask the local Planning Authority to forward the relevant notice of its proposal to the Council or group concerned. If consent is given or no reply is received, BT shall be entitled to remove the box(es) concerned on the same basis as in f above.**

The Director shall be entitled to make a determination overriding any decision by BT to remove or re-site a public call box where he is satisfied that local circumstances do not support the removal or re-siting of the public call box in question.

1.2 The requirements set out in paragraph 1.1 shall not apply where BT wish to remove or re-site a public call box from a site provided that such removal or re-siting would still leave at least one public call box capable of accepting cash payment on that site.

1.3 The Director shall not have the power to make a determination over-riding a decision of BT to remove or re-site a public call box in the circumstances set out in paragraph 1.2.

1.4 Where BT is required to remove a public call box from a site on the instruction of the landowner on whose land the public call box is situated or some other person with the power to issue such an instruction, BT/ shall contact:

- a. the local Planning Authority;**
- b. in the case of England, the local Parish Council (if one exists) and in the case of Scotland and Wales, the local Community Council; and**
- c. in the case of Northern Ireland, where applicable the local community groups**

to establish whether the local community still has reasonable access to public call box service and, if not, how it may continue to have such service.

BT/shall provide public call box service at an identified alternative site unless the box could, in any event, have been removed under the provisions of paragraph 1.2 of these guidelines or BT obtains the agreement in writing of the local Planning Authority that it is not necessary to provide public call box service at an alternative site, or that it will be sufficient to re-site another local public call box. The provisions of paragraph 1.1 f will apply in the event that the local Planning Authority fails to reply to a request for its agreement.

The Director shall be entitled to make a determination overriding such an agreement where he is satisfied that it is necessary to provide another public call box at an alternative site. In the event that the local Planning Authority and BT fail to agree, either party may make representations to the Director who shall then make a determination resolving the matter.

1.5 The definition of a site in the context of these guidelines shall be agreed between BT and Oftel from time to time.

Installation of public call boxes

1.6 BT and Oftel shall agree a set of evaluation criteria to identify the relative merits, in terms of community needs, of the provision of new public call boxes which have been requested, so that such requests are fairly and consistently handled. These criteria shall be monitored by Oftel and changes may be made over time. The objective will be to ensure that the reasonable needs of local communities for public call box services are met. In the event that a request for a public call box is not granted by BT and, if the Director is satisfied that the reasonable needs of the local community are not being met, the Director shall be entitled to make a determination requiring that a request for public call box service be granted, whether or not the local Planning Authority has made representations to the Director.

1.7 BT shall, in as far as is reasonably practical, liaise with local Planning Authorities to ascertain details of major new housing developments. BT shall then survey existing payphone provision in the area to ensure that such new housing developments will be adequately served.

Information to be provided to Oftel

1.8 With effect from 1 January 2003, BT shall supply Oftel every six months with a report setting out:

- a. the number of requests for new public call boxes (including details of the areas in which such provision was requested) and whether or not the request was granted; and**
- b. data on the number of public call boxes re-sited or removed entirely and the reasons for such re-siting or removal in each case.**

Oftel will send a reminder letter to BT shortly before the report is due.

Annex 2

Communication from the European Commission



EUROPEAN COMMISSION

Information Society Directorate-General

Communication services: Policy and regulatory Framework
Policy Development and Regulatory Framework

Brussels, 15 April 2003

D(2003)

This information is provided on an informal basis and does not necessarily reflect the official position of DG Information Society or the European Commission. The Commission accepts no responsibility or liability whatsoever with regard to any information or data referred to in this document. Moreover, the Commission is not the final arbiter in matters of interpretation of the new framework. This is ultimately for the courts, and the ECJ in particular, to determine.

Dear Mr. Whitchurch,

Your request to Peter Scott relating to the implementation of Directive 2002/21/EC the Framework Directive (FWD) and Directive 2002/22/EC the Universal Service Directive (USD) under the new framework for electronic communications has been passed to us for reply.

BT's query:

It is our understanding that art. 5 of the Universal Service Directive concerns the availability of a comprehensive directory and comprehensive DQ service to end-users, and that Art. 25 relates to the rights to an entry in a directory, and obligations on all undertakings which assign telephone numbers to make available number information. However, we believe that neither Article confers a power on NRAs to regulate the provision of wholesale services or to do so on the basis of significant market power. We believe that DQ services do not appear to be electronic communication services within the meaning of art. 2 FWD.

Further, according to the Commission Guidelines (July 2002) two conditions would need to be satisfied for the imposition of wholesale obligations:

The markets should be electronic communications markets and

The markets should have such characteristics as to justify ex-ante regulation

Even if these services did fall under Art 2 FWD, NRAs would be obliged to use the Article 7 procedure of the Framework Directive itself and undertake an appropriate market review for SMP equivalent obligations to be imposed.

In summary, BT believes that the requirements of the USD to provide services to end-users cannot be used to circumvent the procedures of, and the restrictions in, the rest of the Directives themselves.

Comments

Our remarks address the specific provisions for directory information services under the existing and new regulatory frameworks for electronic communications networks and services. In particular,

the relevant provisions of Directive 98/10/EC Voice Telephony Directive and Directive 2002/22/EC Universal Service Directive are analysed. In addition, the relevance of Directive 2002/21/EC Framework Directive is explained.

For purposes of our reply,

‘directory information’ refers to categories of information that include subscriber name, number, address, customer type, directory status and type of number (e.g., fixed or mobile); directory information is collected by network operators from their customers and is used to provide telephone directories and/or directory information services;

‘directory information services’ refer to the commercial provision of directory information by means of an electronic communications system; they include both directory enquiry services and on-line directory information services;

‘directory enquiry (DQ) services’ refer to directory information services that are operator assisted and involve the operator looking up entries on a database;

‘wholesale’ refers to the provision of services between network operators or service providers.

Relevant articles from existing and new framework:

The relevant articles under the existing and new regulatory frameworks are Articles 3 and 6 of Directive 98/10/EC Voice Telephony Directive (VOD) and Articles 5 and 25 of the Universal Service Directive (USD) and **are re-produced in annex.**

BT’s query may be re-phrased as:

- 1. Do the provisions of the Framework Directive (FWD) give NRAs the power to regulate wholesale directory information services on the basis of significant market power (SMP)?**
- 2. Are directory information services considered electronic communications services for the purposes of the new regulatory framework?**
- 3. Do the provisions of either the Voice Telephony Directive (VOD) or the Universal Service Directive (USD) provide for NRAs to have the power to regulate the provision of wholesale directory information services or access to wholesale directory information?**

Analysis and Answers:

Question 1: Do the provisions of the FWD give NRAs the power to regulate wholesale directory information services on the basis of significant market power (SMP)?

Answer: The provisions of the FWD relate, *inter alia*, to the designation of undertakings with significant market power (SMP) and the imposition of obligations under the provisions of Articles 14 to 16 FWD. The provision of wholesale directory information services to third parties is **not included** in the Commission’s Recommendation on Markets Susceptible of ex ante Regulation³ as one of the markets where such regulation by NRAs may be warranted. Thus, NRAs would first have to seek Commission approval to define a market for wholesale directory information services, in accordance with the procedures in Article 7 FWD, and obtain the Commission’s agreement before it could proceed to designate any operator as having significant market power on that defined market. As indicated in the Recommendation on relevant markets, the Commission will use the three criteria set out in section 3.2 of the Explanatory Memorandum to assess whether any such proposed markets could justify ex-ante regulation.

³ Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation of 11 February 2003, available at

http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/documents/recomen.pdf

Question 2: Are directory information services considered electronic communications services for purposes of the new regulatory framework?

Answer: Such services may not fall within the definition of an electronic communications service (ECS), but certain aspects of these services are regulated pursuant to the definition of a “publicly available telephone service” as defined in Article 2 of VOD and Article 2 of USD. Article 2 of VOD defines ‘publicly available telephone services’ as including both fixed telephone services and public mobile telephone services. Fixed public telephone services include

...access to emergency ‘112’ services, the provision of operator assistance, directory services, provision of public pay phones...

Article 2 USD defines “publicly available telephone service” as

a service available to the public for originating and receiving national and international calls and access to emergency services through a number or numbers in a national or international telephone numbering plan, and in addition, may, where relevant, include one or more of the following services: the provision of operator assistance, directory enquiry services, directories, provision of pay phones, ...

Therefore, for purposes of our reply, it is not necessary to determine if directory information services fall within the definition of ECS as they are defined as ‘publicly available telephone services’, with specific regulatory obligations imposed in relation to them, as explained in Question 3.

Question 3: Do the provisions of either or both the VOD or USD provide for NRAs to have the power to regulate either (1) the provision of wholesale directory information services or (2) access to directory information at the wholesale level?

Answer: No as to the former and Yes as to the latter.

There are no provisions in either the VOD or the USD, in relation to directory services, to provide an NRA with powers to regulate the provision of wholesale directory information services. Nor are there any provisions in the FWD, in relation to SMP designation (other than on a case-by-case basis under Article 7 FWD as described above), that would foresee NRAs having the power to impose obligations on operators in relation to wholesale directory information services.

Nonetheless, competition in the directory information services market has been recognised by the Commission as highly beneficial, especially regarding price competition and service innovation.

Both the VOD and USD contain provisions to facilitate access by third parties to directory information at the wholesale level. The provisions of Article 6.3 VOD and Article 25.5 USD relate to the **terms of access** to this information whereby third parties are able to access directory information at the wholesale level in order to provide competitive DQ services and directories.

Under Article 6.3 VOD, Member States are required to ensure that **all** (emphasis added) undertakings which assign telephone numbers to subscribers must meet all reasonable requests for directory information. This information must be provided in a **fair, cost oriented and non-discriminatory manner**. Any operator that assigns numbers must make directory **information** available to other operators to enable them to provide their own directory enquiry services.

Similarly, under Article 25.2 USD, undertakings that assign telephone numbers must meet **all** reasonable requests to make directory information available in an agreed format, on terms which are fair, **objective**, cost oriented and non-discriminatory for the purposes of the provision [by third parties] of publicly available directory enquiry services and directories. NRAs would have the power to regulate the **access** to wholesale directory information, to ensure that third parties could provide their own DQ services and directories..

These articles also prescribe a minimum level of directory services that should be available for all users. NRAs should be able to regulate to enforce the legal requirement to achieve this minimum

standard if needed. Such legal requirement may require all undertakings that assign numbers to make their directory information available to a universal database operator. This obligation flows from the requirement in the USD for a universal directory enquiry service and at least one universal directory, and does not include the commercial provision of directory information.

Conclusion

As a general rule, NRAs are already obliged to ensure that undertakings that assign telephone numbers to subscribers make their directory information available to third parties **in an agreed format on fair, cost-oriented and non-discriminatory terms**. As of 25 July 2003, NRAs will be obliged to apply a fourth criterion, **objective terms** of access, “for the purposes of the provision of publicly available directory enquiry services and directories”. As a result of both VOD and USD, any operator that assigns numbers must provide its **directory information** to others in an agreed format to enable them to provide their own directory enquiry services or directories.

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Annex of Relevant Provisions of the Directives

Article 3 VOD states:

Article 3 Availability of services

1. Member States shall ensure that the services set out in this Chapter are made available to all users in their territory, independent of geographical location, and, in light of specific national conditions, at an affordable price.

Taking into account the progressive adjustment of tariffs towards costs, Member States shall in particular maintain the affordability of the services set out in this Chapter for users in rural or high cost areas and for vulnerable groups of users such as the elderly, those with disabilities or those with special social needs.

To this end, Member States shall remove obligations which prevent or restrict the use of special or targeted tariff schemes for the provision of the services specified in this Directive and may, in accordance with Community law, implement price caps or geographical averaging or other similar schemes for some or all of the specified services until such time as competition provides effective price control.

Schemes designed to ensure affordability shall follow the principles of transparency and non-discrimination. Member States shall publish the rules and criteria for ensuring affordability at the national level, taking into account Article 24.

2. Member States shall publish regular reports on the evolution of tariffs which should be made available to the public. The Commission shall publish regular reports on the evolution of tariffs throughout the Community. Article 6 VOD states:

Article 6 VOD states:

Directory Services

1. The provisions of this Article are subject to the requirements of relevant legislation on the protection of personal data and privacy, such as Directive 95/46/EC and Directive 97/66/EC.

2. Member States shall ensure that:

(a) subscribers have the right to have an entry in publicly available directories and to verify and, if necessary, correct or request removal of that entry;

(b) directories of all subscribers who have not expressed opposition to being listed, including fixed, mobile and personal numbers, are available to users in a form approved by the national regulatory authority, whether printed or electronic, or both, and are updated on a regular basis;

(c) at least one telephone directory enquiry service covering all listed subscribers numbers is available to all users, including users of public pay telephones;

3. In order to ensure provision of the services referred to in paragraph 2 (b) and 2 (c), Member States shall ensure that all organisations which assign telephone numbers to subscribers meet all reasonable requests to make the relevant

information available in an agreed format on terms which are fair, cost oriented and non-discriminatory.

4. Member States shall ensure that organisations providing the service referred to in paragraph 2(b) and 2(c) follow the principle of non-discrimination in their treatment and presentation of information provided to them.

Article 5 USD states:

Directory enquiry and directories

1. Member States shall ensure that:

a) at least one comprehensive directory is available to end-users in a form approved by the relevant authority, whether print or electronic, or both, and is updated on a regular basis, and at least once a year;

b) at least one comprehensive telephone directory enquiry service is available to all end-users, including users of public pay telephones.

2. The directories in paragraph 1 shall comprise, subject to the provisions of Article 11 of Directive 97/66/EC, all subscribers of publicly available telephone services.

3. Member States shall ensure that the undertaking(s) providing the services referred to in paragraph 1 apply the principle of non-discrimination to the treatment of information that has been provided to them by other undertakings.

Article 25 (1) and (2) USD states:

Operator assistance and directory enquiry services

1. Member States shall ensure that subscribers to publicly available telephone services have the right to have an entry in the publicly available directory referred to in article 5(1) (a).

2. Member States shall ensure that all undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information in an agreed format on terms which are fair, objective, cost oriented and non-discriminatory.

3. Member States shall ensure that all end-users provided with a connection to the public telephone network can access operator assistance services and directory enquiry services in accordance with Article 5(1)(b).

Annex 3

Suggested changes to proposed Schedule and Conditions