

EQUALITY OF ACCESS BOARD
RESPONSE TO OFCOM'S
DIGITAL COMMUNICATIONS REVIEW CONSULTATION

Introduction

1. Ofcom has sought responses to its Strategic Review of Digital Communications. The Equality of Access Board (EAB) has ten years of experience of providing independent oversight to Communication Providers (CPs), Ofcom and BT on whether BT has been compliant with the Undertakings. As a result we have a detailed insight into how the current functional separation model is operating, including some of its shortcomings.
2. Our consultation response below summarises the fact-based evidence the EAB has reported on over the past ten years via our annual reports to the Industry and to Ofcom. Not only have we sought to consolidate and summarise that evidence but also we have offered our views on the potential opportunities for improvement in the current regime.
3. So as to maintain our independence and effectiveness, we do not believe it appropriate for the EAB to offer any views on the structural options set out by Ofcom. We have therefore commented only on the Undertakings as they exist today. In consultation process terms, we are responding to Questions 13, 14 and 15, but not 16.

The Role of the EAB

4. The EAB's remit is defined in the Undertakings as a responsibility to monitor, report and advise upon BT's compliance with the Undertakings with a specific focus on equivalence and the operation of Openreach. The EAB has no remit over service or pricing, other than ensuring that both BT and non-BT CPs receive equivalent performance levels.
5. The EAB consists of five members: three who are independent (who form the majority); one who is a BT executive; and the chair, who is a BT non-executive director. Membership of the EAB has been refreshed during the 10 years. The EAB reports its findings annually to Industry, Ofcom and BT. PricewaterhouseCoopers (PwC) provides an independent assurance opinion on selected aspects of the EAB annual report.
6. In its early years, much of the EAB's work concerned monitoring whether BT had delivered the required milestones set out in the Undertakings. In recent years the focus of the EAB has shifted to the more complex task of ensuring ongoing and sustained compliance in an environment of changing markets and technologies. The EAB has an ongoing compliance validation programme whereby it checks that the key requirements of the Undertakings are being maintained.
7. The EAB investigates and reports on breaches that arise from BT's self-reporting, CP complaints or the EAB's own work. It provides advice to BT both to remedy breaches and to avoid them in the first place. It investigates complaints and other requests from CPs, and monitors product Key Performance Indicators (KPIs) and behaviours within BT and Openreach. The EAB is supported in its work by the Equality of Access Office (EAO), a separate function within BT that reports solely to the EAB and has ready access to BT systems and information so as to carry out investigations and monitoring activities.

Performance against the Undertakings

8. The Undertakings were signed in September 2005 and ten years on, as at July 2015, the record is as follows:
- a. BT has completed all of the formal milestones that were in the Undertakings. 14 of the 45 key binding milestones were not achieved on time, but they were all subsequently completed or the requirement revised with the agreement of Ofcom. Two of the 14 missed milestones required BT to pay a financial allowance to CPs as a result of the late delivery. With hindsight, the scale and complexity of some of the systems separation milestones were underestimated.
 - b. BT has had 119 breaches over the ten years, including the 14 missed milestones. BT self-declared more than half of the breaches, the remainder arising from complaints raised by CPs or by investigations initiated by the EAB itself. Whereas missed milestones were a frequent cause of breaches in earlier years, nowadays the most common causes are systems-related problems and one-off instances of inappropriate information sharing by individuals.
 - c. Breaches are categorised by the EAB as either trivial or non-trivial. Trivial breaches are those where a technical non-compliance has been found but it has, amongst other factors, had little or no impact on CPs. Of the 119 breaches, 60 were trivial and 59 were non-trivial.
 - d. All but eight of the 119 breaches have been remedied, and for the outstanding eight there are remedial plans and timescales in place. Only one historic non-trivial breach is outstanding and this is because it involves an extensive programme of system developments and changes to mitigate fully the risk of recurrence. This breach is due to be remedied by March 2016.
 - e. There have been only six formal complaints raised by CPs to the EAB over the ten years. The EAB upheld one complaint relating to Ethernet resilience, but did not uphold the others. We recognise that it can be hard for CPs to identify non-equivalence when they usually only have their own experience and data as a reference point. Notwithstanding the decision on these formal complaints, when the EAB has made a recommendation to improve matters, BT has agreed to take action.
 - f. There have been 214 informal complaints raised through the EAB's "quick check" process. This process allows CPs to raise a concern without requiring the CP to provide prima facie evidence of a breach; evidence that frequently is only available to the EAO after detailed interrogation of BT's systems and information, and hence not readily available to CPs.
 - g. The informal complaints process has proven very valuable in resolving a wide variety of matters that might otherwise have undermined the relationship between BT and Industry, and probably explains the low number of formal complaints. Eight of the subsequent investigations resulted in a breach being discovered and in other cases, although there was no breach, BT either undertook remedial action to improve matters or provided information to help clarify the position.
 - h. There have also been 84 information clarification requests raised through the "quick check" process. Having a way of getting to the bottom of things continues to be a valuable tool in ensuring misunderstandings between CPs and BT/Openreach can be reduced but has also given rise to seven breaches being discovered as a result of the investigation.
 - i. As far as we are aware, there have been no claims by CPs for compensation as a result of the breaches we have determined.
 - j. The EAB has an ongoing compliance validation programme whereby it checks that the key

requirements of the Undertakings are being maintained. This includes the monitoring of KPIs and a behavioural dashboard.

- k. The EAB monitors product KPIs (included in our annual reports) on a quarterly basis to ensure that provision, repair and migration performances are at a similar level for BT and non-BT CPs. The vast majority of these KPIs have demonstrated that Openreach products and service are being delivered equivalently, and where from time to time they have suggested otherwise – not least for Ethernet – exhaustive investigations by the EAO have shown that different business practices, CP-specific events (e.g. system failure, bulk migrations) and the mix of order types are the primary cause of such differences rather than non-compliance. Once identified, these factors have been fed back to Openreach and CPs so that changes in working practices can be made if deemed appropriate.
 - l. In terms of behaviour, amongst other indicators, the EAB has continued to track mandatory training rates as a key enabler to achieving the right behaviours. In July 2015, BT had Undertakings mandatory training completion rates of 99.4% for managers and 98.9% for non-managers, out of a total in-scope work force of over 73,000. Nonetheless, the EAB continues to press for 100% compliance and the BT CEO has endorsed this. Other behavioural indicators include Openreach incentive schemes and governance around access to sensitive information.
 - m. The EAB places a high value on regular meetings with CPs and industry forums at which matters relating to the Undertakings can be raised. In these meetings, the EAB now tends to hear much more from CPs about service and process issues, rather than equivalence and Undertakings implementation as was the case in the early years.
9. In summary, from a process-oriented perspective, whilst BT's performance in meeting the Undertakings requirements is not faultless, in general it has either met the required Undertakings obligations on time or has subsequently met revised timings. There continue to be a number of breaches each year and there is still a requirement for constant awareness and vigilance. The small number of formal complaints and the non-Undertakings nature of many of the concerns that CPs now raise suggest that, in the main, the Undertakings have been executed as agreed.

Performance against Expected Outcomes

10. The outcomes on many fronts would appear to suggest that the Undertakings have been successful at increasing the competitiveness of the UK telecoms market to the benefit of the consumer. Section 4 of Ofcom's consultation examines the evidence for this in more detail.
11. However not all outcomes have been as expected:
 - a. Whilst the achievement of absolute service levels are outside the remit of the Undertakings, it was originally expected that BT CPs consuming equivalent service to non-BT CPs would drive up Openreach's absolute performance for all CPs. However, in practice performance levels have remained a major concern for many CPs, particularly for Ethernet provision at the present time.
 - b. The Undertakings milestones did not differentiate between consumer and business customers, and in practice much of the early delivery of equivalence was weighted towards consumer customers as these represented the vast majority by number. CPs focussed on business customers are only now starting to see the benefits of their portfolio being equivalent and their customer records being moved onto separate systems. This process is due to be complete by March 2017.

Current Concerns and Potential Opportunities

12. There are a number of concerns that CPs have repeatedly raised with the EAB and thus are points to be considered in whatever future model is employed. These include:
- a. **Service** – as mentioned above, despite the fact that Openreach has delivered equivalent service to all CPs including BT, absolute levels have not always improved as expected. CPs point to the setting and monitoring of minimum acceptable service standards with appropriate penalties for regulated products as likely to be more effective in raising standards than requiring equivalence of service alone.
 - b. **Statement of Requirements (SORs)** – this process and its governance is much better and more transparent now, but it remains a contentious topic for both industry and Openreach, especially for the Ethernet portfolio. The most frequent concern is that in some circumstances the business case for Openreach to fulfil a new requirement is only successfully made when a BT CP commits to the volume of business necessary for Openreach to achieve a commercial return. This makes it appear that BT CPs have non-equivalent influence over the requirements process although the EAB has found no evidence that the Undertakings have been breached.
 - c. **Northern Ireland** - there continues to be no Openreach presence in Northern Ireland and hence BT has different working practices in place. The Undertakings requirements are as a consequence different and generally less onerous, and CPs have expressed concerns about this situation. Whilst we note that BT has made efforts to meet the intent of the Undertakings in Northern Ireland over and above its contractual requirement, CPs believe that a binding commitment to do so would provide greater reassurance.
 - d. **“Wooden Dollars”** – some CPs have raised the fact that financial transactions between Openreach and the rest of BT are internal (“Wooden Dollars”) and therefore of lesser impact on BT than the cash flows that external CPs must incur. A frequently quoted example is Project Services offered by Openreach to expedite Ethernet orders. In the current functional separation model the remedy for this is the regulation of prices for Significant Market Power (SMP) products and services.
13. In addition there are a number of areas where the EAB has identified opportunities for improvement that could benefit the process of monitoring functional separation:
- a. **Intent** – ten years on it can sometimes be difficult to interpret the Undertakings in a world where the environment and technology has changed, and where the original intent is sometimes disputed. In any future Undertakings-type agreement, it would be helpful if a summary of the principles and intent could be set out clearly. This would help the EAB or its equivalent to make judgements in unforeseen situations where the specific clauses may not be easily applicable.
 - b. **Clarification of the Openreach boundaries and the Equivalence of Input (EoI) portfolio** – in an increasingly fast-paced and convergent technology world, there would ideally be a clearer and more future-proof definition of the portfolio against which EoI applies, for example whether it should apply just to SMP products offered by Openreach or all products offered by Openreach.
 - c. **Focus** – there are a number of areas in the Undertakings which could now be removed because they are no longer required. For example the section on proposed requirements for BT’s ‘Next Generation Network’ which did not happen as originally envisaged, or the numerous milestones which have now been achieved. This would help increase the focus on the remaining clauses that really do matter.

14. Finally, there are some features of the current regime that the EAB views as particularly important:

- a. **Transparency** – the requirement for the EAB to report publicly on breaches and BT’s performance in respect of the Undertakings not only provides the opportunity for CPs to raise concerns and challenge behaviours that they observe but also, in our experience, has acted as a catalyst for action within BT. Feedback from some overseas markets is that they would value this level of transparency in their equivalence models.
- b. **Self-reporting** – as noted above, the majority of breaches to date have been self-reported by BT, and we view this as a positive indication of the internal awareness of the Undertakings within BT. Whilst undoubtedly penalties for the most serious of breaches (e.g. missed milestones) have played a valuable role in the implementation of the Undertakings and still today can be imposed under SMP regulations, a regime which penalised all breaches irrespective of severity might have the unintended consequence of encouraging less self-reporting. Therefore, if penalties were to be considered, limiting their scope would minimise the potential damage to self-reporting.
- c. **Equivalence** – an obvious point perhaps, but it is our view that whatever form of regime is taken forward, it should continue to embrace the principle of equivalence. Equivalence has underpinned the breadth of competition and consumer choice now enjoyed by the market.

15. **The above consultation response is the collective and unanimous consultation response from all the EAB members.**



- **Stephanie Liston, Independent Member**



- **Edward Astle, Independent Member**



- **Emin Gurdenli, Independent Member**



- **Phil Hodgkinson, EAB Chairman**



- **Tim Whitley, BT Executive Member**

7th October 2015