



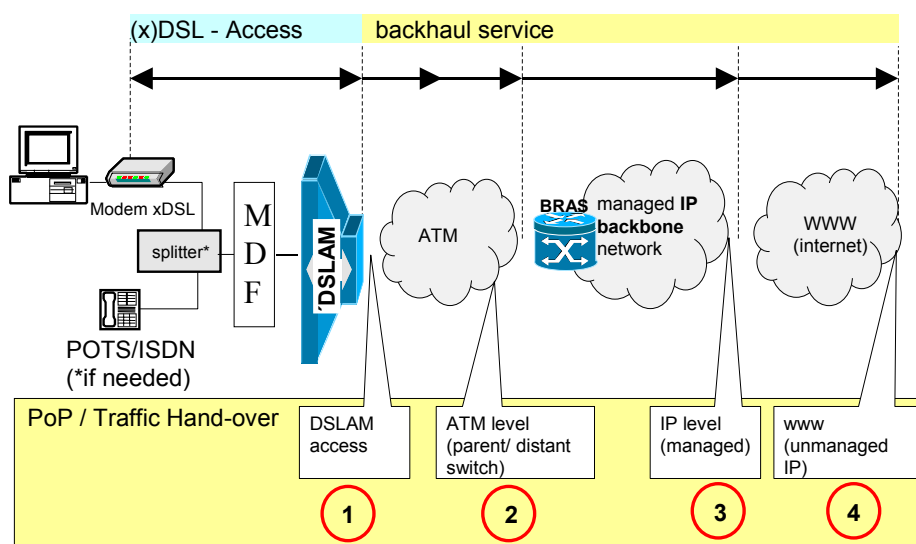
BT Response to ERG Bitstream Consultation

1. Summary of BT Views

- NRAs must conduct a forward-looking market analysis taking into account competitive supply conditions and geographical variations in supply before making a determination of SMP in any market. Before making any ex-ante intervention they should also explain why competition law cannot be relied on and should conduct a cost-benefit analysis taking account of the potential error costs from intervening in emerging markets.
- Remedies imposed on any SMP player must be proportionate and relate to identified problems.
- Bitstream interconnect obligations, if justified by the market analysis, should be imposed only at DSLAM and ATM levels and should be justified in terms of downstream economic benefits for end-users.
- The regulation should not oblige SMP operators to offer too wide a range of bitstream variants. A reasonable set of options should be agreed in industry forums or else be dictated by competition law, for example, if a dominant provider is self providing services using DSL.
- An excessive range of mandated access variants may chill network innovation and upgrades and could reduce incentives for infrastructure construction.
- If pricing cannot be agreed by commercial negotiations the NRA should intervene (subject to a finding of SMP having been made) but should bear in mind the need not to damage incentives for ongoing infrastructure investment.

2. Response to ERG Questions

2.1 How do you evaluate the options described or which (other) options should be made available/mandated?



2.1.1 This diagram from the ERG document summarises the main bitstream interconnection options on which comment is sought:

1. The incumbent provides the DSL access link and hands over the bitstream to the new entrant directly after the DSLAM.
2. The incumbent provides the DSL access link plus a backhaul service and hands over the bitstream to the new entrant at an ATM-PoP (at ATM level).
3. The incumbent provides the DSL access link plus a backhaul service and hands over the bitstream to the new entrant at an IP-PoP (at IP level).
4. The incumbent provides the DSL access link plus a backhaul service and also provides the connectivity to the public IP network of the World Wide Web.

2.1.2 BT View: Before any access obligations are imposed on an operator, as opposed to being offered via commercial negotiation, there must be a finding of SMP in the market for wholesale broadband access. It cannot automatically be assumed that all incumbent operators have SMP in all geographical areas. The market analysis should take account of differences in competition at the various network levels. In particular there may be effective competition for transmission between an incumbent's main ATM switches so there may be no justification for mandating interconnection at the ATM level but this will depend on the detailed market analysis and the state of competition.

2.1.3 *The diagram/analysis in the document is a list of the main options for the point of handover from the incumbent's network to another operator. It thus represents a snapshot of some of the more common requirements now – but not all the interconnection opportunities represented may be available in the future, for example if the IP network is extended direct to the DSLAM, replacing the ATM layer. Subject to ongoing market analysis it may be necessary to require an equivalent to ATM interconnection where this ceases to be available. Maintaining obligations to offer obsolete technology would clearly chill innovation.*

2.1.4 *Technological changes are occurring continuously and manufacturers are continually updating the specifications of their routers, multiplexers and switches. With the development of e.g. resource reservation protocol (rsvp) IP networks may totally replace ATM networks and Ethernet-based DSLAMs are another alternative. All three systems could also co-exist for a period of time in some areas. Currently, however, only ATM layer interconnect provides the control and flexibility required for bitstream applications.*

2.1.5 *Because of the uncertain network evolutionary paths and likely regulatory caution not to withdraw any type of access facilities once granted, any attempt to mandate a range of specific technological options risks suppressing innovation and upgrades. This points to the need for a limited set of access options to be developed in consultation with industry and standards groups.*

2.1.6 *At the present time and with currently typical network configurations, BT believes that where a finding of SMP is made then only options 1 and 2 should be considered by the NRA as remedies. Furthermore, while it is recognised that access should not be mandated if there are realistic alternatives to the mandated provider, buyers must also be protected against undue bundling of services by the SMP provider – e.g. the purchase of backhaul alongside the DSL access services where the purchaser can secure alternate services or self-provide. In other words the market review is key.*

2.1.7 *Subject to market analysis findings, it is desirable for new operators to have:*

- *Access to the DSLAM*
- *Access to the ATM layer*
- *Ability to access the ATM node most relevant to its network*
- *Ability to control the contention ratio to suit market need*
- *Multiple virtual channels*
- *Demonstrably non-discriminatory SLAs and pricing terms/structure to those supplied to the incumbent's retail operations.*

2.1.8 *BT notes that Option 4 would imply incumbents being ordered to provide a service which is not even included in the Recommendation on relevant markets – i.e. Internet connectivity.*

2.2 What do you think of the regulatory approach advocated in the document? (Please provide the reasons for your answer)

Key elements of the approach advocated in the ERG document are:

2.2.1 "...bitstream access should be made available additionally to LLU if requested by OLOs/ISPs or on a non-discrimination basis."

2.2.1.1 BT View: Before any access is mandated an NRA should undertake a proper forward-looking market analysis to establish whether any player has market power and should consider whether there will be a net positive impact from intervention (given likely error costs and magnitude of benefits). In principle LLU should suffice since it enables new entrants to design and build the network features of their choice but careful market analyses by NRAs will probably reveal that some additional form of access is needed in some geographical areas for a time – particularly where incumbent operators are not voluntarily offering a reasonable range of products. Where possible the price should be based on commercial negotiations. Mandated access may not be a relevant remedy where a wide range of wholesale offers is already available.

2.2.1.2 Where commercial negotiations on pricing issues fail, the NRA should intervene but should give due weight to the need to encourage ongoing infrastructure investments. Retail minus and LRIC+ both have disadvantages (particularly in fast moving technologies where there are significant options benefits from deferring investment). It may be appropriate, in view of the outcome of the market analysis, to adopt different methodologies for the various vertical supply elements (i.e. DSLAM access, backhaul, and ATM conveyance).

2.2.2 "NRAs must examine in detail the effect of the technical restrictions of incumbents' access offers on new entrants, particularly as regards the point of access. The assessment regarding the appropriate point of access should be made from the perspective of the beneficiaries, who should be able to define the product." and "...the burden of proof that the requested (DSLAM) profile is technically impossible to implement lies with the incumbent".

2.2.2.1 BT View: This is an area of rapid technological change where capabilities and costs are varying rapidly. The process of upgrading the fixed network will inevitably mean that there are both geographical and temporal variations in the applicability of any conceptual model of vertical interconnection. This argues for a small number of mandated access points and features. Anything else risks freezing innovation and delaying network upgrades. Technological change may result in some access point options becoming significantly more costly relative to others (as equipment trends move away from particular interfaces) and

some options may become unavailable (for example if fibre to the cabinet replaces copper loops from the exchange). “Technically impossible” is too high a standard and risks disproportionate obligations –but the burden of proof should be on the requesting operator and NRA to show significant downstream economic benefit (for end-users) from mandating each interconnect variant

2.2.2.2 Mandating SMP operators to offer a wide range of service variations subject to the preferences of new entrants potentially imposes enormous cost and risk on the SMP operators at a time when they are struggling to maintain the support of their investors for the construction of e-Europe. Furthermore, some technical and QoS options for later interconnection requests could be foreclosed by earlier commitments. It would thus be desirable for multiple service requests to be considered jointly and in consultation with industry on technical standards; and for regulators to accept that there will be practical limits to diversity. The approach indicated by ERG would run counter to the need specified in the Directives for proportionality and regard to a proper return on capital.

2.2.3 “..NRAs have to take account of varying national circumstances resulting from different network architectures as well as the different market situations across Europe.”

2.2.3.1 BT View: As above, network architectures differ even within a single Member State and are constantly evolving so any regulatory intervention has to be very carefully measured. However, subject to market analysis, a level of consistent access capability to these services e.g. at the Option 2 level above would assist in providing similar products and competitive opportunities across the EU and delivering true pan-EU products which are currently materially hampered by the huge variance in the availability of DSL access services across the EU.

2.2.4 “...it is important that the NRA ensures a consistent price structure of all regulated access products as competition along the entire value chain should be enhanced and the choice between the different forms of access might otherwise be distorted”.

2.2.4.1 BT View: It is unclear what is meant by a consistent price structure in this context. Any attempt to maintain constant price differentials or apply price squeeze tests simultaneously over various points in a vertical supply chain will be a recipe for total paralysis. Inevitably, any technology (and hence cost) change will disadvantage some player who will then appeal for redress. Maintaining a consistent (in these terms) price structure in an area of rapidly evolving technology will have a detrimental effect on innovation. Nevertheless the price of the interconnect product should be consistent with the price charged to the incumbent’s own business and protections should be in place to ensure the competition rules on non-discrimination and

excessive and predatory pricing can be properly applied – including transparent internal pricing between the SMP operator’s retail and wholesale arms.

2.2.5 “...the provision of bitstream access is essential to the development of competition in the wholesale broadband access market as well as in the retail services market...”.

2.2.5.1 BT View: The goal should be the development of competing infrastructures so it is important that the pricing of bitstream access does not remove any incentive for the construction of new infrastructure. A retail minus approach – though it has some problems associated with it – may be the best approach if commercial negotiations fail.

2.2.6 The ERG notes that bitstream access is a low cost option, one which allows new entrants to use their own networks and potentially a “more appropriate access product in times of dry capital markets”.

2.2.6.1 BT View: This is not necessarily a low cost option for the SMP operators especially if investment costs are raised by the need to provide a wide range of features to meet the demands of different interconnecting operators. In effect the burden of convincing investors to produce more funds in difficult times is to be placed on heavily regulated SMP operators which is hardly a recipe for rapid deployment of broadband. The ERG position also presumes a failure in capital markets which has not been demonstrated. Bitstream is low cost in the sense that it requires a lower level of capital investment up front, but ongoing costs may be higher. Bitstream (and resale of the incumbent’s offer) allow business models less dependent on high concentrations of customers at each local node. These are therefore alternative cost models rather than low cost models.

2.2.7 The ERG comments that “The new regulatory framework now in place explicitly favours a strong regulatory approach”.

2.2.7.1 BT View: The new framework does no more than require a closer alignment of SMP with competition law concepts, a proper market analysis, and proportionate application of remedies. It would be more accurate to say that the new framework favours a more focussed approach than before, tailored to the specific problems identified.

2.3 In which fields and by which means would you like regulators to take a harmonized approach?

2.3.1 Regulators should take a light handed approach to price squeeze issues – relying as far as possible on competition law. There should be broad acceptance that failure to satisfy the arithmetic of a price squeeze test may be a consequence of the methodology (particularly

where the test is applied to broad vertical and horizontal combinations of products) or represent product differentiation rather than any exclusionary intent. It is important that price squeeze tests be conducted to a standard format and only re-done when there is a significant change in market conditions. There may be certain simple methods by which the competition law rules can be made more effective, such as transparency of the internal charges in the SMP operator.

2.3.2 Regulators should take a similar approach to rules/requirements on accounting separation which should be imposed in similar circumstances across Europe. At the wholesale level, the quantity of data supplied should be adequate to ensure compliance with non-discrimination requirements, should not be excessive, and should be published. This is currently not properly applied across Europe and is prejudicing the proper roll-out of pan-EU product sets.

2.3.3 The treatment of geographical sub-areas, within a Member State, where conditions of competition are materially different due to the presence or absence of competing networks should be harmonised. This should be true for all markets – not just wholesale broadband access.

2.3.4 We await the appearance of the Commission / ERG document on remedies but reiterate our view that there should be a harmonised approach to their imposition – covering the justification for regulatory intervention (options analysis and evidence of clear benefits) and the nature/level of obligations imposed in similar circumstances.

2.4 Respecting the rules of the Framework Directive and the Access and Interconnection Directive, do you think that cable operators should be requested to offer bitstream access?

2.4.1 Subject to a proper market analysis, if a cable operator is found to have market power then it would be appropriate to consider application of access obligations. The presence of contention in the local CATV network is not a sufficiently fundamental difference from contention in the backhaul network from a DSLAM to justify treatment as a separate market. However, the nature of CATV in most cases as an additional option to the PSTN may result in there being no player with SMP in cabled areas but this will depend on the services being provided over the various access technologies as well as the technical characteristics of the relevant access technologies.

2.5 Are there any other aspects / further comments concerning bitstream access that you would like to raise?

2.5.1 BT believes that, certainly for the UK, there is not a separate economic market for Internet access at the retail level above any arbitrary data rate (e.g. 256kbit/s). Detailed analysis carried out by BT clearly suggests that retail Internet access services based on cable modems and retail Internet access services based on unmetered narrowband call origination (e.g. FRIACO) are sufficiently price constraining on retail Internet access services based on DSL-based bitstream access to place these services in the same economic market at retail level.