ELECTRONIC COMMUNICATIONS BILL
BT Response

Key Points

BT:

- believes that the government programme to promote and facilitate e-commerce is vital if the UK is to maintain and improve its global competitive position.

- welcomes the legal recognition of signatures and enabling legislation to allow Ministers to update the statute book to ensure that, where appropriate, electronic means can be used as an alternative to pen and paper.

- believes that there should be a timetable for the identification and amendment by secondary legislation, of all existing legislation that could slow down the development of e-commerce. We support the recommendation in the PIU report[1] that by March 2000 government departments identify areas where they can take advantage of the equivalence between digital and written documents.

- applauds the government acceptance of an industry run accreditation scheme for Cryptography Support Services in place of Part I of the Bill. We will continue to work with industry, user organisations and other interested parties under the auspices of the AEB to ensure that a suitable and cost effective accreditation scheme is forthcoming. The suspension of Part I should be specifically allowed for within the Bill.

- believes that there is a danger that some of the focus on the promotion of e-commerce will be lost by the inclusion of the complex and extensive requirements concerning law enforcement. SMEs are likely to have difficulties in coping with the complexities of part 3 of the Bill, as the extensive references to the Interception of Communications Act will not be familiar to them.

[1] e-commerce@it's.best.uk: recommendation 35

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1. GENERAL COMMENTS

BT believes that the Bill will provide welcome impetus for e-Commerce in the UK. It will provide legal clarity and a framework that will allow e-Commerce to flourish. These comments build on the April 1999 BT response to the DTI Consultation "Building Confidence in Electronic Commerce[2]".

BT would welcome further discussion on the contents of this paper with interested parties. In the first instance, requests for further details or points of clarification should be addressed to:

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2. PART 1 - CRYPTOGRAPHY SERVICE PROVIDERS

1. While the explanatory notes clearly state that the register is voluntary, the wording in the Bill does not. We believe that as drafted, the Bill does not properly reflect the primacy of self regulation nor meet the requirements of Article 3 of the Electronic Signature Directive. The Bill should explicitly state the voluntary nature of registration and approvals. It should also make clear that part I of the Bill would only be enacted if a satisfactory industry run voluntary scheme was not forthcoming or such a scheme did not work properly.

2. We do not believe that the broad discretion given in Clause 2 - (2)(c) and (3)(a) is necessary.

[2] Available at http://www.bt.com/World/corpfin/regulatory/

3. There is no indication of fee levels in Clause 2 (7). BT would like to see fixed fees which related to the cost of gaining and maintaining approval for all seeking approval

4. BT would like to see some indication of whom the Secretary of State may delegate approvals functions to in Clause 3. We are also concerned that there is no effective limitation on the amount and scope of information that may be required by an approvals body. We suggest a provision similar to that introduced in the Data Protection Act, limiting disclosure for registration purposes would be appropriate here.

5. BT believes that it was intended that Clause 6 (1) should apply to encrypted computer to computer communications (no human intervention). However, as worded the clause only appears to cover situations where a person is communicating.

6. It is not clear if non-commercial provision of cryptography support services (company internal system) or free to user services are covered by Clause 6.3. BT believes that they should not be covered and that this should be clear.

3. PART II – FACILITATION OF ELECTRONIC COMMERCE, DATA STORAGE. ETC

7. BT believes that there is a possibility that this Part may fall altogether because Clause 8 may be attacked as an overly broad "Henry VIII" provision on its passage through Parliament. It may be worthwhile to consider two alternative approaches:

- To create a "default" that e-signature and that e-storage are legally valid (in any case where signature and storage is presently required) and specify the exemptions to this presumption (certificates for marriage, divorce, wills etc.) and specify the process for possible additions to the list. There is a model for this approach in US legislation; or

- Maintain the approach in the draft Bill, but specify in a Schedule to the Bill the legislation, circumstances in which e-signatures and e-storage will be valid from commencement of the Act

8. BT believes that the definition of "electronic communication" in Clause 23 is unsatisfactory. As drafted it is very broad and would appear to cover all modern-day non-paper communication, such as phone-calls, faxes etc. and has no limitation or reference to such communications being made in the course of "e-business"/ "e-commerce" as such.

9. Clause 7 should include documents created on a computer then printed, without any electronic communication involved.

10. Clause 8(3) should be clarified so that it is possible to understand the extent to which it (a) imposes additional requirements beyond the present law on use of signatures, writing, storage and record-keeping, and if it does so whether (b) that is intended.

11. BT has the following suggested amendments to Clause 8:
- add words to clarify that the provisions only apply if the making of a record has been required under law prior to the passing of the Act;
- clarify meaning of "record" - so that it can mean in electronic or other forms (e.g. barcodes, microfiche) and does not refer solely to written records (the latter would seem to defeat the purpose of Part II;
- clarify meaning of "everything" - does it mean an exact, complete record or will a summary or extract be acceptable.

12. It is vital that all government departments identify legislation that needs to be amended as soon as possible. We believe that a timetable for this, including dates for completion, should be included in the Bill in order to provide the impetus needed. The timetable should also identify key areas where early amendment would have the greatest impact.

13. In order to engender confidence among consumers and minimise fraud, it is important that registration and certification authorities are able to vet staff adequately and legally. BT believe that it should be possible for organisations involved to share customer information, in the same way that credit card issuers do in order to minimise applications from multiple aliases from a single address.

4. PART III - INVESTIGATION OF PROTECTED ELECTRONIC DATA

14. BT feels that the balance between the power to investigate and the safeguarding of individual and commercial privacy needs further

discussion. We are concerned that as currently drafted there is a danger that this section of the Bill could have undesirable commercial consequences. The provisions in this part of the Bill are likely to be considered onerous, particularly by small businesses. To be consistent with the government's stated aims, the legislation must be such that, from the outset any participant in e-communications (and at least a potential recipient of a notice) can understand what may be required of him, plainly and clearly from the face of the Act. This is not the case in the present Bill. There is uncertainty about the scope of the powers of "investigating authorities" acting under Part III and how their powers may be exercised in practice which is not dispelled even by a fair knowledge of existing law, such as IoCA, and its customary application (which many cannot be expected to possess).

15. We also believe that the relationship between this Bill and other legislation such as IoCA needs to be clarified. BT would welcome further discussion on this aspect of the Bill, particularly on the balance between legislation and the content of codes of practice such as that proposed by the Home Office for the interception of communications.

16. In relation to clause 11, there is inadequate provision to prevent and, or deter investigating authorities from requiring key disclosure routinely, rather than as a limited fall-back option in the rare cases where provision of plaintext may be insufficient. If request for keys becomes the de facto norm, that would effectively amount to the introduction of key escrow "indirectly" which the government has said is not the intention of the legislation.

17. In relation to clause 13, here again there is inadequate provision to prevent and,or deter use of "tipping-off" notices in cases where the commercial cost is not justified.

18. It is not clear that existing laws, e.g. relating to aiding and abetting or perverting the course of justice, are insufficient such that there is a need to create a specific, new offence of "tipping-off". It will be inconsistent with the aim of light regulation and creating the right environment for promotion of e-commerce in the UK, if a new criminal offence is created if it is not absolutely required.

19. Even if the need to create a new offence is justified, it is broadly drawn and therefore creates a real concern that people will not clearly

understand the circumstances in which an offence can be committed, including inadvertently.

20. BT assume that the meaning of "intelligible" is intended to be to put something into the form that it was received (by BT) in, and not an obligation to further decrypt. If this is the case, then the use of the term "plaintext" would make this clearer in Clause 11.

21. In general terms the proposed safeguards appear to be inadequate to protect the recipient of a notice from suffering adverse commercial consequences as a result of complying with a notice.

22. We are concerned that there appears to be nothing in the Bill to negate Service Provider liability for disclosing keys and plain text to an investigating agency. The effect of this would be that Service Providers would be expected to check that investigating agencies are acting within their powers. BT are also concerned that this would damage relationships with Services Providers, where trust between the parties could well be undermined by these provisions.

23. In line with existing comparable practice (e.g. under IoCA), a notice should include and specify matters such as the legislation pursuant to which the investigating authority is acting is valid.

24. In the paragraphs dealing with "Law Enforcement" in the Regulatory Impact Assessment in the Explanatory Notes there is a recognition that there may be considerable costs in implementing new security systems or in changing keys. Nonetheless, the Bill does not provide for tangible safeguards to minimise these risks. For example, clause 15(3) is very loose and affords no real protection and clause 16 does not provide for any sanctions or compensation for breach of the code of practice.

25. There is no provision in the Bill for limiting the meaning of "key". This may expose a person to liability for disclosing a key that decrypts (a) the communications of persons other than the person under investigation, or even (b) communications of the person under investigation which are irrelevant to the matter being investigated, e.g. legitimate, personal communications.

5. PART IV - MISCELLANEOUS AND SUPPLEMENTAL

26. BT recognises this part as a standalone element of the Bill having the express intention of enacting provisions amending the way in which Telecommunications Act Licences are modified. BT has fully participated in the two previous formal Consultations and various industry/Government discussions. Our general position on the issue of Licence Modifications has already been set out in the two formal responses which were submitted to Government. This position remains unchanged.

27. The position contained in the first of those two responses is especially relevant in so far as the proposals contained in the draft Bill more closely approximate to those outlined in the first consultation.

Specifically BT:

- remains particularly concerned that these proposals do not amount to a full appeal on the merits. In BT's view it is neither necessary nor desirable to remove the right of appeal to the MMC (or other equivalent appointed body);
- continues to maintain that where individual licences are tailored to meet special circumstances on an objectively justified basis, it may be argued that no modification to the current procedure is necessary for those aspects;
- considers that in cases where all licences have the same condition but where it is only triggered in a small percentage (often in only 1 or at most 2) those who are already affected should be assigned greater weight in the establishment of the "significant minority".

28. These new proposals differ from the original proposals specifically in removing the quantitative "blocking minority" concept and replacing it with the more discretionary "significant minority". This can be determined on a case by case basis and may be subject to rules and principles issued by the Secretary of State. BT believes that such rules and principles should be issued by the Secretary of State and that the Director should not be empowered under Clause 12 of the Bill until such rules and principles have been so prescribed.

29. Following from these concerns, BT proposes the following amendments to the text of the Bill and each set of amendments is followed by and Explanatory Note detailing exactly what the preceding amendment is intended to achieve:

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Clause 20
(*modification of licences by the Director*)

Page 18, Line 28, at end insert-

"(4C) Where the Director proposes to make any modification to a licence granted to a particular person and

(a) at the same time proposes to make a modification in the same or similar terms to any other licence,

(b) the terms of the modification are such that the licence condition which is to be modified will only have effect on the occurrence of a specified event or the existence of a specified state of affairs,

(c) at the time the Director proposes to make the modification the event has occurred, or the state of affairs exists, only in respect of one licensee of any type or category and in relation to any geographic area,

then, in respect of the proposed modification, that licensee shall be regarded as a significant minority of the relevant licensees for the purpose of section 12A below."

Explanatory Note

The draft Bill currently provides for the proposed modifications to a single licence to be opposed by the licensee but for proposed changes in similar terms to more than one licence only to be blocked if they are opposed by a "significant minority" of licensees. What constitutes a "significant minority" would be determined by the Director or on a case basis subject to rules and principles issued by the Secretary of State.

As many licence modifications contain "trigger" provisions which mean that the change will only come into effect when a certain event occurs or state of affairs exist (e.g. the licence holder has secured a specified market share) it is possible for changes to more than one licence only to have a practical impact on one licence (because that licensee is the only one for whom the relevant event has occurred or the relevant state of affairs exists). In that event this amendment would ensure that the licensee, as the only licensee really affected by the change, would constitute a significant minority for the purposes of objecting to the change.

Clause 20

(*modification of licences by the Director*)

Page 21, Line 25, at end insert-

> "and the Director shall not exercise any power under this section until such time as the Secretary of state has first made such an order."

Explanatory Note

The draft Bill currently provides for the Director to determine what constitutes a "significant minority" of licensees affected by a proposed licence modification by reference to rules and principles prescribed by order by the Secretary of State. However, there is no express provision requiring the Secretary of State to exercise the power to prescribe such rules and principles nor is there any prohibition on the Director exercising those powers in the absence of such rules and principles.

This amendment would prohibit the Director from exercising his powers under Clause 12 of the Bill until after the first time that the Secretary of State has exercised the power to prescribe such principles.

Clause 20

(*modification of licences by the Director*)

Page 21, Line 29, leave out "both"

Page 21, Line 32, leave out "both"

Page 21, Line 36, at end insert -

" ; and

(d) the proportion of the total number of objecting licensees that are relevant licensees who, because of -

(i) the occurrence of an event, or

(ii) the existence of a state of affairs,

specified in the proposed modification will be immediately affected by that modification on its coming into effect."

Explanatory Note

The draft Bill provides for the Secretary of State to prescribe by order the rules and principles which the Director must have regard to in determining what constitutes a "significant minority" of licensees affected by a proposed licence modification.

These amendments would require the Secretary of State to include within those rules and principles a requirement to take account of the extent to which, when compared to the other relevant licensees, the objecting licensees are practically affected by the proposed licence modification because they have already passed a "trigger point" at which the modification would come into effect (e.g. having secured a specific market share).