



# Confirmation decision under section 139A of the Communications Act 2003 relating to contravention of information requirements

Confirmation Decision issued to British  
Telecommunications plc by the Office of Communications  
("Ofcom")

Non-confidential version

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## About this document

This document sets out Ofcom's confirmation that British Telecommunications plc ("BT") has contravened requirements to provide information in response to statutory information requests made by Ofcom under sections 135 and 191 of the Communications Act 2003.

These findings relate to BT's responses to three separate requests by Ofcom for information concerning the provision by BT of Ethernet services.

This document also sets out Ofcom's decision that it is appropriate and proportionate in this case to impose a penalty on BT in respect of the contraventions it has identified.

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## Section 1

# Introduction and Background

- 1.1 This document confirms that we are satisfied that British Telecommunications plc (“**BT**”) has contravened requirements to provide information in response to statutory information requests made by Ofcom under sections 135 and 191 of the Communications Act 2003 (the “**Act**”).
- 1.2 Our findings relate to BT’s responses to three separate requests by Ofcom for information concerning the provision by BT of Ethernet services, specifically:
  - 1.2.1 a request for information under section 135 of the Act, dated 24 September 2014, for the purposes of the Business Connectivity Market Review (the “**BCMR s135 Notice**”);
  - 1.2.2 a request for information under section 191 of the Act, dated 24 September 2015, for the purposes of resolving a dispute brought by Vodafone Limited (“**Vodafone**”) on 14 August 2015 relating to the provision of Ethernet services by BT (the “**Dispute s191 Notice**”); and
  - 1.2.3 a request for information under section 135 of the Act, dated 6 November 2015, for the purposes of Ofcom’s own-initiative investigation into BT’s compliance with its regulatory obligations in relation to the provision of Ethernet services (the “**Investigation s135 Notice**”).
- 1.3 Each of the contraventions referred to in this document came to light recently as a result of Ofcom’s enquiries in the Deemed Consent investigation and the contravention findings it has made following that investigation.

## Ethernet services

- 1.4 Ethernet services are the most widely-used type of leased lines, which provide high-quality access to fixed networks and underpin effectively all communication services used by consumers and businesses. They are essential components of business Information and Communications Technology (ICT) services, particularly those used by large multi-sited enterprises and Government organisations, and play a key role in delivering fixed and mobile broadband services to consumers, as CPs use them extensively in their networks.
- 1.5 BT is the largest supplier of leased lines in the UK. The majority of communications providers (“**CPs**”) depend on access to BT’s leased line services, such as Ethernet, in order to provide communications services, including broadband, to their customers.
- 1.6 Ofcom carries out periodically a detailed review of competition in the provision of leased lines in the UK in order to identify whether any business has significant market power (“**SMP**”), which would enable it to act in a manner to distort competition. The review is known as the Business Connectivity Market Review (“**BCMR**”).
- 1.7 In each of the BCMRs completed in 2008, 2013 and 2016, Ofcom found that BT had SMP in the provision of certain leased line services, including Ethernet services, in the UK. Ofcom has imposed regulatory obligations on BT as a result of its market power to ensure that CPs are able to access these services. The obligations Ofcom

imposed on BT in each of the BCMRs are fundamental to promoting competition in communications services used by consumers and businesses.

- 1.8 The BCMR s135 Notice was sent to BT for the purposes of the BCMR completed in 2016.

## **BT's regulatory obligations in relation to the provision of Ethernet services**

- 1.9 As a result of its SMP, BT is required to provide access to its Ethernet services in accordance with certain regulatory obligations. These include an obligation to provide network access in accordance with the terms and conditions in BT's published contract, including a service level guarantee ("**SLG**") in relation to the timeframe for delivery for Ethernet services.
- 1.10 In accordance with these regulatory obligations, BT is required as part of its SLG to deliver Ethernet services by the 30<sup>th</sup> working day (the contractual delivery date or "**CDD**"), unless the CP consents to an extension. In certain specified circumstances, BT is able to deem that the CP has consented to an extension to the CDD. This contractual mechanism is known as Deemed Consent.
- 1.11 In August 2015, Vodafone referred a dispute to Ofcom about BT's use of Deemed Consent and whether it was consistent with the terms of BT's published contract and its regulatory obligations.<sup>1</sup> Ofcom sent BT the Dispute s191 Notice requiring it to provide information which Ofcom considered necessary for the purpose of resolving the dispute.
- 1.12 In the course of resolving the Vodafone dispute, Ofcom identified a number of areas which it considered warranted further investigation. It therefore opened an own-initiative investigation on 6 November 2015 to look at whether BT's use of Deemed Consent was compliant with its regulatory obligations imposed as a result of the SMP findings made in the BCMR (the "**Deemed Consent Investigation**"). Ofcom sent BT the Investigation s135 Notice requiring it to provide information which it considered was necessary for the purpose of carrying out the Deemed Consent Investigation.

## **Statutory information requests**

- 1.13 Ofcom has statutory powers to require the provision of information which it considers necessary for the purpose of carrying out its functions. In relation to the contraventions set out in this document, the relevant powers to require the provision of information are contained in sections 135 and 191 of the Act.<sup>2</sup> A person required to provide information under one of these provisions has a statutory duty to provide it to Ofcom in the manner and within such reasonable period as Ofcom may specify.<sup>3</sup>
- 1.14 These statutory powers are fundamental to Ofcom's ability to carry out its statutory functions in relation to communications matters, such as conducting market reviews, imposing regulatory obligations, resolving disputes and taking enforcement action, in line with its principal duty of furthering the interests of citizens and consumers. They enable Ofcom to gather the information which it considers necessary to carry out its

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<sup>1</sup> A copy of Ofcom's final determination in the Dispute is available at: [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw\\_01165](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01165)

<sup>2</sup> These and related provisions concerning requirements to provide information are set out in more detail in Annex 1 to this document.

<sup>3</sup> See sections 135(4) and section 191(3) of the Act.

functions in a timely and effective manner and therefore are key to the integrity of the regulation of electronic communications networks and services under the Act.

- 1.15 Without such powers, Ofcom would be prevented from exercising its functions in the interests of citizens and consumers because of the asymmetry of information that exists: much of the information which it requires is held by CPs that it regulates.
- 1.16 Parliament has recognised in the enactment of the Act that information-gathering powers are a foundation stone for a regulatory regime for telecommunications which operates effectively and in the interests of citizens and consumers. In addition to the powers conferred on Ofcom to require the provision of information in sections 135 and 191, it has given Ofcom the power to impose financial penalties in the event of a contravention of a statutory requirement to provide information.<sup>4</sup> In addition, a person who fails to provide information in accordance with a requirement imposed by Ofcom under section 135 or section 191 is guilty of a criminal offence.
- 1.17 Accordingly, Ofcom considers that a contravention of a requirement to provide information under section 135 or section 191 is a serious matter. These contraventions hinder Ofcom's ability to carry out its functions and more generally have the potential to undermine the integrity of the regulatory regime, thereby harming citizens and consumers.

## Contravention findings

- 1.18 Against this background, Ofcom has made the following findings of contravention in this case.

### BCMR s135 Notice

- 1.19 As set out in more detail in Section 2, in its response of 3 December 2014 to the BCMR s135 Notice, BT failed to provide a set of slidepacks which were prepared for a weekly meeting conducted by [redacted]an Openreach Executive Member[redacted] and [redacted]the Openreach Executive Member's[redacted] senior management team. The slide packs only came to light over a year later when BT provided them to Ofcom in April 2016 in response to an information request issued for the purposes of the Deemed Consent Investigation.
- 1.20 Ofcom notes that BT had the opportunity to provide comments on a draft of the BCMR s135 Notice, and, in line with BT's comments, the scope of the final request had been amended to focus on information that was used at regular (weekly and monthly) meetings between [redacted]an Openreach Executive Member[redacted] and [redacted]the Openreach Executive Member's[redacted] senior management team and other meetings that were part of the recognised governance for Ethernet.
- 1.21 For the reasons set out in Section 2, Ofcom is satisfied that these slide packs fell within the scope of the BCMR s135 Notice and therefore BT failed to comply with the requirements of the BCMR s135 Notice by failing to identify them.

### The Dispute s191 Notice

- 1.22 As set out in more detail in Section 3, in its response of 8 October 2015 to the Dispute s191 Notice, BT failed to identify one of the processes and procedures which it used to extend the CDD for the provision of Ethernet services using Deemed

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<sup>4</sup> See sections 139 and 191(5) of the Act.

Consent and failed to accurately describe such processes and procedures as they applied to one of its Ethernet products. These errors were identified by Ofcom over five months later as a result of further information about BT's processes and procedures which BT provided in the course of the Deemed Consent Investigation. For the reasons set out in Section 3, Ofcom considers therefore that BT failed to comply with the requirements of the Dispute s191 Notice.

- 1.23 Further, as set out in more detail in Section 3, in its response of 8 October 2015 to the Dispute s191 Notice, BT said that it was only in exceptional circumstances that Deemed Consent would be applied retrospectively, and in these circumstances the CP would be notified as soon as practically possible after the delay. In view of the findings of contravention made by Ofcom as a result of the Deemed Consent Investigation, Ofcom considers that these statements were misleading and give rise to a contravention of the requirements imposed on BT by the Dispute Section 191 Notice.

### **The Investigation s135 Notice**

- 1.24 As set out in more detail in Section 4, Ofcom identified in March 2016 that BT failed to provide a number of documents that fell within the scope of the Investigation s135 Notice. For the reasons set out in Section 4, Ofcom is satisfied that the omissions give rise to a contravention of the requirements imposed on BT by the Investigation s135 Notice.

### **Penalty**

- 1.25 As noted, Ofcom considers that a contravention of a requirement to provide information is a serious matter. In this case, Ofcom considers that the omissions in BT's response to the s135 BCMR Notice and the misleading statements in its response to the s191 Dispute Notice delayed the detection of the contraventions of BT's SMP obligations which Ofcom has found as a consequence of the Deemed Consent Investigation. Ofcom considers that the other omissions in BT's responses to the s191 Dispute Notice and to the s135 Investigation Notice are indicative that BT does not have effective systems in place to respond accurately and comprehensively to information requests in accordance with its statutory obligations under sections 135 and 191 of the Act.
- 1.26 Having considered these matters in the round, Ofcom has decided to impose a penalty of £300,000 on BT. Ofcom considers that this is appropriate and proportionate, given the seriousness of these contraventions, the potential harm to consumers and citizens, BT's size and turnover and Ofcom's central objective of deterring further contraventions.
- 1.27 The basis for Ofcom's decision as to the amount of the penalty imposed on BT is explained in Section 5.
- 1.28 A copy of the formal notification setting out Ofcom's confirmation of the contraventions it has found in respect of BT's responses to the BCMR s135 Notice, the Dispute s191 Notice and the Investigation s135 Notice is at Annex 2.

## Section 2

# Confirmation of contravention of the BCMR s135 Notice

## Information requested from BT under section 135 of the Communications Act 2003

2.1 In order to enable Ofcom to carry out its 2016 BCMR review, Ofcom issued a number of information requests to BT. These included the BCMR s135 Notice, which was issued to BT on 24 September 2014 and required the provision of specified information by 5pm on 5 November 2014.<sup>5</sup>

2.2 A copy of the BCMR s135 Notice is provided at Annex 3. In accordance with section 137(3) of the Act, Ofcom described the required information and set out its reasons for requiring it. In particular, the BCMR s135 Notice stated:

*“This notice requires you to provide the information set out in the Annex to this Notice, for the purpose of enabling Ofcom to review the telecommunications markets for retail leased lines and associated wholesale services...the purpose of this notice is to obtain specified information that relates to the quality of service provided by BT in the delivery of wholesale leased lines – in particular its Ethernet product portfolio”.*

2.3 The specified information required by the BCMR s135 Notice was set out in the Annex to that notice.

2.4 In the Annex to that Notice, Ofcom explained that:

*“we are interested in other information and data that you may have in relation to the Relevant Products for the Relevant Period which: (i) assesses BT’s performance in the Order Process and repair of Relevant Products; (ii) attempts to identify and/or explain causes for the observed changes in performance; or (iii) proposes process and other operational improvements to improve performance. Such information may, for instance, be contained in but not exclusively:*

- *Regular management reports and briefings;*
- *Process or Support System analysis / study reports performed by internal staff or external consultants; and*
- *Proposals for Order Process and/or Support System changes or enhancements.*

2.5 Question 3 of the Annex then required:

*“Please provide a list of the following specified information (where such information exists), other than that provided in response to the*

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<sup>5</sup> See Annex 3.

*specific requests in this notice, which, in relation to the Relevant Products for the Relevant Period (or such period as is applicable to the existence of the specified positions and organisations within Openreach as set out below): (i) assesses BT's performance in the Order Process and repair of the Relevant Products; (ii) attempts to identify and/or explain causes for the observed changes in performance; or (iii) proposes process and other operational improvements to improve performance. Please provide a short description of the listed information and explanation of whether the listed information relates to one or more of (i), (ii) and (iii) above.*

- *Final versions of documents used at (a) regular meetings (weekly and monthly) or any exceptional meetings concerning Ethernet performance between [X]an Openreach Executive Member[X] and [X]the Openreach Executive Member's[X] senior management team; and (b) other meetings that are part of the recognised governance for Ethernet within Openreach such as the Ethernet Steering Group...*

2.6 The BCMR s135 Notice included the following definitions:

*"Order Process" means the end to end process used to fulfil an order including the necessary technical, commercial and legal dialogue with the customer and all other parties that need to be involved and ending with the delivery of the required service product for operational use but not including subsequent processes relating to rental and maintenance activities;*

*"Relevant Products" means specific Ethernet leased line products distinguished by product type as follows:*

- a) Ethernet Access Direct (EAD) all variants excluding EAD Local Access (EAD LA);*
- b) Wholesale Extension Services (WES) all variants excluding WES Local Access (WES LA);*
- c) WES LA;*
- d) Wholesale End-to-End Services (WEES);*
- e) Ethernet Backhaul Direct (EBD);*
- f) WES Aggregation;*
- g) Cablelink; and*
- h) Backhaul Extension Services (BES);*

*"Relevant Period" means the period from 1 January 2008 to 31 July 2014;*

*"Support System" means any electronic system used to store and process information that relates to the operation of BT in relation to the Order Process for the Relevant Products.*

- 2.7 Before issuing the BCMR s135 Notice, Ofcom had provided BT with a draft of the Notice on 4 September 2014 and invited comments from BT on the content and the proposed deadlines for the provision of the information requested.<sup>6</sup> BT provided comments on the draft on 12 September 2014.<sup>7</sup> BT's comments were taken into account when the form of the BCMR s135 Notice was finalised. Specifically, in line with BT's comments,<sup>8</sup> the scope of the request was amended to focus on information that was used at regular (weekly and monthly) meetings between [X]an Openreach Executive Member[X] and [X]the Openreach Executive Member's[X] senior management team and other meetings that were part of the recognised governance for Ethernet.
- 2.8 In accordance with paragraph 137(3) of the Act, Ofcom considers that the making of the BCMR s135 Notice was proportionate to the use to which the information was to be put (namely, for the purpose of enabling Ofcom to review the telecommunications markets for retail leased lines and associated wholesale services).

### **BT's response to the BCMR s135 Notice**

- 2.9 BT responded to Question 3 of the BCMR s135 Notice on 3 December 2014.<sup>9</sup> A copy of BT's response is set out in Annex 6.
- 2.10 In response to Question 3, BT explained that it had undertaken a reasonable search to determine the list of final versions of documents that are responsive to that Question. Under the heading "*Final versions of documents used at regular meetings or any exceptional meetings concerning Ethernet performance between the [X]Openreach Executive Member[X]and [X]the Openreach Executive Member's[X] senior management team*", BT said:
- "The regular meetings concerning Ethernet performance between [X]Openreach Executive Member[X] and [X]the Openreach Executive Member's[X] senior management team are called the Network Investment SITREP Review - a weekly meeting"; and*
- "The owner of the Network Investment SITREP Review meetings has confirmed that they are not aware of any other 'exceptional' meetings beyond the regular Network Investment SITREP Review meetings".*
- 2.11 Under the heading "*Final versions of documents used at other meetings that are part of the recognised governance for Ethernet within Openreach such as the Ethernet Steering Group*", BT said: "*The Ethernet Steering Group was held monthly from March 2014 to July 2014...There have been no other recognised governance meetings for Ethernet...*"
- 2.12 BT then provided, in an annex to its response, a list and description of information provided to (amongst others) the weekly Network Investment SITREP Review and Ethernet Steering Group meetings. At the time of receiving this response, Ofcom had

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<sup>6</sup> Letter of 4 September 2014 from [X], Ofcom, to [X], BT. See Annex 4.

<sup>7</sup> Letter of 12 September 2014 from [X], BT, to [X], Ofcom. See Annex 5.

<sup>8</sup> See BT's comments in respect of question 3, letter of 12 September 2014 from [X], BT, to [X], Ofcom, page 4. See Annex 5.

<sup>9</sup> BT had explained to Ofcom, on 4 November 2014, that it was struggling with Question 3 of the BCMR s135 Notice and that it would not be able to submit a response by the deadline of 5 November 2014.

no reason to believe that the list of information provided by BT in response to Question 3 was not complete and accurate.

## Subsequent information provided by BT to Ofcom

- 2.13 In response to formal information requests made under section 135 of the Act for the purposes of the Deemed Consent Investigation, BT provided Ofcom with the following documents:
- 2.13.1 email correspondence beginning on 8 February 2013, relating to a weekly call to review SLG payments, and chaired by [redacted] Openreach Executive Member [redacted];<sup>10</sup>
  - 2.13.2 one SLG Weekly Review slide pack for the week ending 28 June 2013;<sup>11</sup>
  - 2.13.3 36 SLG Weekly Review slide packs from 4 April 2014 – 5 December 2014;<sup>12</sup>
  - 2.13.4 39 Excel spreadsheets.<sup>13</sup>
- 2.14 In relation to the documents listed at paragraphs 2.13.3 – 2.13.4 above, BT explained in its response to the fourth information request, dated 7 April 2016 that it had identified these by adopting “a *“top-down” approach to identifying formal final reports to senior management regarding audit, compliance, risk-management and/or finance processes related to Deemed Consent or Deemed Consent and SLGs...*”<sup>14</sup>.
- 2.15 In response to the sixth information request, dated 21 June 2016, BT said that until September 2014 the SLG Weekly Review slide packs “*would have supported reviews with the [redacted] Openreach Executive Member and senior managers reporting to the Openreach Executive Member [redacted]*”.<sup>15</sup>
- 2.16 The information contained in the SLG Weekly Review slide packs (based on the spread sheet data) included information about Ethernet orders which had been delayed and the expected liability associated with the delay, a breakdown of BT’s liabilities by reference to the cause of the delay and graphs tracking BT’s liabilities in relation to Ethernet against the backlog of Ethernet orders and completions.<sup>16</sup>
- 2.17 The information in the SLG Weekly Review slide packs also typically included a slide incorporating summary findings in relation to the “*Top 15*” or “*Top 25*” completed circuits by SLG value. These findings included the SLG payment liability for each

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<sup>10</sup> This email was provided by BT to Ofcom on 1 April 2016 in response to Ofcom’s first information request under s.135 of the Act, dated 6 November 2015. See Annex 7.

<sup>11</sup> This document was provided by BT to Ofcom on 7 April 2016 in response to Ofcom’s fourth information request under s.135 of the Act, dated 11 March 2016. See Annex 8

<sup>12</sup> These documents were provided by BT to Ofcom on 7 April 2016 in response to Ofcom’s fourth information request under s.135 of the Act, dated 11 March 2016. See examples at Annex 9.

<sup>13</sup> These documents were provided by BT to Ofcom on 7 April 2016 in response to Ofcom’s fourth information request under s.135 of the Act, dated 11 March 2016.

<sup>14</sup> Response dated 7 April 2016 from [redacted], BT to [redacted], Ofcom, page 26. See Annex 10.

<sup>15</sup> Letter of 6 July 2016 from [redacted], BT, to [redacted], Ofcom. See Annex 11.

<sup>16</sup> See paragraph 3.97.2 of the section 96C notification and the evidence referred to therein.

order listed, the primary cause of the liability and whether there was an opportunity to “*date manage*” or “*no opportunity to reduce SLGs*”.<sup>17</sup>

- 2.18 Ofcom has found as a result of the Deemed Consent Investigation that these summary findings related to the work of a team – the SLG Triage Team - established by BT to review completed orders.<sup>18</sup> The purpose of these reviews was to identify delays in provisioning for which Deemed Consent was not applied, where it could have been applied during the circuit provision process, and then to implement reductions in the SLGs paid to customers as if Deemed Consent had been applied.<sup>19</sup>
- 2.19 Based on the information in the SLG Weekly Review slide packs, we consider that one of the purposes of the weekly meetings for which the packs were prepared was to track BT’s liabilities in relation to the provision of Ethernet service and to examine the aspects of BT’s performance in the provision of these services which gave rise to these liabilities.
- 2.20 We do not have a comprehensive set of information to show, week by week, who within Openreach participated in these reviews and/or received the information prepared for them. However, based on the email correspondence referred to above and the information provided by BT in response to the fourth, fifth and sixth information requests, we find that these weekly reviews were conducted by [redacted]Openreach Executive Member[redacted]and [redacted]the Openreach Executive Member’s[redacted] senior management team from March 2013 until at least September 2014.<sup>20</sup>

## BT’s representations

- 2.21 On 26 March 2017, BT confirmed to Ofcom that it would not make any written or oral representations about the matters in this Section, which were set out in a notification issued to BT under section 138 of the Act. The time for making representations has now expired.

## Contravention

- 2.22 Accordingly, based on the evidence referred to in paragraphs 2.13 – 2.20, we are satisfied that the slide packs and spread sheets prepared for the weekly meetings in 2013 and up until 31 July 2014 fell within the scope of Question 3 of the BCMR s135 Notice. These were not identified in BT’s response to the BCMR s 135 Notice. Accordingly, we are satisfied that BT contravened the requirement to provide Ofcom with a list of the final versions of documents used at meetings between the [redacted]Openreach Executive Member[redacted] and [redacted]the Openreach Executive Member’s[redacted] senior management team within the scope of Question 3 of the BCMR s 135 Notice.

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<sup>17</sup> See, for example, Ethernet SLG Weekly Review, 28 June 2013, page 6; Ethernet SLG Weekly Review, 18 April 2014, page 18; Ethernet SLG Weekly Review, 9 May 2014, pages 24 to 28; and Ethernet SLG Weekly Review, 6 June 2014, pages 22 to 26. See examples at Annex 9.

<sup>18</sup> See paragraphs 4.44 – 4.50 of the section 96C notification (and the evidence referenced therein).

<sup>19</sup> See paragraph 4.47 of the section 96C notification (and the evidence referenced therein).

<sup>20</sup> See paragraphs 3.97.2, 4.30 – 4.45 and 4.103 of the section 96C notification (and the evidence referenced therein).

## Section 3

# Confirmation of contravention of the Dispute s191 Notice

## Information requested from BT under section 191 of the Communications Act 2003

- 3.1 In order to investigate the matters in dispute between Vodafone and BT, Ofcom issued the Dispute s191 Notice to BT on 24 September 2015. This required the provision of specified information by 8 October 2015.<sup>21</sup>
- 3.2 A copy of the Dispute s191 Notice is provided at Annex 12. In accordance with section 137(3) of the Act, Ofcom described the required information and set out its reasons for requiring it. In particular, the Dispute s191 Notice stated:

*“This notice requires you to provide the information set out below, in the manner and form specified, for the purpose of considering a dispute referred to Ofcom under Chapter 3 of Part 2 of the Act and making a determination for resolving it”.*

- 3.3 The specified information required by the Dispute s191 Notice was set out in the Annex to that notice.

- 3.4 Paragraph 1 of the Annex required:

*“Please describe the processes and procedures followed by BT to extend the Contractual Delivery Date (CDD) for provision of relevant Ethernet services, beyond the timescales set out in the Connected Services Agreement (CSA), where BT intends to deem consent as per Clause 2.3 of Schedule 4C(i) of the CSA).*

*Where these processes and procedures are set out in BT documents (internal and/or external), please provide copies of the relevant documents (as in place during the Relevant Period).”*

- 3.5 Paragraph 2 of the Annex required:

*“Where it is not set out in your answer to Question 1, please describe the processes and procedures relevant to the categories of circumstances listed below, as described in Vodafone’s dispute submission.*

*In answering this question please highlight the relevant processes and procedures within the documents provided for Question 1 and/or any other relevant internal or external documentation in place during the Relevant Period.*

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<sup>21</sup> See Annex 12.

Categories described in Vodafone's dispute submission

*I. Retrospective application of deemed consent to change the CDD...*

- 3.6 The Dispute s191 Notice defined the "Relevant Period" as "*the period from 1 September 2012 to 31 January 2014*".
- 3.7 In accordance with paragraph 137(3) of the Act, Ofcom considers that the making of the Dispute s191 Notice was proportionate to the use to which the information was to be put (namely, for the purpose of enabling Ofcom to consider, and resolve, a dispute referred to it under Chapter 3 of Part 2 of the Act).

## **BT's response to the Dispute s191 Notice**

- 3.8 BT responded to the Dispute s.191 Notice on 8 October 2015. A copy of BT's response is set out in Annex 13.
- 3.9 As a result of information subsequently provided by BT as part of the Deemed Consent Investigation, we have identified two separate contraventions of the Dispute s.191 Notice, and discuss these in turn below.

## **BT's general processes and procedures in applying Deemed Consent**

- 3.10 In response to Question 1, BT's response of 8 October 2015 said, amongst other things, that:
- 3.10.1 *"the two relevant delivery systems utilised by the Ethernet JC are 'COSMOSS' and 'eCo'";*
- 3.10.2 *"In order for [Deemed Consent] to apply, BT must notify the CP as soon as reasonably practical where it intends to deem consent and if there are any changes to the CDD. All updates to CPs must be made via eCo";*
- 3.10.3 In order to change the CDD, *"[a]n email will be sent to the CP confirming any applicable date change using the eCo system"*.
- 3.11 In response to Question 2, BT's response said, under the heading "notice of deemed consent not provided in writing", that:
- 3.11.1 *"The [Job Controller] must provide a written update on eCo in the form of an e-mail to the CP. If a written update on eCo is not provided, DC cannot apply"*.
- 3.12 At the time of receiving the information referred to above, Ofcom had no reason to believe that BT had provided an incomplete or inaccurate response to Question 1 of the Dispute s.191 Notice.
- 3.13 However, following correspondence between Ofcom and BT between 14 and 30 March 2016 pertaining to the Investigation s135 Notice, it became apparent that BT had failed to respond accurately to the Dispute s191 Notice.<sup>22</sup>

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<sup>22</sup> See Annexes 14, 15, 23, 24 and 25.

3.14 In particular:

3.14.1 on 30 March 2016, BT confirmed that the majority of EBD orders<sup>23</sup> are raised via its equivalence management platform (“EMP”) and ‘flow’ system, rather than the eCo system, and that the EMP/‘flow’ system is used to extend the CDD for some of those orders. It confirmed that, for all Ethernet orders, *“no systems, other than ‘flow’ and COSMOSS are used to extend the CDD”*,<sup>24</sup> and

3.14.2 on 30 March 2016<sup>25</sup> and 8 April 2016,<sup>26</sup> BT confirmed that, for some EBD orders during the Dispute Period, it would not communicate date changes with CPs (where Deemed Consent was applied) via its eCo system. It explained that: *“[d]ifferent systems are used for the purpose of communicating date management to customers”*. BT went on to explain that:

*“When EBD orders are raised via the [EMP]/‘flow’ the system automatically emails the customer any updates at the key stages...eCo scripts for these orders would therefore not have existed”;*

*in some cases, “the communications process would have been via manual emails to the CP”;* and

*“In respect of Ethernet orders generally, there are no other systems other than eCo and the Openreach portal (i.e. Siebel) that are used by BT to communicate date changes to our customers”.*

3.15 In its letters to Ofcom of 30 March 2016 and 8 April 2016, BT therefore appeared to acknowledge that, for EBD orders, the processes and procedures followed by it to extend the CDD for provision of relevant Ethernet services, where it intends to deem consent, are different to those described in its response to the Dispute s191 Notice.

3.16 In particular, BT explained that in order to extend the CDD for a number of EBD orders, it used the system tool ‘flow’ and that, in order to communicate the date change to CPs, it did not use its eCo system. Rather, it used the Openreach portal (i.e. Siebel) or, in a small number of cases, sent manual emails to CPs.

3.17 This was information regarding the processes and procedures followed by BT to extend the CDD for provision of relevant Ethernet services beyond the timescales set out in the CSA where BT intends to deem consent and is relevant to the Dispute Period.

3.18 In light of the supplementary description provided by BT of its processes and procedures in the letters of 30 March 2016 and 8 April 2016, it appears that BT failed

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<sup>23</sup> EBD, also known as ‘Ethernet Backhaul Direct’, is a specific type of Ethernet leased line product provided by BT. It can be distinguished from other types of Ethernet leased line products such as, for example, Ethernet Access Direct (EAD). Further details on how EBD works are provided at: [https://www.ciz-openreach.co.uk/Infrastructure/search/34?page=1&page=1&f\\_productname=Ethernet+Backhaul+Direct&page=1](https://www.ciz-openreach.co.uk/Infrastructure/search/34?page=1&page=1&f_productname=Ethernet+Backhaul+Direct&page=1)

<sup>24</sup> See Annex 15.

<sup>25</sup> See Annex 15.

<sup>26</sup> See Annex 16.

to provide, in response to Question 1 of the Dispute s.191 Notice, a complete and accurate description of the processes and procedures followed by it to extend the CDD for provision of relevant Ethernet services.

### **The retrospective application by BT of Deemed Consent**

- 3.19 In response to Question 2(I.) of the Dispute s.191 Notice, concerning the processes and procedures relevant to the retrospective application of Deemed Consent to change the CDD, BT also said that:

*“these are only exceptional circumstances whereby retrospective application of Deemed Consent would occur”;*

*“If Deemed Consent is to occur, BT’s policy is that the CP should be notified formally in advance. It is only in exceptional circumstances that Deemed Consent would be applied retrospectively, and in these circumstances the CP would be notified as soon as practically possible after the delay”;* and

*“Deemed Consent cannot apply retrospectively if it is not done in good time allowing the CP to inform the end-user”.*<sup>27</sup>

- 3.20 However, as a result of the Deemed Consent Investigation, a range of additional information was gathered by Ofcom under section 135 of the Act. This included information about, amongst other things, the establishment by BT of a number of teams engaged in the retrospective application of Deemed Consent in order to minimise SLG payments due, and information about individual Ethernet orders.
- 3.21 In light of this subsequent information, Ofcom has found in the Deemed Consent Investigation (amongst other things) that:
- 3.21.1 from January 2013 – 17 December 2014, BT applied Deemed Consent retrospectively to orders in a sustained and systematic way;<sup>28</sup>
  - 3.21.2 there is evidence that on occasion BT applied Deemed Consent retrospectively in respect of delays that had taken place several months previously;<sup>29</sup>
  - 3.21.3 as part of its strategy for using Deemed Consent retrospectively, BT set up a number of dedicated teams with the function of applying Deemed Consent retrospectively. These teams included the SLG Triage Team, which reviewed closed orders with a view to reducing SLG payments by the retrospective use of Deemed Consent;<sup>30</sup>
  - 3.21.4 members of the Openreach Executive knew about the work of the SLG Triage team;<sup>31</sup>

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<sup>27</sup> See Annex 13.

<sup>28</sup> See paragraphs 4.25 – 4.119 of the s.96C notification and the evidence referenced therein.

<sup>29</sup> See paragraphs 4.82 – 4.87 and Annex 4 of the s.96C notification and the evidence referenced therein.

<sup>30</sup> See paragraphs 4.101 – 4.106 of the s.96C notification and the evidence referenced therein.

<sup>31</sup> See paragraphs 4.160 – 4.168 and 4.185 – 4.194 of the s.96C notification and the evidence referenced therein.

- 3.21.5 there is evidence to indicate that BT was aware of the compliance issues relating to the SLG Triage Team at the end of 2014 and that its activities were concluded in December 2014 after concerns were raised by the regulatory team;<sup>32</sup> and
- 3.21.6 the retrospective application of Deemed Consent during the Investigation Period formed part of a deliberate strategy pursued by BT in order to minimise its SLG liabilities.<sup>33</sup>
- 3.22 In light of Ofcom’s findings in the Deemed Consent Investigation (as summarised above), the statements from BT in its response to the Dispute s191 Notice set out at paragraph 3.19 above are incorrect. Further, in view of the findings in the section 96C notification set out at 3.21.4 – 3.21.6 above, we consider that BT should have known at the time of responding to the Dispute s191 Notice that the following statements were inaccurate:
- 3.22.1 *“these are only exceptional circumstances whereby retrospective application of Deemed Consent would occur”*;<sup>34</sup> and
- 3.22.2 *“It is only in exceptional circumstances that Deemed Consent would be applied retrospectively, and in these circumstances the CP would be notified as soon as practically possible after the delay”*.<sup>35</sup>

## BT’s representations

- 3.23 On 26 March 2017, BT confirmed to Ofcom that it would not make any written or oral representations about the matters in this Section, which were set out in a notification issued to BT under section 138 of the Act. The time for making representations has now expired.

## Contravention

- 3.24 In light of the above, we are satisfied that BT contravened the requirement imposed under section 191 of the Act. Firstly, BT failed to describe in full the processes and procedures followed by it to extend the CDD for provision of relevant Ethernet services during the Dispute Period in response to Question 1. Secondly, in response to Question 2, BT made a number of misleading statements about its processes and procedures when retrospectively applying Deemed Consent.

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<sup>32</sup> See paragraph 4.50 of the s.96C notification and the evidence referenced therein.

<sup>33</sup> See paragraph 4.120 – 4.158 of the s.96C notification and the evidence referenced therein.

<sup>34</sup> See Annex 13.

<sup>35</sup> See Annex 13.

## Section 4

# Confirmation of contravention of the Investigation s135 Notice

## Information requested from BT under section 135 of the Communications Act 2003

4.1 In order to ascertain whether a contravention of BT's SMP obligations had occurred during the Investigation Period, Ofcom issued the Investigation s135 Notice to BT on 6 November 2015. This required the provision of specified information by, in respect of Questions 1 and 2 of that notice, 5pm on 20 November 2015 and, in respect of Questions 3 and 4 of that notice, 5pm on 18 December 2015.<sup>36</sup> As discussed in more detail below, Ofcom subsequently extended the deadline for BT's response to Questions 3 and 4.

4.2 A copy of the Investigation s135 Notice is provided at Annex 17. In accordance with section 137(3) of the Act, Ofcom described the required information and set out its reasons for requiring it. In particular, the Investigation s135 Notice stated:

*"This Notice requires you to provide the information set out in the attached Annex, in the manner and form set out in this Notice, for the purpose of enabling Ofcom to consider whether to exercise its powers under sections 96A – 96C of the Act in relation to BT's use of Deemed Consent during the period between 1 September 2012 and 31 December 2014..."*

4.3 The specified information required by the Investigation s135 Notice was set out in the Annex to that notice.

4.4 Question 1 of the Annex required:

*"For all orders for Relevant Products provisioned on a date between 1 May 2014 to 31 July 2014 (inclusive), please provide:*

*(i) [...]*

*(iii) The total number of orders where BT set a CDD at a date 30 or more working days after the date on which the order was processed by BT, relying on Deemed Consent."*

4.5 Question 2A. of the Annex required:

*"Please provide a list of all orders falling within the description set out in Q1.(iii)."*

4.6 Question 3 of the Annex required:

*"For each order listed in response to Question 2.A, please provide the following information:*

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<sup>36</sup> See Annex 17.

- i. *Any information concerning or informing decisions relating to that order's CDD, as provided by BT to the CP via eCo*
- ii. *Any information concerning or informing decisions relating to that order's CDD held by BT on COSMOSS...*

4.7 In accordance with paragraph 137(3) of the Act, Ofcom considers that the making of the Investigation s135 Notice was proportionate to the use to which the information was to be put (namely, for the purpose of enabling Ofcom to consider whether to exercise its powers under sections 96A – 96C of the Act in relation to BT's use of Deemed Consent during the period between 1 September 2012 and 31 December 2014).

## **BT's response to the Investigation s135 Notice**

4.8 BT responded to Questions 1 and 2 in Annex 1 of the Investigation s.135 Notice on 20 November 2015.

4.9 On 17 December 2015, BT requested an extension to the date on which it was required to provide the information requested under Question 3(i) of the Investigation s135 Notice.<sup>37</sup> Ofcom agreed to that request. In particular, on 29 January 2016, Ofcom required BT to provide copies of 'eCo scripts' which are responsive to Question 3(i) by 4 February 2016.<sup>38</sup> Further, on 25 February 2016, Ofcom required BT to provide copies of 'eCo attachments' responsive to Question 3(i) by 4 March 2016.<sup>39</sup>

4.10 On 4 February 2016, BT provided a partial response to Question 3(i) of the Investigation s135 Notice. In Annex 1 of its response, BT explained that:

*"The eCo scripts for the full set of orders can be found in the files "1. CDD May 14, ' 2. CDD June 14, and '3. CDD July 14' that will be provided separately due to file size...*

*We can confirm that we are in a position to send the un-reviewed eCo attachments if Ofcom so requires".<sup>40</sup>*

4.11 On 4 March 2016, BT provided the remainder of its response to Question 3(i) of the Investigation s135 Notice. In particular, at Annex 1 of that response, BT explained, in relation to Question 3(i), that:

*"BT has already provided the eCo scripts for the orders listed in our response to Question 2A on 20 November 2015.*

*BT will be providing the un-reviewed eCo attachments for these orders via the Ofcom MFT file transfer system. There are approximately 100,000 attachments, the majority of which are email*

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<sup>37</sup> See Annex 18.

<sup>38</sup> See Annex 19.

<sup>39</sup> See Annex 19.

<sup>40</sup> See Annex 20.

*attachments that may have further file attachments contained within. We will confirm once these attachments have been sent.*<sup>41</sup>

- 4.12 On 7 March 2016, BT confirmed that the eCo attachments had been sent to Ofcom.<sup>42</sup> A copy of BT's response is set out in Annex 22.

## Subsequent information provided by BT to Ofcom

- 4.13 On 14 March 2016, Ofcom sent an email to BT regarding its response to Question 3(i) of the Investigation s135 Notice.<sup>43</sup> In that email, Ofcom explained that:

*"During the process of reconciling the eCo attachments and COSMOSS scripts (both of which were provided to Ofcom on 7 March 2016) with the eCo scripts, we discovered that there appears to be a large number of jobs for which you have not provided eCo scripts. I have attached a list of those jobs for which the eCo scripts appear to be missing from your 4 February 2016 response."*

- 4.14 In a letter to Ofcom on 18 March 2016, BT explained that *"in this response, BT is providing the eCo scripts for a further 834 COSMOSS orders"*.<sup>44</sup> It acknowledged that these had been missed from its original submission of 4 February 2016.<sup>45</sup>
- 4.15 Further, on 30 March 2016, BT confirmed that it had *"identified a further 5,703 eCo attachments which relate to the 854 missing eCo scripts and which we are providing here"*.<sup>46</sup>

## BT's representations

- 4.16 On 26 March 2017, BT confirmed to Ofcom that it would not make any written or oral representations about the matters in this Section, which were set out in a notification issued to BT under section 138 of the Act. The time for making representations has now expired.

## Contravention

- 4.17 In its letters to Ofcom of 18 March 2016, 30 March 2016 and 19 April 2016<sup>47</sup>, BT acknowledged that it had failed to provide 854 eCo scripts and 5,703 eCo attachments, all of which were responsive to Question 3(i) of the Investigation s135 Notice, by the dates requested by Ofcom.
- 4.18 This was, in relation to some of the orders listed by BT in response to Question 2.A of the Investigation s135 Notice, information concerning or informing decisions relating to those orders' CDD, as provided by BT to the CP via eCo.

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<sup>41</sup> See Annex 21.

<sup>42</sup> See Annex 22.

<sup>43</sup> See Annex 23.

<sup>44</sup> Following a further letter from Ofcom to BT on 22 March 2016, BT clarified in an email on 24 March 2016 that it had provided Ofcom with eCo scripts for 854 (rather than 834) orders on 18 March 2016. See Annex 25.

<sup>45</sup> See Annex 24.

<sup>46</sup> See Annex 15.

<sup>47</sup> See Annex 26. BT's letter of 19 April 2016 was submitted to Ofcom in response to Ofcom's letter of 5 April 2016, also at Annex 26.

- 4.19 In light of the supplementary eCo scripts and eCo attachments provided by BT on 18 and 30 March 2016, we are satisfied that BT has contravened a requirement imposed under section 135 of the Act. BT failed to provide, in respect of 854 of the Ethernet service orders listed by BT in response to Question 2A. of the Investigation s135 Notice, information concerning or informing decisions relating to those orders' CDD, as provided by BT to the CP via eCo.

## Section 5

# Penalty

## Introduction and summary

- 5.1 We are satisfied that BT contravened requirements to provide information in response to statutory information requests made by Ofcom under sections 135 and 191 of the Act.
- 5.2 These findings relate to BT's responses to three separate requests by Ofcom for information concerning the provision by BT of Ethernet services, specifically:
- 5.2.1 the BCMR s135 Notice;
  - 5.2.2 the Dispute s191 Notice; and
  - 5.2.3 the Investigation s135 Notice.
- 5.3 Ethernet services are the most widely-used type of leased lines, which provide high-quality access to fixed networks and underpin effectively all communication services used by consumers and businesses. They are essential components of business Information and Communications Technology (ICT) services, particularly those used by large multi-sited enterprises and Government organisations, and play a key role in delivering fixed and mobile broadband services to consumers, as CPs use them extensively in their networks. BT is the largest supplier of Ethernet services in the UK.
- 5.4 Ofcom's ability to regulate the Ethernet market effectively, including by conducting regular market reviews, imposing and monitoring regulatory obligations, resolving disputes and taking enforcement action, is therefore of critical importance to the communications market and to citizens and consumers.
- 5.5 Ofcom's powers, under sections 135 and 191 of the Act, to require the provision of information which it considers necessary for the purpose of carrying out its functions, are fundamental to its ability to carry out these statutory functions in line with its principal duty of furthering the interests of citizens and consumers. They enable Ofcom to gather the information which it considers necessary to carry out its functions in a timely and effective manner and therefore are key to the integrity of the regulation of electronic communications networks and services under the Act.
- 5.6 Parliament has recognised in the enactment of the Act that information-gathering powers are a foundation stone for a regulatory regime for telecommunications which operates effectively and in the interests of citizens and consumers. In addition to the powers conferred on Ofcom to require the provision of information in sections 135 and 191, it has given Ofcom the power to impose financial penalties in the event of a contravention of a statutory requirement to provide information.<sup>48</sup> In addition, a person who fails to provide information in accordance with a requirement imposed by Ofcom under section 135 or section 191 is guilty of a criminal offence.
- 5.7 Accordingly, Ofcom considers that a contravention of a requirement to provide information under section 135 or section 191 is a serious matter. These

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<sup>48</sup> See sections 139 and 191(5) of the Act.

contraventions hinder Ofcom's ability to carry out its functions and more generally have the potential to undermine the integrity of the regulatory regime, thereby harming citizens and consumers.

- 5.8 Accordingly, we find that it is appropriate to impose a penalty for the contraventions by BT of the information requirements specified in this notice.
- 5.9 Any penalty has to be proportionate in its amount. In setting the penalty, we have had regard to the Penalty Guidelines.<sup>49</sup> In line with the Penalty Guidelines, having considered all of the circumstances of this case in the round, we are imposing a penalty of £300,000. We consider that this figure is appropriate and proportionate for the reasons set out below.
- 5.10 On 26 March 2017 BT confirmed that it would not make written or oral representations about the the penalty that Ofcom said it was minded to impose in a notification issued under section 138 of the Act. The time for making representations has now expired.

### **Amount of the penalty**

- 5.11 Ofcom has considered all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. In the following paragraphs, we set out our assessment of the factors which we consider to be the most relevant to determining an appropriate penalty that is proportionate to the contraventions we have found.

### **Seriousness of the contraventions and degree of harm**

- 5.12 A contravention of a requirement to provide information is inherently serious. Ofcom's powers, under sections 135 and 191 of the Act, to require the provision of information which it considers necessary for the purpose of carrying out its functions are fundamental to its ability to carry out these statutory functions, in line with its principal duty of furthering the interests of citizens and consumers. They enable Ofcom to gather the information which it considers necessary to carry out its functions in a timely and effective manner and therefore are key to the integrity of the regulation of electronic communications networks and services under the Act.
- 5.13 Where companies contravene these requirements, Ofcom is at risk of being prevented from exercising its functions in the interests of citizens and consumers because of the asymmetry of information that exists: much of the information which it requires is held by CPs that it regulates. Where a CP has SMP, this asymmetry of information is likely to be particularly pronounced because the CP is likely to hold much of the information which Ofcom requires to carry out its review of the market, to determine the regulatory obligations which are appropriate to offset the effects of the CP's SMP and promote competition and then to monitor the implementation and effectiveness of those regulatory obligations.
- 5.14 There are specific features of the contraventions that Ofcom has identified in this Notification which contribute to their seriousness. First, Ofcom considers that each of the contraventions that it has identified indicate that BT does not have effective systems in place to respond accurately and comprehensively to information requests

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<sup>49</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0029/79823/penalty\\_guidelines\\_-\\_statement.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0029/79823/penalty_guidelines_-_statement.pdf)

in accordance with its statutory obligations under sections 135 and 191 of the Act. By way of example, Ofcom notes:

- 5.14.1 even though the BCMR s135 Notice was refocussed, at BT's request, to require the provision of material used at regular meetings between [~~×~~]Openreach Executive Member[~~×~~] and [~~×~~]the Openreach Executive Member's[~~×~~] senior management team, BT failed to provide the SLG Weekly Review slides produced on a weekly basis for such meetings;
  - 5.14.2 for the reasons set out at paragraphs 3.21, BT should have been aware that the statements made in the Dispute s191 were inaccurate; and
  - 5.14.3 Ofcom was able to identify from a simple reconciliation exercise that a number of eCo scripts and attachments were missing from BT's response to the Investigation s135 Notice.
- 5.15 BT is a CP which is subject to SMP obligations in respect of markets which are subject to a regular review cycle. Further, its SMP obligations include the obligation to give network access to other CPs, a requirement which is susceptible to disputes under the Act. Accordingly, BT must be aware that it will receive statutory information requests from Ofcom on a regular basis. Ofcom would expect a prudent CP mindful of its regulatory obligations in this situation to have effective systems for identifying and retrieving the information requested in order to provide comprehensive and accurate responses in accordance with its statutory duties. BT's apparent failure to do so suggests a degree of carelessness in respect of its regulatory responsibilities.
- 5.16 Ofcom also considers that the impact of the contraventions on the exercise of its regulatory functions is a serious matter. BT's failure to identify the SLG Weekly Review slides in its response to the BCMR s135 Notice could have limited the robustness of Ofcom's review as part of the BCMR of BT's quality of service and the SMP obligations to which it was subject in this regard.
- 5.17 Further, the omission prevented Ofcom from being able to require the provision of the slides and then to review their content.<sup>50</sup> In view of the information contained in the slides relating to the work of the SLG Triage Team (see paragraphs 2.16 to 2.17 above), Ofcom may have opened its investigation into whether BT's use of Deemed Consent was compliant with its regulatory obligations several months earlier.
- 5.18 Conversely, the inaccurate statements about retrospective application of Deemed Consent only occurring on an exceptional basis (see paragraph 3.19 above), had the potential to mislead Ofcom about BT's use of Deemed Consent and could have deterred it from opening its investigation in November 2015.
- 5.19 BT's incomplete information about the systems it used to apply Deemed Consent in its response to the Dispute s191 Notice had the effect of hindering the efficient progress of Ofcom's investigation. Relying on BT's response that the only systems it used were eCo and COSMOSS, Ofcom requested information in the Investigation s135 Notice only in respect of these two systems. As set out in paragraphs 3.14 to 3.15 above, it was not until 30 March 2016 that BT acknowledged the oversight and not until 8 April 2016 that BT completed the provision of information about orders

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<sup>50</sup> On 13 January 2015, in its 8<sup>th</sup> information request to BT in the BCMR, Ofcom required the provision of specified documents listed in BT's response to the BCMR s135 Notice.

processed on the EMP/flow system, some four months after the original deadline of 18 December 2015 set in the Investigation s135 Notice.

- 5.20 The omissions set out in respect of the Investigation s135 Notice also adversely affected Ofcom's ability to progress its investigation efficiently. Although Ofcom agreed to BT's request for extensions to the deadline of 18 December 2015 originally set, BT did not provide the full set of eCo scripts for more than a month after the extended deadline of 4 February 2016 nor the full set of eCo attachments for almost a month after the extended deadline of 4 March 2016.
- 5.21 The risk that BT's contraventions could have resulted in harm to citizens and consumers was serious in this case, given that the contraventions all related to information required for the exercise of Ofcom's regulatory functions in respect of Ethernet services. As set out above, Ethernet services underpin effectively all communication services used by consumers and businesses and play a key role in delivering fixed and mobile broadband services to consumers, as CPs use them extensively in their networks. The contraventions therefore had the potential to cause material harm to CPs, businesses and consumers.

### **Additional factors**

- 5.22 In this case, we consider that the seriousness of the contraventions we have found and the degree of harm are the most relevant factors when determining an appropriate and proportionate penalty. However, Ofcom's Penalty Guidelines set out a number of other potentially relevant factors which may be taken into account by it when determining the amount of any penalty and we have considered the extent to which any of these are relevant in this case.
- 5.23 We recognise that, whilst the contraventions identified in this notification had the effect of hindering the efficient progress of the Deemed Consent Investigation, they have not ultimately prevented Ofcom from investigating BT's application of Deemed Consent nor from being able to find BT in breach of its regulatory obligations in relation to Ethernet services. We do not have any evidence that BT has gained (financially or otherwise) as a result of these particular contraventions.
- 5.24 We also recognise that, in respect of the missing eCo scripts and attachments required by the Investigation s135 Notice, BT did eventually provide these to Ofcom on 18 and 30 March 2016 respectively. Upon Ofcom's request, BT did therefore remedy the consequences of this particular contravention.
- 5.25 However, we have also taken into account that, whilst we do not have any evidence that the contraventions we have found occurred deliberately, BT's apparent failure to have effective systems in place for fully and accurately identifying and retrieving the information requested by Ofcom suggests a degree of carelessness in respect of its regulatory obligations.
- 5.26 We have also considered whether there are any relevant precedents where Ofcom has imposed a penalty against a regulated body for failure to comply with information requests. We note that Ofcom has imposed penalties in three previous cases; against Telecom Billing Services Ltd ("**TBSL**"), Prodigy Internet Limited ("**PIL**") and Continental Telecom Ltd ("**CT**") respectively.

- 5.27 In respect of TBSL, Ofcom imposed a penalty of £50,000 on 22 June 2006 for two separate contraventions of information requirements.<sup>51</sup> In respect of PIL, Ofcom imposed a penalty of £30,000 on 9 November 2007 as a result of PIL's complete failure to provide any of the information requested by Ofcom.<sup>52</sup> On 14 December 2010, Ofcom imposed a penalty of £50,000 on CT, which was the statutory maximum at that time for failure to provide information.<sup>53</sup> Ofcom found that CT's contravention of the requirement to provide information was more serious than those committed by TBSL and Prodigy as it impacted Ofcom's ability to calculate turnover for the purpose of imposing a penalty under section 96 of the Act.
- 5.28 We note that in all three cases, Ofcom was applying a different version of the Penalty Guidelines. Ofcom's Penalty Guidelines currently explain that, whilst decisions made under the previous Penalty Guidelines may be relevant to Ofcom's future decision-making, they are likely to become less relevant to future enforcement work over time, and Ofcom may, in light of the circumstances of each case, impose higher penalties in future cases than in previous ones to secure effective deterrence. Given that the statutory maximum penalty has increased since these three contraventions were found from £50,000 to £2,000,000, we consider that the three precedents referred to above are of less relevance in this case.

## Deterrence

- 5.29 Ofcom's Penalty Guidelines explain that the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient to deter the business from contravening regulatory requirements, and to deter the wider industry from doing so, having regard to the seriousness of the infringement.<sup>54</sup>
- 5.30 As a general matter, we are of the view that the need for deterrence in any penalty set for a contravention of information requirements is important as information requests are fundamental to Ofcom's ability to regulate electronic communications networks and services under the Act effectively and in a timely manner, and Ofcom needs to be able to rely on responses to them.
- 5.31 Given the seriousness of the contraventions set out in this notice (discussed above), deterrence is particularly important in this case. It is also particularly important given that BT is subject to a number of regulatory obligations, having been found to have SMP, including in the market for the provision of Ethernet services. Breaches by BT of information requests related to its SMP have the potential to undermine the effectiveness of the regulatory obligations to which it is subject. We therefore

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<sup>51</sup> See

[http://webarchive.nationalarchives.gov.uk/20160702162827/http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_880/notice.pdf](http://webarchive.nationalarchives.gov.uk/20160702162827/http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_880/notice.pdf). In particular, Ofcom found that TBSL had failed to comply fully with one request for information in relation to two areas of information that were requested. Further, when Ofcom requested this information again through a further information request, TBSL failed to respond completely.

<sup>52</sup> See

[http://webarchive.nationalarchives.gov.uk/20080602222348/http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/comp\\_bull\\_ocases/open\\_all/cw\\_946/139.pdf](http://webarchive.nationalarchives.gov.uk/20080602222348/http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_946/139.pdf).

<sup>53</sup> See

[http://webarchive.nationalarchives.gov.uk/20160702162827/http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/cases-in-compliance/cw\\_01043/s139\\_to\\_Continental\\_Telecom.pdf](http://webarchive.nationalarchives.gov.uk/20160702162827/http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/cases-in-compliance/cw_01043/s139_to_Continental_Telecom.pdf).

<sup>54</sup> Paragraph 4, Revised Penalty Guidelines, Statement, Revising the Penalty Guidelines, 2 December 2015, [https://www.ofcom.org.uk/data/assets/pdf\\_file/0029/79823/penalty\\_guidelines\\_-\\_statement.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0029/79823/penalty_guidelines_-_statement.pdf)

consider that it is important to ensure that any penalty we set in relation to the breaches we have identified is large enough to incentivise compliance by BT with all of Ofcom's information requests.

- 5.32 We consider that the penalty which we are imposing is sufficiently large to ensure that it is a deterrent, having regard to BT's size and turnover<sup>55</sup> and to the seriousness of the contraventions in this case and is at such a level which can change any potential non-compliant behaviour by BT, and by other providers.

### **Ofcom's determination of the amount of the penalty**

- 5.33 Under section 139(5) of the Act, there is a statutory maximum penalty which Ofcom may impose on BT in relation to contraventions of information requirements. This statutory maximum is £2,000,000, although the level of the penalty imposed should be appropriate and proportionate to the contravention(s) in respect of which it is imposed.
- 5.34 Taking all the factors set out at paragraphs 5.12-5.32 above in the round, we have decided to impose on BT a penalty of £300,000. We consider that this is appropriate and proportionate, given the seriousness of these contraventions, the potential harm to consumers and citizens, BT's size and turnover and Ofcom's central objective of deterring further contraventions.

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<sup>55</sup> BT's Regulatory Financial Statement for 2015/16 records total revenues of £813m for Alternative Interface leased lines, which largely comprise Ethernet services (see BT's Regulatory Financial Statement for the year ended 31 March 2016, page 21 (aggregated Western Eastern and Central London Area (WECLA) and non-WECLA internal and external AISBO revenues): <http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements/2016/CurrentCostFinancialStatements2016.pdf>). Of this £813m, £485m came from BT Group internal revenues and £328m from external revenues. This latter figure is broadly consistent with the figure of £[<]m provided by BT in the course of the Deemed Consent Investigation about Openreach's external revenues for Ethernet for the year ending 31 March 2016 (see BT's response to the 9th information request, dated 4 November 2016, at Annex 27).

## Annex 1

# Legal framework

- A1.1 Parliament has conferred on Ofcom statutory powers to require the provision of information which it considers necessary for the purpose of carrying out its functions
- A1.2 In this Annex, we set out the key statutory provisions upon which Ofcom relied in order to send the BCMR s.135 Notice, the Dispute s.191 Notice and the Investigation s.135 Notice. We also set out those statutory provisions which are relevant to the enforcement by Ofcom of these information requests.

## Section 135 of the Act

- A1.3 The BCMR s.135 Notice and the Investigation s.135 Notice were both sent by Ofcom using its information-gathering powers under section 135 of the Act.

- A1.4 Section 135 of the Act states that:

*“Ofcom may require a person falling within subsection (2) to provide them with all such information as they consider necessary for the purpose of carrying out their functions under this Chapter”.*

- A1.5 Section 135(2) of the Act includes CPs within the scope of this provision.

- A1.6 Section 135(3) of the Act confirms that the information that may be required by Ofcom under section 135 of the Act includes information that they require for, amongst other things, any one or more of the following purposes:

*“(a) ascertaining whether a contravention of a condition or other requirement set or imposed by or under [Chapter 1 of the Act] has occurred or is occurring;*

*...*

*(g) identifying markets and carrying out market analyses in accordance with, or for the purposes of, any provision of [Chapter 1 of the Act]”.*

- A1.7 Section 135(4) of the Act states that a person required to provide information under section 135 must provide it in such manner and within such reasonable period as may be specified by OFCOM.

- A1.8 Section 135(5) of the Act provides that the powers in section 135 are subject to the limitations in section 137. Section 137(3) provides that Ofcom are not to require the provision of information under section 135 except:

- 1.8.1 by a demand for the information that describes the required information and sets out Ofcom's reasons for requiring it; and
- 1.8.2 where the making of a demand for the information is proportionate to the use to which the information is to be put in the carrying out of Ofcom's functions.

## Sections 138 to 144 of the Act

A1.9 Sections 138 to 144 of the Act specify the enforcement powers that Ofcom has in relation to contravention of information requirements and the offences that may be committed in connection with the information requirements.

A1.10 Section 138 of the Act (Notification of contravention of information requirements) states that:

*“(1) Where Ofcom determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a requirement imposed under section 135 or 136, they may give that person a notification under this section.*

*(2) A notification under this section is one which—*

- (a) sets out the determination made by OFCOM;*
- (b) specifies the requirement and contravention in respect of which that determination has been made;*
- (c) specifies the period during which the person notified has an opportunity to make representations;*
- (d) specifies the information to be provided by the person to OFCOM in order to comply with a requirement under section 135 or 136;*
- (e) specifies any penalty that OFCOM are minded to impose in accordance with section 139; and*
- (f) where the contravention is serious, specifies any direction which OFCOM are minded to give under section 140.*

A1.11 Section 139 of the Act specifies the penalties that may apply for contravention of the information requirements. Section 139(5) provides that a penalty for a contravention of the information requirements (other than in respect of a continuing contravention) is to be an amount not exceeding £2,000,000 as Ofcom determine to be both (a) appropriate and (b) proportionate to the contravention in respect of which it is imposed.

A1.12 Section 139A of the Act specifies Ofcom’s enforcement powers where a section 138 notification has been served on a party, that person has been given the opportunity to make representations about the matters notified, and the period allowed for the making of representations has expired. In particular, it states that:

*“(2) OFCOM may—*

*(a) give the person a decision (a “confirmation decision”) confirming the imposition of requirements on the person, or the giving of a direction to the person, or both, in accordance with the notification under section 138; or*

*(b) inform the person that they are satisfied with the person’s representations and that no further action will be taken.*

*(3) OFCOM may not give a confirmation decision to a person unless, after considering any representations, they are satisfied that the person has, in one or more of the respects notified, been in contravention of a requirement notified under section 138.*

*(4) A confirmation decision—*

*(a) must be given to the person without delay;*

*(b) must include reasons for the decision;*

*(c) may require immediate action by the person to comply with a requirement notified under section 138(2)(d), or may specify a period within which the person must comply with the requirement; and*

*(d) may require the person to pay—*

*(i) the penalty specified in the notification under section 138, or*

*(ii) such lesser penalty as OFCOM consider appropriate in the light of the person's representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, and may specify the period within which the penalty is to be paid.*

*(5) It is the duty of the person to comply with any requirement imposed by a confirmation decision.*

*...”*

## **Section 191 of the Act**

A1.13 Ofcom has statutory information gathering powers under section 191 of the Act that enable it to obtain such information as it considers necessary for the purpose of, amongst other things, considering a dispute referred to it under Chapter 3 of the Act and making a determination for resolving it. The Dispute s.191 Notice was sent to BT by Ofcom using Ofcom's information-gathering powers under section 191 of the Act

A1.14 Section 191 of the Act states that:

*“Where a dispute has been referred or referred back to OFCOM under this Chapter, they may require any person to whom subsection (2) applies to provide them with all such information as they may require for the purpose of—*

*(a) [...]*

*(c) considering the dispute and making a determination for resolving it.”*

A1.15 Section 191(2) of the Act includes a party to the dispute referred to Ofcom under Chapter 3 of the Act.

A1.16 Section 191(3) of the Act provides that a person required to provide information under section 191 must provide it in such manner and within such reasonable period as may be specified by Ofcom.

A1.17 Section 191(5) of the Act provides that sections 138 to 144 of the Act apply for the enforcement of a requirement under this section as they apply for the enforcement of requirements under sections 135 or 136 of the Act.

## Annex 2

# Confirmation Decision

## Notification to British Telecommunications plc under section 139A of the Communications Act 2003 regarding the contravention of requirements under sections 135 and 191 of that Act

### Information requirements

- A2.1 Sections 135 and 191 of the Act confer on OFCOM the power to require a communications provider to provide OFCOM with all such information as OFCOM consider necessary for the purpose of, respectively:
- a. carrying out their functions under Chapter 1 of Part 2 of the Act; and
  - b. considering a dispute referred to them under Chapter 3 of Part 2 of the Act and making a determination for resolving it.
- A2.2 On 24 September 2014, OFCOM issued a notice to BT requiring the provision of specified information under section 135 of the Act (the “**BCMR s135 Notice**”), enabling OFCOM to review the telecommunications markets for retail leased lines and associated wholesale services.
- A2.3 On 24 September 2015, OFCOM issued a notice to BT requiring the provision of specified information under section 191 of the Act (the “**Dispute s191 Notice**”). The Dispute s191 Notice was issued to BT for the purposes of considering a dispute referred to Ofcom under Chapter 3 of Part 2 of the Act and making a determination for resolving it.
- A2.4 On 6 November 2015, OFCOM issued a notice to BT requiring the provision of specified information under section 135 of the Act (the “**Investigation s135 Notice**”). The Investigation s135 Notice was issued to BT for the purposes of enabling Ofcom to consider whether to exercise its powers under sections 96A to 96C of the Act in relation to BT’s use of Deemed Consent during the period between 1 September 2012 and 31 December 2014.

### Subject of this Confirmation Decision

- A2.5 This Confirmation Decision is addressed to British Telecommunications plc (“BT”), whose registered company number is 4190816. BT’s registered office is 81 Newgate Street, London EC1A 7AJ.

### Notification given by Ofcom under section 138

- A2.6 On 3 March 2017, Ofcom issued a notification to BT under section 138 of the Act setting out Ofcom’s reasonable grounds for believing that BT had contravened requirements imposed under sections 135 or 191 of the Act. The notification also specified the penalty that Ofcom was minded to impose on BT for the contraventions.
- A2.7 BT was given until 3 April 2017 to make written representations about the matters set out in the notification.

## Confirmation Decision

- A2.8 The period allowed for making representations has now expired. On 26 March 2017, BT confirmed to Ofcom that it would not make any written or oral representations about the matters notified.
- A2.9 Accordingly, Ofcom is satisfied that BT has, in the respects notified in the notification issued under section 138, contravened requirements imposed in the BCMR s135 Notice, the Dispute s191 Notice and the Investigation s135 Notice. Ofcom has decided to give BT a Confirmation Decision, and to impose a financial penalty, in accordance with section 139A of the Act. The reasons are set out in the explanatory statement to which this Confirmation Decision is annexed.

## Penalty

- A2.10 Ofcom has determined that BT must pay a penalty of £300,000 in respect of its contraventions of the information requirements imposed under section 135 and section 191 of the Act.
- A2.11 BT has until 5.00pm on 2 May 2017 to pay Ofcom the penalty.

## Interpretation

- A2.12 For the purpose of interpreting this Confirmation Decision—
- (a) except in so far as the context otherwise requires, words or expressions have the meaning assigned to them in paragraph 9 below, and otherwise any word or expression has the same meaning as it has in the Act;
  - (b) headings and titles shall be disregarded;
  - (c) expressions cognate with those referred to in this notification shall be construed accordingly; and
  - (d) the Interpretation Act 1978 (c. 30) shall apply as if this notification were an Act of Parliament.
- A2.13 In this Confirmation Decision:
- (a) “**Act**” means the Communications Act 2003 (c. 21), as amended;
  - (b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined in section 1159 of the Companies Act 2006;
  - (c) “**BCMR s135 Notice**” has the meaning given to it in paragraph 3 of this notification;
  - (d) “**Deemed Consent**” has the meaning given to it in Annex 1 of the Investigation s135 Notice;
  - (e) “**Dispute s191 Notice**” has the meaning given to it in paragraph 4 of this notification;

- (f) **“Investigation s135 Notice”** has the meaning given to it in paragraph 5 of this notification;
- (g) **“OFCOM”** means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002.

1

**Signed**

**Nuala Cosgrove**

**Legal Director**

**A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002**

**5 April 2017**

**Annex 3****List of additional annexes**

Annex number	Title	Date
3.	The BCMR s135 Notice	24 September 2014
4.	Draft copy of the BCMR s135 Notice	4 September 2014
5.	BT comments on the draft BCMR s.135 Notice	12 September 2014
6.	BT response to the BCMR s135 Notice	3 December 2014
7.	Email correspondence beginning on 8 February 2013, relating to a weekly call to review SLG payments	From 8 February 2013
8.	SLG Weekly Review slide pack for the week ending 28 June 2013	w/e 28 June 2013
9.	Sample of the further SLG Weekly Review slide packs	4 April 2014 18 April 2014 9 May 2014 6 June 2014 5 December 2014
10.	BT response to the fourth information request	7 April 2016
11.	BT response to the sixth information request	6 July 2016
12.	The Dispute s191 Notice	24 September 2015
13.	BT response to the Dispute s.191 Notice	8 October 2015
14.	Letter from Ofcom to BT	22 March 2016
15.	Letter from BT to Ofcom	30 March 2016
16.	Letter from BT to Ofcom	8 April 2016
17.	The Investigation s135 Notice	6 November 2015
18.	Request from BT for an extension in relation to Question 3(i) of the Investigation s135 Notice	17 December 2015

19.	Ofcom responses to BT's request for an extension	29 January 2016 and 25 February 2016
20.	BT partial response to Question 3(i) of the Investigation s135 Notice	4 February 2016
21.	BT further response to Question 3(i) of the Investigation s135 Notice	4 March 2016
22.	BT confirmation that the eCo attachments had been sent to Ofcom	7 March 2016
23.	Email from Ofcom to BT regarding BT's response to Question 3(i) of the Investigation s135 Notice	14 March 2016
24.	Letter from BT to Ofcom regarding the missing eCo scripts	18 March 2016
25.	Email from BT to Ofcom	24 March 2016
26.	Letter from Ofcom to BT, dated 5 April 2016, and BT's response to this letter, dated 19 April 2016	5 April 2016 19 April 2016
27.	BT's response to the ninth information request	4 November 2016