

Confirmation Decision under Section 96C of the Communications Act 2003 relating to a contravention of SMP Conditions

Confirmation Decision issued to British
Telecommunications plc (“BT”) by the Office of
Communications (“Ofcom”)

Non-confidential version

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Confidentiality

Confidential information in the original version of this Decision has been redacted from the published version. Redacted confidential information in the text of the published version of the Decision is denoted by [X]. Where redacted text is replaced with alternative text, the new text is denoted by [X] at the beginning and the end, e.g. [X]a Consultant[X].

The names of individuals mentioned in the original version of this Decision have been removed from the published version. Names have been replaced by a descriptor of the individual's role, with replacements denoted by square brackets, e.g. [Executive 1].

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Glossary of terms

2008 BCMR Statement: Ofcom's 2008 Business Connectivity Market Review Statement.
<https://www.ofcom.org.uk/consultations-and-statements/category-1/bcmr>

2008 SLG Direction Statement: 'Service level guarantees: incentivising performance, Statement and Directions' 20 March 2008.
<http://stakeholders.ofcom.org.uk/consultations/slg/statement/>

2013 BCMR Statement: Ofcom's 2013 Business Connectivity Market Review Statement.
https://www.ofcom.org.uk/_data/assets/pdf_file/0024/83508/business-connectivity-market-review.pdf

2016 BCMR: Ofcom's Business Connectivity Market Review that was completed in 2016.

2016 BCMR Statement: Ofcom's 2016 Business Connectivity Market Review Statement.
<https://www.ofcom.org.uk/consultations-and-statements/category-1/business-connectivity-market-review-2015>

Act: The Communications Act 2003.

AISBO: Alternative interface symmetric broadband origination. The AISBO market covers Ethernet services up to and including 1Gbit/s.

Audit Report: a report issued on 31 August 2015 setting out the findings of an audit carried out between 27 July and 12 August 2015 by an external auditor in relation to the process and practices being followed within Openreach in relation to the use of Deemed Consent in Ethernet Orders.

BES: Backhaul Extension Services.

BT: British Telecommunications plc whose registered company number is 01800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

BT Wholesale: A division of BT Group, which provides retail telecoms services directly to consumers.

CCD: Customer Committed Date as defined in the CSA.

CDD: Contractual Delivery Date as defined in the CSA. For the purposes of this Confirmation Decision references to the CDD are taken to refer also to the CCD (as appropriate according to the context).

[REDACTED].

[REDACTED].

circuit: A particular order for Ethernet services. Sometimes abbreviated to 'cct'.

Confirmation Decision: the Confirmation Decision under section 96C of the Act at Annex 2.

[REDACTED]**Consultant Report:** A Consultant report[REDACTED] dated 26 November 2012.

COSMOSS: An internal Openreach system for the management of circuits. Used for managing the provision of new and existing orders.

CP: Communications Provider.

CSA: Connectivity Services Agreement. The CSA is BT's Reference Offer contract that sets out the terms and conditions upon which BT, via its Openreach division, supplies various regulated wholesale leased line products collectively referred to as Ethernet services.

DC codes: Deemed Consent codes. DC codes are communicated to the CP when BT notifies them of its intention to deem consent.

Deemed Consent: A mechanism in the CSA, whereby BT deems that the CP has consented to an extension to the CDD in the circumstances specified in the CSA.

Deemed Consent Appeals Process: A mechanism for CPs to appeal the application of Deemed Consent by BT as set out in BT's Deemed Consent Guidance for CPs.

DLoA: Designated level of authority for decisions to authorise SLG payments. Sometimes referred to as DOA.

Dominant Provider: A CP which has Significant Market Power.

EAD: Ethernet Access Direct.

EBD: Ethernet Backhaul Direct.

ECCs: Excess Construction Charges. Additional charges for extra work not included in the original Reference Offer.

eCo: A customer facing order management system, where CPs can submit, modify and manage orders. Openreach also uses the system to manage orders and store emails that are used to update and interact with the CP.

EMP: Equivalence Management Platform. A platform introduced as a replacement for BT's legacy provisioning systems, including eCo. Introduced for EAD in January 2012 and for EBD in March 2012. In February 2013, the introduction of EMP was halted and rolled back, but it has recently been re-launched on a trial basis. Also referred to as Ethernet Strategic Transformation (EST) or "EMP/Flow". Flow is a process management system that interacts with other systems to transfer data from EMP to COSMOSS.

EST: Ethernet Strategic Transformation. An alternative name for EMP.

Ethernet services: Services presented with the standard networking protocol defined under that name in IEEE 802.3 and published by the Institute of Electrical and Electronics Engineers which provide dedicated transmission capacity at a range of bandwidths between sites.

Ethernet Steering Group: A governance body for the provision of Ethernet Services, which was in place from March 2014 to July 2014.

F&T: fit and test. The final stage in the Ethernet provisioning process before an order is handed over to a CP.

Handover: The final stage of an order when the CP is informed that the order is complete.

ICT: Information and Communications Technology.

Infrastructure build: Work that is required to ensure that adequate infrastructure is in place to enable the provision of an order for Ethernet Services.

Job controller: Job controllers manage the day-to-day delivery of Ethernet products. They act as the interface between engineers on site and the CPs. Sometimes abbreviated to JC.

Job Control Manual: BT's primary guidance document for job controllers on how to carry out their role in relation to the provision of Ethernet services.

Job number: Unique identifier of an order.

KCI (1, 2 & 3): Keep Customer Informed milestones. Internal deadlines in Openreach's Ethernet provisioning process when important information should be provided to the CP.

KIL calls: A series of daily calls during July 2013 concerning Ethernet performance, which involved members of the Openreach Executive and other senior Openreach managers. Also referred to as "Ethernet Recovery KIL Calls".

Legacy Platform: Openreach's legacy Ethernet provisioning system, including eCo.

LLU: Local Loop Unbundling

MBORC: Matters Beyond Our Reasonable Control

[X].

Network Investment SITREP Review: A weekly meeting of the Network Investment division attended by [Executive 1] and their senior management team. Also known as "NI SITREP".

NI: Network Investment – the name of the Openreach business unit responsible for delivering Ethernet services to CPs.

Notice: A notice issued to BT to provide Ofcom with information under Section 135 of the Act.

Openreach: A BT Group business offering CPs products and services that are linked to BT's nationwide local access network.

Openreach Executive: A senior management team responsible for the operational running of BT's Openreach division.

order type: The type of order for which the appointment is being requested. The different order types used by BT include: Provide, Regrade, Shift, Remove/Re-site and Rearrange.

OVD: The Order Validation Date is the date on which the order was processed.

Penalty Guidelines: Ofcom's guidelines on imposing penalties published under section 392 of the Act.

https://www.ofcom.org.uk/data/assets/pdf_file/0032/49685/penalty_guidelines_2015.pdf

product type: The type of Ethernet service being provided – WES, EAD, BES, EBD.

Provide order: A type of order where BT installs a new Ethernet service, rather than moving or updating an existing one.

RCA: root cause analysis – used in relation to analysis conducted by Openreach of why individual orders for Ethernet services did not meet their delivery dates.

Reference Offer: Published terms and conditions on the basis of which services are provided. For the purposes of this investigation, BT's published Reference Offer is their CSA.

Relevant Regulatory Obligations: means all of the following regulatory obligations which applied to BT at the point in time, or over the period of time, as relevant according to the context: SMP Condition HH5.9/Condition 6.9/Condition 5.10, SMP Condition HH1.2/Condition 1.2/Condition 1.3 and the SLG Direction.

[X]A Review[X]: a study commissioned by BT from [X]a Consultant[X], and carried out in the last quarter of 2012, to look at the Ethernet provisioning process, with a view to designing and implementing an improved process which would deliver a number of performance metrics.

Sample: A representative sample of orders taken from a batch of 8,600 orders completed during the Sample Period.

SCD: The Service Completion Date is the date on which the order was completed by BT.

SLA: service level agreement. The SLA is contained within the CSA and outlines the terms for the provision of certain Ethernet services, including the timescales within which BT has to complete the provision of an order.

SLG: service level guarantee whereby BT commits to provide the requested Ethernet service by the CDD in line with the SLA.

SLG Direction: the direction made in the 2008 SLG Direction Statement and re-imposed by Ofcom in the 2008, 2013 and 2016 BCMR Statements, which requires BT to modify its service level agreements governing the supply of certain Ethernet services.

SLG payment: A compensatory payment made by BT to the affected CP where it fails to provide the requested Ethernet service by the CDD in line with the SLA.

SLG Payments Team: The team within Openreach's Finance business unit responsible for making SLG payments.

SMP: Significant Market Power. A market position, individually or jointly with others, equivalent to dominance, i.e. a position of economic strength affording the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

SMP Conditions: Regulatory conditions imposed on a specific CP that has been found to have SMP in a market reviewed by Ofcom.

Vodafone: Vodafone Ltd whose registered company number is 01471587, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

Vodafone Dispute: A dispute between Vodafone and BT concerning BT's use of Deemed Consent in relation to the provision of Ethernet services during the period from 1 September

2012 to 31 January 2014. Our final statement resolving this dispute is available at http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01165/01165_Final_determination.pdf

Vodafone Dispute Determination: The final determination to resolve the Vodafone Dispute.

wayleave: Written consent allowing Openreach to carry out work on privately owned land.

WES: Wholesale Extension Services.

WEES: Wholesale End-to-End Services.

Relevant Periods

Dispute Period: 1 September 2012 – 31 January 2014. The period under investigation in the Vodafone Dispute.

Investigation Period: 1 September 2012 – 26 August 2016.

Original Relevant Period: 1 September 2012 to 31 December 2014. The period originally under investigation.

Practice 1 Breach Period: January 2013 – December 2014. The duration of the breach identified in Section 4, relating to the retrospective application of Deemed Consent.

Practice 2 Breach Period: 10 January 2013 – 17 December 2014. The duration of the breach identified in Section 5, relating to the findings of Ofcom's sample review.

Practice 3 Breach Period: 24 October 2013 – 26 August 2016. The duration of the breach identified in Section 6, relating to the appeals of Deemed Consent applications.

Sample Period: 1 May 2014 – 31 July 2014. The period from which sample orders were taken for the purposes of Ofcom's sample review.

Section 1

Executive Summary

Introduction

- 1.1 This document sets out our finding that BT has breached its regulatory obligations which applied to the provision of its Ethernet services as a result of the way it used Deemed Consent to extend the delivery timeframes for those services and failings in its processes for paying compensation in the event of the late delivery of those services.
- 1.2 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.
- 1.3 BT is the largest supplier of leased lines in the UK. The majority of CPs depend on access to BT's leased line services, such as Ethernet, in order to provide communications services, including broadband, to their customers.
- 1.4 In line with Ofcom's duties under the Communications Act 2003 (the Act) and in light of the critical importance of leased lines generally, and of Ethernet services in particular, we carry out periodically a detailed review of competition in the provision of leased lines in the UK. The review is known as the Business Connectivity Market Review (BCMR). Our analysis of competition in the BCMR identifies any business which has Significant Market Power (SMP), that is in a position of economic strength which enables it to behave independently of competitors, customers and, ultimately, consumers. Where a business has this degree of market power, it can act in a manner to distort competition.
- 1.5 In the BCMRs which we completed in 2008, 2013 and 2016, we 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.
- 1.6 The level of investment required to build fixed networks which match the coverage of BT's ubiquitous network in the UK is very large. The coverage of other CPs' networks is more limited and they need to use BT's Ethernet and other leased line services to serve sites which are beyond the reach of their own networks. Absent our regulatory obligations, BT would have both the incentive and ability to distort competition in the provision of Ethernet and other leased lines services, ultimately against end-users' interests. The obligations we imposed on BT in each of the BCMRs are therefore fundamental to promoting competition in communications services used by consumers and businesses.
- 1.7 The regulatory obligations we have imposed on BT include the SMP Conditions and the SLG Direction to which this Confirmation Decision relates.¹ These are designed

¹ The Relevant Regulatory Obligations, namely SMP Conditions HH5.9/6.9/5.10, HH1.2/1.2/1.3 and the SLG Direction set in the 2008, 2013 and 2016 BCMR Statements.

to ensure that CPs are able to access Ethernet services on a wholesale basis and on regulated terms, so as to promote competition in downstream markets and incentivise BT to maintain an appropriate level of performance.

- 1.8 BT's failure to comply with its regulatory obligations in relation to the provision of Ethernet services is a serious matter. Unless BT complies with its regulatory obligations, its market power is capable of harming competition in downstream markets, making it more likely that CPs, businesses and Government bodies will pay more or have less choice or quality in their connectivity services. Harm in the form of higher prices, less choice or lower quality of services would then be passed on to consumers, including those buying broadband services for home or business use.
- 1.9 We have imposed a penalty of £42 million on BT to reflect the seriousness of the contraventions and, for the protection of consumers, to deter further breaches by BT and, more generally, to deter breaches by other CPs which are subject to regulatory obligations by virtue of their significant market power.
- 1.10 The calculation of this figure includes a 30% discount applied to the provisional penalty figure of £60 million proposed in the section 96A notification, as a result of BT's accepting liability and entering into a voluntary settlement with Ofcom.

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

- 1.11 As a result of its significant market power, BT is required to provide access to its Ethernet services in accordance with the following regulatory obligations:
 - 1.11.1 SMP Conditions HH5.9/6.9 and 5.10 require BT to provide network access in accordance with the terms and conditions in BT's published contract.² These conditions are intended to: assist transparency; provide CPs with the necessary information to enable them to make informed decisions about purchasing Ethernet services from BT to enable them to compete; and help ensure market stability so as to secure incentives to invest and facilitate market entry;
 - 1.11.2 SMP Conditions HH1.2/1.2 and 1.3 require BT to provide network access on fair and reasonable terms and on such terms and conditions as Ofcom may direct.³ These conditions are intended to prevent supply on terms that would prevent or restrict competition in relevant markets;
 - 1.11.3 The SLG Direction requires BT to include in its published contract for Ethernet services a service level guarantee (SLG) in relation to the timeframe for delivery.⁴ The SLG Direction is intended to provide an

² 2008 BCMR Statement, Annex 8: Notification under sections 48(1) and 79(4) of the Act, Schedule 4, page 406; 2013 BCMR Statement, Annex 7: Notification under sections 48(1) and 79(4) of the Act, Schedule 2, Part 3; 2016 BCMR Statement, Annex 35, Notification under sections 48(1) and 79(4) of the Act, Schedule 1, Part 3.

³ 2008 BCMR Statement, Annex 8: Notification under sections 48(1) and 79(4) of the Act, Schedule 4, page 404; 2013 BCMR Statement, Annex 7: Notification under sections 48(1) and 79(4) of the Act, Schedule 2, Part 3, page 123; 2016 BCMR Statement, Annex 35, Notification under sections 48(1) and 79(4) of the Act, Schedule 1, Part 3, page 19.

⁴ 2008 SLG Direction, Annex 3, page 65.

incentive to BT to deliver Ethernet services to a pre-defined level of performance.

- 1.12 In accordance with these regulatory obligations, BT is required as part of the SLG in its published contract to deliver Ethernet services by the 30th 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. In the event that BT is unable to deliver Ethernet services until after the CDD, it must pay compensation to the CP equivalent to one month's line rental for each day of delay (up to a maximum of 60 days). These compensation payments are known as SLG payments.

Ofcom's Findings

- 1.13 Ofcom opened an investigation on 6 November 2015 into BT's use of Deemed Consent in the provision of its Ethernet Services as a result of identifying a number of areas which warranted further investigation during the course of resolving the Vodafone Dispute.⁵ Ofcom issued its section 96A notification, setting out our finding that BT had breached the regulatory obligations set out at paragraph 1.10, on 22 March 2017.
- 1.14 On 26 March 2017, BT agreed to enter into a voluntary settlement with Ofcom in relation to the matters set out in this Confirmation Decision.
- 1.15 In this document, we set out evidence that in 2013 and 2014, BT was facing material liabilities for SLG payments on Ethernet circuits that it failed to deliver by their CDD. In 2013, it forecast its expenditure on SLG payments at over £[X], with the potential for this to increase to £[X]; in May 2014, a briefing to the Openreach Executive reported spend on SLG payments as just under £[X] per week. We have found evidence that BT developed strategies to address these liabilities. While these included measures directed at improving its delivery performance, we have also identified conduct whereby BT used Deemed Consent to extend the CDD of orders and calculated SLG payments in breach of its regulatory obligations.
- 1.16 Specifically, our findings in this investigation are as follows:
- 1.16.1 **Practice 1:** between January 2013 and December 2014 BT contravened SMP Conditions HH5.9/6.9 and HH1.2/1.2, and the SLG Direction by systematically and frequently applying Deemed Consent retrospectively to both open and closed orders in order to reduce SLG payments. There is evidence that this was deliberate conduct carried out by senior management at Openreach with the knowledge of the Openreach Executive. More details of this conduct can be found in Section 4.
- 1.16.2 **Practice 2:** BT contravened SMP Conditions HH5.9/6.9 and HH1.2/1.2, and the SLG Direction as a result of a sustained failure by BT to ensure that CPs were adequately notified of applications of Deemed Consent between January 2013 and December 2014. This is based on a review of a sample of orders completed between May and July 2014 as well as

⁵ See http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01165/01165_Final_determination.pdf

additional documentary evidence. More details of this conduct can be found in Section 5.

- 1.16.3 **Practice 3:** BT contravened SMP Conditions HH1.2/1.2 and 1.3, HH5.9/6.9 and 5.10 and the SLG Direction from 24 October 2013 to 26 August 2016 by failing to ensure that the full amount of SLG payments were paid following successful appeals by CPs of applications of Deemed Consent. These failings led to an underpayment of SLG payments by BT in respect of 161 orders, amounting in total to £719,000.⁶ More details of this conduct can be found in Section 6.

Remedy and penalty

- 1.17 BT is required to remedy the consequences of the contraventions. The steps that we consider BT should take include identifying Ethernet orders where BT applied Deemed Consent retrospectively and compensating the CP for any SLG payments that would otherwise have been paid. We consider that BT should make all compensatory payments to remedy the consequences of its breach within 12 months of this Confirmation Decision.
- 1.18 BT has taken steps to remedy the contraventions in Practice 3 and therefore no remedial action is required in respect of these contraventions.
- 1.19 Ofcom has decided to impose a financial penalty of £42 million which includes a 30% discount applied to the provisional penalty figure of £60 million proposed in the section 96A notification, as a result of BT's accepting liability and entering into a voluntary settlement with Ofcom. We consider this is appropriate and proportionate given the seriousness and significance of BT's contraventions of its SMP obligations and when considering Ofcom's objectives in deterring further contraventions of regulatory obligations.
- 1.20 These findings are set out in this document as follows. In Section 2 we set out the Relevant Regulatory Obligations and how we have applied them in this case. Section 3 provides information about Ethernet services and BT's provisioning processes, including how it applies Deemed Consent and calculates SLG payments in the event of late delivery. Section 2 also has information about the structure of Openreach, the division of BT which is responsible for the provision of Ethernet services. Sections 4 – 6 set out Ofcom's findings in relation to Practices 1, 2 and 3 and, in each case, the evidence we have relied on. The steps that BT is required to take to remedy the consequences of the contravention are set out in Section 7. Ofcom's reasons for imposing a penalty and the factors it has taken into account in determining the appropriate level of the penalty are set out in Section 8.

⁶ Ofcom analysis of Deemed Consent Challenges and SLG Payments – FINAL, 4 November 2016. 0611

Section 2

Introduction and Legal Framework

- 2.1 This document relates to BT's use of Deemed Consent in the provision of Ethernet services to CPs. Deemed Consent is a contractual mechanism that enables BT to extend the delivery date for the provision of these services under the service level agreement (SLA) in its contract. BT has established a process which enables CPs to appeal the use of Deemed Consent if they consider that BT has not applied it in accordance with the terms of its contract. The findings in this document also relate to the operation of this appeals process.
- 2.2 BT is subject to regulatory obligations in relation to the provision of Ethernet services by virtue of its position of significant market power (SMP). These obligations include the provision of the services on fair and reasonable terms, conditions and charges and in accordance with the charges, terms and conditions in BT's published contract. BT's contract includes the Deemed Consent mechanism and the obligation to pay compensation to a CP if it fails to deliver the Ethernet service in accordance with its SLA.
- 2.3 In November 2015, we opened an investigation into whether BT's use of Deemed Consent complied with its regulatory obligations and we set out our findings in this document.
- 2.4 In this section we set out the scope of our investigation. This was triggered by the Vodafone Dispute and the Vodafone Dispute Determination informs the findings in this document. In this section we therefore outline the findings of the Vodafone Dispute Determination which are relevant to the matters addressed in this document.
- 2.5 We then set out the regulatory obligations which apply to BT's Ethernet services, the relevant terms of BT's published contract for the provision of these services and the process established by BT to enable CPs to appeal the application of Deemed Consent.
- 2.6 At the end of this Section, we explain how we have applied these obligations to the conduct that we identify in Sections 4, 5 and 6.

Investigation and scope

- 2.7 On 6 November 2015, Ofcom issued its provisional conclusions in the Vodafone Dispute. During the course of our assessment of the Vodafone Dispute, we identified a number of areas which we considered warranted further investigation. On 6 November 2015, Ofcom therefore opened an own initiative investigation into the circumstances under which BT used Deemed Consent to extend the delivery timeframes for its Ethernet services and whether BT had complied with its regulatory obligations.

The Vodafone Dispute Determination

- 2.8 On 14 August 2015, Vodafone submitted a dispute to Ofcom in relation to the way that BT had provisioned its Ethernet services in practice. Vodafone alleged that BT had misused Deemed Consent during the period between 1 September 2012 and 31 January 2014 (the "Dispute Period") by engaging in various categories of conduct.

Vodafone claimed that this resulted in BT failing to meet its obligations in relation to the timeframes for the provision of its services.⁷

- 2.9 In resolving the Vodafone Dispute, we did not analyse specific orders or reach a view on whether BT did engage in the specific behaviour described under each category identified by Vodafone. Rather, we considered whether the types of behaviour in which BT had allegedly engaged could or would have been consistent with BT's obligations under its published contract for Ethernet services (the Connectivity Services Agreement or CSA) and BT's SMP obligations. Having considered the arguments of both Vodafone and BT, and undertaken our assessment of each of these categories, we reached a number of conclusions. Those that are relevant to this investigation are summarised in Table 2.1 below. For the purposes of this investigation, we have not examined whether BT has also engaged in the other categories of behaviour we considered in the Vodafone Dispute and therefore we make no findings in relation to these.

Table 2.1: Deemed Consent: High level summary of relevant Final Conclusions by Category

Category	In accordance with the CSA?	BT's obligations to provide services as soon as reasonably practicable and on fair and reasonable terms, and on such terms as Ofcom may from time to time direct	BT's obligations to not depart from published Reference Offer
1. No notice given of the intention to deem consent for a change of CDD.	Would not be in accordance with the terms of the CSA	Could be in breach of obligations	Would be in breach of obligations
2. Insufficient level of reasoning provided by BT.	Could be in accordance with the terms of the CSA	Could be in breach of obligations	Could be in accordance with obligations
6. Retrospective application of Deemed Consent to change the CDD.	Where BT did not set the new CDD as soon as reasonably practicable: would not be in accordance with the terms of the CSA	Where BT did not set the new CDD as soon as reasonably practicable: could be in breach of obligations	Where BT did not set the new CDD as soon as reasonably practicable: would be in breach of obligations

- 2.10 These findings have informed our assessment of BT's conduct which we have assessed in sections 4 and 5, namely:

- 2.10.1 retrospective application of Deemed Consent (section 4) and;

⁷ Vodafone Dispute submission, 14 August 2015, paragraph 7, 0619.

- 2.10.2 failure to provide notification of Deemed Consent, failure to provide sufficient explanation of Deemed Consent, and/or retrospective application of Deemed Consent i.e. failure to send notification of Deemed Consent as soon as reasonably practicable (section 5).
- 2.11 We have also had regard to other findings made in relation to the Vodafone Dispute Determination about the application of BT's SMP obligations, notably:
 - 2.11.1 the factors which we considered relevant to determining whether BT has failed to supply Ethernet services on terms that are fair and reasonable and in accordance with the SLG Direction; and
 - 2.11.2 our assessment of BT's obligation under the CSA to notify the CP of its intention to apply Deemed Consent as soon as reasonably practicable.

These findings are set out in more detail at paragraphs 2.43 – 2.50 below.

BT's regulatory obligations applicable to Ethernet services

- 2.12 On 8 December 2008, 28 March 2013 and 28 April 2016, Ofcom published, respectively, the 2008 BCMR Statement, the 2013 BCMR Statement and the 2016 BCMR Statement. These statements determined that BT had SMP in the provision of Ethernet services and imposed regulatory obligations on BT via SMP Conditions.⁸
- 2.13 The SMP finding means that BT operates in the markets for Ethernet services without effective constraint from competition.⁹ The SMP Conditions that Ofcom has set are those that it considers are appropriate, based on the nature of the competition problem identified in the relevant markets.¹⁰
- 2.14 In deciding what SMP Conditions to set, Ofcom must also be satisfied that each one is:
 - 2.14.1 objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - 2.14.2 not such as to discriminate unduly against particular persons or against a particular descriptions of persons;
 - 2.14.3 proportionate to what the condition or modification is intended to achieve; and
 - 2.14.4 transparent in relation to what it is intended to be achieved.¹¹
- 2.15 Ofcom must also ensure that the SMP Conditions it sets secure or further the performance of its general duties under section 3 of the Act, which include promoting competition and furthering the interests of citizens and consumers.

⁸ 2008 BCMR Statement, Annex 8: Notification under sections 48(1) and 79(4) of the Act, paragraph 3 and Schedule 4; 2013 BCMR Statement, Annex 7: Notification under sections 48(1) and 79(4) of the Act, paragraph 14 and Schedule 2, Part 3; 2016 BCMR Statement, Annex 35, Notification under sections 48(1) and 79(4) of the Act, paragraph 14 and Schedule 1, Part 3.

⁹ See, for example, paragraph 1.10 2016 BCMR Statement.

¹⁰ See, for example, explanation at paragraph 2.3(iii) 2016 BCMR Statement.

¹¹ Section 47 Communications Act 2003.

- 2.16 For the purposes of this investigation, the relevant regulatory requirements are:
- 2.16.1 the SMP Conditions to provide network access in accordance with the terms and conditions in BT's published Reference Offer;
 - 2.16.2 the SMP Conditions to provide network access on fair and reasonable terms and on such terms and conditions as Ofcom may direct; and
 - 2.16.3 the Direction, made under the SMP Condition to provide network access on fair and reasonable terms, requiring BT to include a specified SLG in its contracts for Ethernet services (the "SLG Direction").
- 2.17 The requirement to publish a Reference Offer and to provide services on its terms and conditions, serves the following purposes: to assist transparency for the monitoring of potential anti-competitive behaviour; and to give visibility to the terms and conditions under which other providers will purchase wholesale services. The SMP condition also aims at ensuring that CPs have the necessary information to allow them to make informed decisions about purchasing Ethernet services in order to compete in downstream markets. This helps to ensure stability in markets without which incentives to invest might be undermined and market entry may be rendered less likely.¹²
- 2.18 The principal aim of the requirement for BT to provide its services on fair and reasonable terms is to prevent supply of such services on terms that amount to a refusal to supply or which would otherwise prevent or restrict competition in the relevant markets and enable BT to monopolise the provision of services in the related downstream markets.¹³
- 2.19 The SLG Direction aimed to re-structure compensation payments for late provision and repair to better reflect CPs' average losses. Ofcom considered that Openreach's contracts for Ethernet services did not provide Openreach with "*sufficient incentive to maintain an appropriate level of performance*" and that Openreach was "*not providing service on fair and reasonable terms*".¹⁴ The arrangements put in place by the SLG Direction were intended to give Openreach "*an appropriate financial incentive to maintain and provision service at an efficient level*".¹⁵
- 2.20 The findings we have made in this document span the period covered by the 2008 BCMR Statement, 2013 BCMR Statement and, in relation to the findings on Deemed Consent appeals in section 6, the 2016 BCMR Statement, and therefore we set out the relevant SMP Conditions and Direction made in each in the paragraphs below.

Condition HH5.9/Condition 6.9/Condition 5.10: provision of network access in accordance with the Reference Offer

- 2.21 In the 2008 BCMR Statement, Condition HH5.9 stated that:

¹² See <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/> paragraphs 12.339, 12.340 and 12.349. See also Table 8.11 of <http://stakeholders.ofcom.org.uk/consultations/bcmr08/>.

¹³ See paragraphs 12.272, 12.273 and 12.284 to 12.286 of <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/>. See also Table 8.11 of <http://stakeholders.ofcom.org.uk/consultations/bcmr08/>.

¹⁴ Paragraph 1.7 and 2.6 of the 2008 SLG Direction.

¹⁵ Paragraph 3.59 of the 2008 SLG Direction.

“The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.”¹⁶

- 2.22 Network access covers the provision of Ethernet services and the “relevant Reference Offer” is BT’s published terms and conditions for the provision of these services.
- 2.23 These requirements were re-imposed in the same terms in Condition 6.9 in the 2013 BCMR Statement and to the same substantive effect in Condition 5.10 in the 2016 BCMR Statement.¹⁷

Condition HH1.2/Condition 1.2/ Condition 1.3: provision of network access on fair and reasonable terms

- 2.24 In the 2008 BCMR Statement, Condition HH1.2 was set in the following terms:

“The provision of Network Access in accordance with paragraph HH1.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms and conditions (excluding charges) and on such terms and conditions (excluding charges) as Ofcom may from time to time direct.”¹⁸

- 2.25 The condition was re-imposed in the 2013 BCMR Statement in Condition 1.2, with the same substantive requirement to provide network access on fair and reasonable terms and conditions:

“the provision of network access by the Dominant Provider in accordance with this Condition must—

(a) take place as soon as reasonably practicable after receiving the request from a Third Party;

(b) be on fair and reasonable terms, conditions and charges; and

(c) be on such terms, conditions and charges as Ofcom may from time to time direct.”¹⁹

- 2.26 In the 2016 BCMR Statement, Condition 1.2 was replaced with Condition 1.3 to similar effect:

“Where Condition 10 applies to the provision of network access by the Dominant Provider, the provision of that network access in accordance with this Condition must:

¹⁶ 2008 BCMR Statement, Annex 8: Notification under sections 48(1) and 79(4) of the Act, Schedule 4, page 406.

¹⁷ 2013 BCMR Statement, Annex 7: Notification under sections 48(1) and 79(4) of the Act, Schedule 2, Part 3; 2016 BCMR Statement, Annex 35, Notification under sections 48(1) and 79(4) of the Act, Schedule 1, Part 3.

¹⁸ 2008 BCMR Statement, Annex 8: Notification under sections 48(1) and 79(4) of the Act, Schedule 4, page 404.

¹⁹ 2013 BCMR Statement, Annex 7: Notification under sections 48(1) and 79(4) of the Act, Schedule 2, Part 3, page 123.

(a) take place as soon as reasonably practicable after receiving the request from a Third Party (and, in any event, in accordance with Condition 7);

(b) be on:

(i) fair and reasonable terms and conditions (excluding charges); and

(ii) such terms, conditions and charges as Ofcom may from time to time direct.”²⁰

SLG Direction

- 2.27 On 20 March 2008, Ofcom issued the SLG Direction, a direction under section 49 of the Act and Condition HH1.2,²¹ requiring the modification of the SLAs governing the supply of certain Ethernet services.²² CPs had complained about Openreach’s service performance, saying that too often Openreach failed to deliver in the timeframes set out under its (unregulated) SLAs. After the failure of commercial negotiations to resolve the issue, Ofcom was asked to intervene and impose a regulatory solution.²³
- 2.28 Noting that SLAs were “essential elements of any commercial contract as they provide... an incentive to deliver service to a pre-defined...level of performance”,²⁴ we said that BT’s commercial SLAs, including those for Ethernet services, were not “fair and reasonable as they do not provide Openreach with a strong enough incentive to sustain service performance at an efficient level”.²⁵ We said that SLG Payments “need to be challenging to give appropriate financial incentives and that compensatory payments due need to be directly reconcilable to...late provision and that they should be paid promptly after the event in question.”²⁶
- 2.29 Accordingly, the SLG Direction required the following modifications of BT’s contracts for the provision of the specified Ethernet services:
- to require BT to provide reasons to justify a contractual delivery date (CDD) later than the 57th day;
 - to require an extension of the CDD beyond the 57th day to be subject to the CP’s consent; and
 - to require BT to pay compensation (“SLG payment”) set at 100% of one month’s line rental for every day or part day of delay beyond the CDD, up to a maximum of 60 days.

²⁰ 2016 BCMR Statement, Annex 35, Notification under sections 48(1) and 79(4) of the Act, Schedule 1, Part 3, page 19.

²¹ This SMP condition was set by Ofcom on 24 June 2004 under section 48(1) and 79 of the Act.

²² *Service level guarantees: incentivising performance, Statement and Directions*, 20 March 2008 (“SLG Direction Statement”), Annex 3.

<http://stakeholders.ofcom.org.uk/binaries/consultations/slg/statement/statement.pdf>. The Ethernet services covered by the SLG Direction were WES, BES and WEES.

²³ SLG Direction Statement, paragraphs 1.2 – 1.3.

²⁴ *Ibid*, paragraph 1.1

²⁵ *Ibid*, paragraph 1.17.

²⁶ *Ibid*, paragraph 3.63.

- 2.30 We said that the changes made by the SLG Direction "represent a fair deal for all concerned" and that "consumers should benefit from increased value for money, in terms of increased service quality, higher compensation or lower prices."²⁷
- 2.31 In the 2008, 2013 and 2016 BCMR Statements, Ofcom decided to re-impose the SLG Direction in substantively the same terms, applying to BT's Ethernet services in the relevant wholesale markets where BT had been found to have a position of significant market power.²⁸

BT's Contractual Obligations

- 2.32 BT's CSA is its Reference Offer (for the purposes of SMP condition HH5.9/6.9/5.10) that sets out the terms and conditions upon which BT, via its Openreach division, supplies Ethernet services.²⁹
- 2.33 BT modified the CSA in line with the SLG Direction. Accordingly, the CSA specifies the CDD by which BT has to complete the provision of an order and provides that BT will pay compensation for each day or part day of delay in delivery of service beyond the specified CDD unless it obtains consent from the CP to extend the delivery timetable.
- 2.34 However, BT voluntarily chose to set the CDD specified in the CSA at 30 working days rather than the 57 days stipulated in the SLG Direction. Therefore, under the terms of the CSA, BT may only extend the CDD beyond 30 working days with the CP's prior consent. Where such consent has been validly obtained BT will not be liable for SLG payments.
- 2.35 The key provisions of the CSA are set out below
- 2.36 Schedule 1 of the CSA defines the CDD as:
- "the 30th Working Day after the Ethernet Access Direct Service..., Ethernet Backhaul Direct Service, Wholesale Extension Service, WEES Service or Backhaul Extension Service Order is Processed by BT;*
- or such later date where consent is obtained or deemed pursuant to paragraph 2.3 of Schedule 4C."*
- 2.37 Schedule 4C(i) of the CSA applies in respect of EBD, EAD, WES, BES and WEES services³⁰ which are ordered on the "Legacy Platform". Schedule 4C(ii) applies to

²⁷ *Ibid*, paragraph 2.11.

²⁸ 2008 BCMR Statement, paragraph 8.292 and Schedule 15; 2013 BCMR Statement, paragraph 12.236 and Annex 8, Schedule 2; 2016 BCMR Statement, paragraphs 13.750 – 13.765, Annex 35, Schedule 4. The provision requiring compensation to be set at 100% of one month's line rental for every day or part day of delay beyond the CDD, up to a maximum of 60 days specifically applies only to BES, WES and WEES in the Directions made.

²⁹ The current version of BT's Connectivity Service Agreement is available at <https://www.openreach.co.uk/orpg/home/products/ethernet-services/contracts/contracts.do>. The key provisions of the CSA set out in paragraphs 2.32 – 2.39 have been in place since at least March 2009. See BT's letter to Ofcom – response to The Vodafone Dispute, 25 September 2015, para 7 page 3, 0613

³⁰ These services are explained at paragraph 3.5.

EAD and EBD Services ordered on “EMP”.³¹ The terms of Schedules 4C(i) and 4C(ii) are the same in all key respects relating to the extension of the CDD.³² Specifically, paragraph 2.3 provides that BT will

“(i) provide reasons to justify, and

(ii) obtain the Communications Provider’s prior written consent (not to be unreasonably withheld or delayed)

to extend the CDD beyond the

(a) 30th Working Day for the Ethernet Backhaul Direct Service Order, TDM Access Order or Ethernet Access Direct Service order

(....)

(c) 30th Working Day for the [WES] Order, [WEES] Order or the [BES] Order³³

provided always that BT will notify the Communications Provider as soon as reasonably practicable where it intends to deem consent and any subsequent CDD is as soon as reasonably practicable.”

- 2.38 Paragraph 3.1 of Schedule 4C (“Service Guarantees”/“Provision”) stipulates that BT will deliver its services by midnight on the CDD. If BT fails to do this, the CP shall be entitled to the compensation set out in paragraph 4.1 of the Schedule. Paragraph 3.1 is subject to paragraph 7, which sets out the circumstances in which service guarantees and any compensation payments will not apply.
- 2.39 Paragraph 6.1 of the Schedule provides that any compensation payable will normally be made by deduction from the CP’s next invoice unless not practicable. It is stated to be payable without the need for the CP to make a claim. Paragraph 6.2 clarifies that any compensation payable shall be without prejudice to any right or remedy including any right to claim additional loss.

Deemed Consent under the CSA

- 2.40 As set out in paragraph 2.37 above, paragraph 2.3 of Schedule 4C allows BT to extend the CDD if it is able to deem that a CP has consented to the extension (in lieu of obtaining actual consent from that CP). The circumstances in which BT may apply Deemed Consent are set out in paragraphs 2.3 and 7 of the CSA and BT had codified these, with each Deemed Consent reason having a specific Deemed Consent code (“DC code”). For example, the need for infrastructure build is “DC22”, the identification of asbestos is “DC27”. BT said in the Vodafone Dispute that a table setting out the justifications for Deemed Consent under the CSA and the corresponding Deemed Consent codes (DC codes) is provided regularly to CPs.³⁴ An example of one of these tables setting out the DC codes is attached at Annex 13.
- 2.41 Where BT proposes to apply Deemed Consent to extend the CDD, paragraph 2.3(i) of Schedule 4C requires that it provides reasons to justify this. In addition, paragraph

³¹ The Legacy Platform and EMP are discussed at paragraphs 3.22 to 3.25 below.

³² Schedule 4C(ii) requires delivery by the “CCD” rather than the CDD but the definition in Schedule 1 to the CSA is aligned with that for CDD.

³³ This provision appears in Schedule 4C(i) only.

³⁴ Vodafone Dispute Determination, paragraph 2.24.

2.3 requires “always” that BT notifies the CP as soon as reasonably practicable where it “intends to apply Deemed Consent”.

- 2.42 In addition to the provisions of the CSA relating to Deemed Consent, BT also established a mechanism for CPs to appeal the application of Deemed Consent by BT (the “Deemed Consent Appeals Process”). This is set out in BT’s Deemed Consent Guide for CPs. A CP that wishes to appeal the application of Deemed Consent is required to set out its case for challenging the application and provide evidence. A final decision, including rationale, is issued by BT within 5 working days of the appeal being acknowledged. If an appeal is successful, this may result in BT incurring a liability to make a SLG payment under the CSA in respect of the delay for which the CP’s consent had not been validly obtained.³⁵

Our approach to applying BT’s regulatory obligations to establish the breaches in sections 4, 5 and 6

- 2.43 Our investigation has examined the ways in which BT has applied Deemed Consent and the Deemed Consent Appeals Process and whether these are consistent with the regulatory obligations set out above. We have made this assessment as follows:
- 2.44 First, we considered whether the conduct we identified is consistent with BT’s obligations under the CSA, taking account of, in particular, the findings in the Vodafone Dispute Determination summarised in Table 2.1 above.
- 2.45 Where the conduct is not in accordance with the terms of the CSA, we have applied the finding in the Vodafone Dispute Determination, namely that where there is a departure from the relevant Reference Offer (CSA), it follows that a breach of BT’s regulatory obligation to provide network access in accordance with the terms of the Reference Offer (HH5.9/6.9/5.10) would have occurred.³⁶
- 2.46 We accepted in the Vodafone Dispute Determination that not every individual departure from the CSA would necessarily be a breach of BT’s obligation under conditions HH1.2/1.2, to provide services on terms that are fair and reasonable.³⁷ We said that it was sufficient to assess whether BT had engaged in conduct which means it has failed to supply on fair and reasonable terms, by reference to the potential of such conduct to undermine the objectives of Conditions HH1.2 and 1.2.³⁸ We also said that in establishing whether BT has breached its obligations under HH1.2 and 1.2, regard may need to be had to other factual circumstances and we gave some examples of factors that could be relevant.³⁹
- 2.47 There has been no challenge to the Vodafone Dispute Determination and our assessment of whether BT’s conduct contravenes its regulatory obligations is informed by the findings that we made in that determination. Accordingly, for the purposes of assessing whether the conduct we have identified gives rise to a contravention of Conditions HH1.2/1.2, we have taken account of the following factors, informed by the factors identified in the Vodafone Dispute Determination as relevant in this regard:

³⁵ Deemed Consent Guide for CPs, June 2012, pages 6 and 7, 0007

³⁶ See paragraph 3.44, Vodafone Dispute Determination

³⁷ See paragraph 3.49, Vodafone Dispute Determination.

³⁸ Vodafone Dispute Determination, paragraph 3.51.

³⁹ Vodafone Dispute Determination, paragraph 3.52

- 2.47.1 whether there is evidence of a failure by BT to put the right mechanisms and processes in place to ensure compliance with its regulatory obligations; or evidence of systematic conduct in breach of the CSA;⁴⁰
 - 2.47.2 the frequency of the conduct;
 - 2.47.3 whether the conduct reflects a deliberate attempt to undermine the objectives pursued by the relevant SMP Conditions; and
 - 2.47.4 the potential impact of the conduct on CPs.
- 2.48 In addition, and specifically in relation to our assessment of Practice 1 (retrospective application of Deemed Consent) in section 4 and Practice 2 (failure to provide adequate notification of Deemed Consent as soon as reasonably practicable) in section 5, we have taken account of the findings in the Vodafone Dispute Determination about the objectives of HH1.2/1.2. In this regard, we said that:
- 2.48.1 the provisions of the CSA regarding the delivery of Ethernet services within specified timeframes contribute materially to ensuring that BT complies with its obligation to provide its services on fair and reasonable terms and as soon as reasonably practicable;
 - 2.48.2 a fundamental aspect of BT's compliance is that the CP concerned should be informed of any extensions to these timeframes - the ability of a CP to manage a delay in the provision of its own services or to challenge an extension of the delivery date for BT's services is an important element of what SMP Conditions H1.2 and 1.2 sought to achieve;
 - 2.48.3 hence, the provision of a notification to the CP of BT's intent to deem consent, sent as soon as reasonably practicable, with an explanation that is sufficient for the CP to understand the reason for the delay and its impact on timescales, is an important element of BT's obligation since it enables the CP to manage a delay in the provision of its own services with its customer or to challenge an extension of the delivery date; and
 - 2.48.4 a failure to provide such a notification therefore risks undermining the effectiveness of BT's obligation to provide its services on fair and reasonable terms.⁴¹
- 2.49 In relation to BT's obligation under the CSA to notify the CP as soon as reasonably practicable where it intends to deem consent, we have had regard to the following findings in the Vodafone Dispute Determination:
- 2.49.1 Once BT is aware that it intends to extend the CDD, it should notify the CP of this fact as soon as reasonably practicable.⁴²
 - 2.49.2 Where a delay occurs on the day of the CDD itself (for example, where BT engineers are unable to gain access at the site in order to complete an

⁴⁰ This factor was not cited explicitly in the Vodafone Dispute Determination in relation to HH1.2/1.2 but is comparable to the non-exhaustive list of factual circumstances that were identified as potentially relevant to the question of whether BT had provided Ethernet services on terms that were fair and reasonable.

⁴¹ See paragraph 5.9 – 5.10 and 5.32, Vodafone Dispute Determination.

⁴² See paragraphs 4.66, 5.77 and 5.83.1, Vodafone Dispute Determination.

installation), BT cannot be expected to give notice before the CDD but, save when justified by the circumstances, should be able to do so on the day of the CDD.⁴³

- 2.49.3 When justified by the circumstances that caused the delay, a notification on the first working day after the CDD may be consistent with the requirements of the CSA. For example, where an engineer is not able to inform the job controller of the delay until the end of a working day, the job controller may not be available to contact the CP with notification of the intent to apply Deemed Consent until the next working day. We note however that these circumstances would appear to be exceptional, rather than typical.⁴⁴
- 2.50 Finally, in relation to BT's compliance with the SLG Direction, we have taken account of the findings in the Vodafone Dispute Determination where we said that it was not sufficient for BT simply to amend the wording of the CSA – it was necessary for the SLG Direction to be implemented in practice.⁴⁵ Accordingly, in our assessment of the conduct, we have considered whether it gave effect to the requirements of the SLG Direction, which include the requirement to give reasons and obtain prior consent for any extensions to the delivery timelines. In making our assessment, we have had regard to whether the conduct was frequent or systematic.⁴⁶

⁴³ See paragraphs 4.67 – 4.68, 5.79 and 5.83.2, Vodafone Dispute Determination.

⁴⁴ See paragraphs 5.80 and 5.83.3, Vodafone Dispute Determination.

⁴⁵ See paragraph 3.56, Vodafone Dispute Determination.

⁴⁶ See paragraph 3.56, Vodafone Dispute Determination.

Section 3

Openreach's relevant structures and processes

Introduction

- 3.1 This section is in two parts. In the first part we explain what Ethernet services are and provide background information concerning the provisioning of Ethernet, SLG payments and Deemed Consent. We explain how BT's provisioning process for Ethernet services was intended to operate during the Original Relevant Period, and how Openreach managed the delivery of Ethernet orders. We next describe BT's obligation to make SLG payments when orders are delivered late. Then we look at BT's use of Deemed Consent in the Ethernet provisioning process, including how BT characterised Deemed Consent in its representations in response to the Vodafone Dispute. We consider how Deemed Consent is described in BT's external guidance for CPs and internal guidance and training materials for job controllers. Then we conclude by looking at the process that BT applied enabling CPs to appeal applications of Deemed Consent.
- 3.2 In the second part we consider the structure of Openreach and its governance during the Original Relevant Period and we describe the Openreach business units that have been the focus of our investigation. We also describe the governance mechanisms that were in place, in addition to the Openreach Executive, during the Original Relevant Period to oversee the delivery of Ethernet services and monitor Openreach's liabilities in relation to SLG payments.

Ethernet services

- 3.3 Ethernet services are a type of leased line which provides dedicated capacity between fixed locations for the transmission of data. These are important components of business Information and Communications Technology (ICT) services, particularly those used by large multi-sited enterprises and Government organisations. They also play a significant role in delivering fixed and mobile broadband services to consumers, as CPs use them extensively in their networks.⁴⁷ Ethernet services require infrastructure including exchanges, underground ducts and optical fibres and/or copper wire cables.
- 3.4 We reviewed the market for the provision of Ethernet services as part of the Business Connectivity Market Reviews which were completed in 2008, 2013 and 2016.⁴⁸ In the 2016 BCMR Statement, we found that the UK market for leased line services is worth approximately £2bn per annum at the wholesale level, of which BT's revenues for wholesale Ethernet services were approximately £0.9bn in 2015.⁴⁹ We also said that significant growth is forecast for Ethernet services with demand increasing in

⁴⁷ 2016 BCMR Statement, paragraph 1.1.

⁴⁸ See the 2008 Business Connectivity Market Review Statement ("2008 BCMR Statement"), 2013 Business Connectivity Market Review Statement ("2013 BCMR Statement") and the 2016 Business Connectivity Market Review Statement ("2016 BCMR Statement").

⁴⁹ 2016 BCMR Statement, paragraph 3.44.

particular for Ethernet at 100Mbit/s and above as end-users migrate to higher-speed services.⁵⁰

- 3.5 BT supplies wholesale Ethernet products through its Openreach division to CPs (including BT Wholesale), which use them to connect different parts of their own networks and to supply high bandwidth data connectivity to their business and residential customers. Ethernet products that BT supplies include:
- a) Ethernet Backhaul Direct (EBD) Service;
 - b) Ethernet Access Direct (EAD) Service;
 - c) Backhaul Extension Services (BES);
 - d) Wholesale Extension Services (WES); and
 - e) Wholesale End-to-End Services (WEES).
- 3.6 There are several different types of order for Ethernet services. Provide orders entail the provision of a new Ethernet service. In addition to Provide orders, there are a number of other types of order that Openreach fulfils with respect to Ethernet services, all of which involve making changes to Ethernet services that are already in place. These are:
- 3.6.1 Remove/Re-site: move the local end (i.e. terminating segment) to another building served by the same local serving exchange;
 - 3.6.2 Re-arrange: move the local end to another building served by a different local serving exchange;
 - 3.6.3 Regrade: upgrade the product bandwidth e.g. 10Mbit to 100Mbit or to 1000Mbit or change the product feature;
 - 3.6.4 Shift: move the local end within the building where it is currently installed.
- 3.7 BT is subject to a requirement (under the SLG Direction or the CSA as described in section 2) to make SLG payments in relation to Provide orders, but this obligation does not apply to the other categories of order. Our findings in sections 4 and 6 relate only to Provide orders (where BT faced SLG liabilities), whereas our findings in section 5 also relate to other types of orders

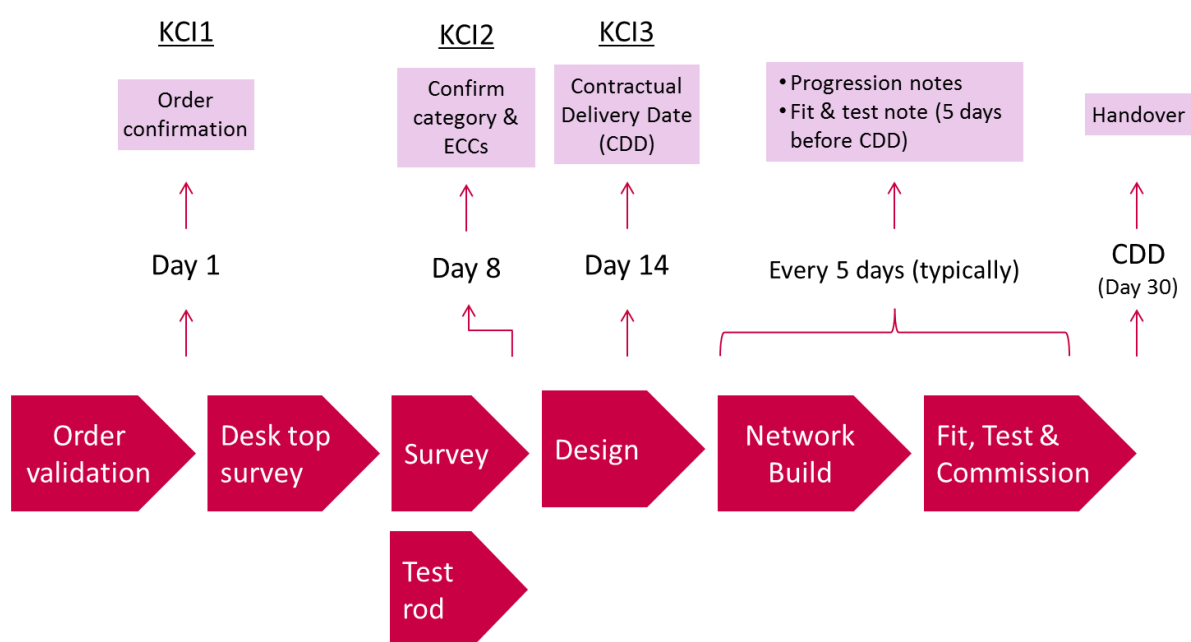
Ethernet, SLG payments and Deemed Consent

Provisioning of Ethernet services

- 3.8 Figure 3.1 shows a high-level overview of the process for Ethernet provision that was in place during the Original Relevant Period and subsequently. It assumes an ideal provisioning process, wherein BT provides the order by the 30th working day and does not apply Deemed Consent to extend the contractual delivery date (CDD).

⁵⁰ 2016 BCMR Statement, paragraph 3.49.

Figure 3.1



Source: 2016 BCMR: May 2015 Consultation Annexes.

- 3.9 The first stage of the process is order validation, which is the point at which Openreach checks that the order contains the necessary relevant information and meets its business rules. The customer is then informed whether the order is accepted or rejected. The date that the order is accepted and given an order number, or validated, is taken as “Day 1” in the provisioning process for that order (known as the “Order Validation Date” or OVD). It is at this point that the customer will be sent a communication referred to as a KCI1,⁵¹ which confirms that BT has accepted the order.
- 3.10 Once accepted, an order will be progressed to the planning stage. This will typically involve a desktop survey to ascertain whether suitable infrastructure and fibre is available between relevant sites and the route that will be taken. This stage will also include surveys of customer sites, which will inform how complex it might be to install necessary equipment.
- 3.11 The results of the planning stage will be used to classify the order into one of four categories, according to the level of existing infrastructure to complete the work, and which denote the predicted complexity of providing the order. These categories are set out in Table 3.1 below.

⁵¹ There are three “Keep Customer Informed” (KCI) updates that fall at various parts in the process. These are key milestones in the provisioning process, where BT will send an email update to the customer. It is a term of BT’s SLA in Schedule 4C(ii) of the CSA that BT will send these updates but BT’s conduct is also to send them in respect of Ethernet orders which are covered by the SLA in Schedule 4C(i) of the CSA.

Table 3.1: Openreach provision categories for Ethernet products

Category	Definition
1	Existing infrastructure exists between the Openreach exchange and the CP building. It is likely here that only blow/splice of fibre is required. ⁵²
2	No fibre to the CP building exists, but core routing is available nearby. It is likely that only a short distance of duct, cabling or tubing is required (prior to blow and splice) anywhere from the node ⁵³ right up to the termination point.
3	There is no existing fibre from the exchange to the customer site. A new spine ⁵⁴ and node is required.
4	No spare core cable is available for the desired route and therefore a new core of tie cable is required

Source: Annex II, BT's letter to Ofcom of 25 September 2015, 0620.

- 3.12 Openreach will communicate this category to the customer, and set out any indicative excess construction charges (ECCs). It does this by issuing a KCI2 email.
- 3.13 The customer must agree to any ECCs over a certain level before Openreach will proceed with the order. Once accepted, the order progresses to the design stage of the planning activity, where a number of activities take place depending on the complexity of the order. These activities can include:
- 3.13.1 design of fibre access network required to deliver the order including planning for installation;
 - 3.13.2 performing a test rod, which is where a rod is fed through the duct where a cable is to be installed in order to check for blockages; and
 - 3.13.3 applying for and obtaining wayleave and permission for street work activities.
- 3.14 Around Day 14 of the delivery timetable, Openreach will notify the initial CDD for the order in KCI3. This will typically be 30 working days from the order validation (the latest date permitted under the CSA), unless BT has identified a reason for applying Deemed Consent, which would enable BT to extend the deadline or the CP has expressly agreed to a later delivery date.
- 3.15 Once any network build is complete or where the planning stage has identified that no network build is required, Openreach must arrange an appointment with the customer to fit and test the equipment on the customer site. Once arranged, Openreach will visit the customer site and test the installation.

⁵² Fibre splicing is a product technique used to connect multiple parts of a fibre route using special lighting equipment. Fibre splicing can occur at exchanges, in the external network and at a customer's premises. Where the technique involves a splice from an existing fibre to new fibre, a period of downtime will occur. The fibre is blown down protective tubing by a machine to prevent it from getting damaged or breaking.

⁵³ A node acts as a point of aggregation within a network.

⁵⁴ A fibre spine connects common points in a network.

- 3.16 Once fit and test has occurred, and assuming no issues have been identified, the circuit is recorded on BT's systems as complete, and a service completion date (SCD) is recorded. A few days after this, Openreach then sends a handover email, which confirms to the customer that service is installed and working. This handover email will tell the CP the SCD for their order, as well as the final CDD set. If the SCD is after the CDD, the order will be eligible for SLG payments. The handover email does not confirm the precise level of SLG payments for the order, if any. This is the end of the provisioning process.
- 3.17 There is then a period of delay between the handover of an order and the confirmation and making of SLG payments to the CP for that order. This is because SLG payments are typically paid in arrears in each CP's monthly invoice.⁵⁵ Individual monthly itemised statements are provided to each CP in the last two days of each month, which detail the payments being made for each circuit closed in the preceding month.⁵⁶
- 3.18 The day to day management for the delivery of an Ethernet service order is carried out by BT's job controllers. They act as the interface between BT's planning and field engineers, who carry out the technical work involved in fulfilling an Ethernet order, and the CP. Job controllers are responsible for updating the CP about issues affecting the delivery of the Ethernet circuit and are typically responsible for applying Deemed Consent as permitted under the CSA.
- 3.19 The way in which the job control function in Openreach was structured during the Original Relevant Period is described at paragraphs 3.78 to 3.88 below. The way in which job controllers apply Deemed Consent, the systems that they use to do so and Openreach's internal manuals and materials for job controllers on the application of Deemed Consent during the Original Relevant Period are described in paragraphs 3.20 – 3.25, 3.35 and 3.43 – 3.55.

How Openreach manages the delivery of Ethernet orders

- 3.20 Openreach has three systems in place for managing Ethernet service orders: COSMOSS, eCo and EMP/Flow. These three systems enable communications between Openreach technical staff and job controllers and between job controllers and the CP and facilitate the job control function.
- 3.21 Two of BT's delivery systems are relevant to the application of Deemed Consent, 'COSMOSS' and 'eCo':
- COSMOSS is an internal Openreach system for the management of circuits and is used for managing the provision of new and existing orders. This system is updated by all groups of Openreach staff responsible for managing orders (job controllers, planners, field engineers etc.). The information contained in COSMOSS is for internal use only, but it can be added in a format which sends a note to the CP via eCo; and

⁵⁵Contract for Connectivity Services Schedule 4 – Service Level Agreement, Schedule 4C(i), 0056; SLA SLG Payments Rules.pdf, 16 October 2015, 0396, which says "Closed Ethernet Order data is made available to the Proactive SLG team on 2nd of every month for the preceding month."

⁵⁶ SLA SLG Payments Rules.pdf, 16 October 2015, 0396

- eCo is a customer facing order management system, where CPs can submit, modify and manage orders. Openreach also uses the system to manage orders and store emails that are used to update and interact with the CP.⁵⁷
- 3.22 Openreach's handling of an Ethernet order, including decisions to apply Deemed Consent, is documented in eCo and COSMOSS records. We have assessed this evidence in respect of individual orders as set out in section 5.
- 3.23 BT has told us that Ethernet Backhaul Direct (EBD) orders can also be placed with BT using its Equivalence Management Platform (EMP)/Flow platform, rather than its eCo platform.⁵⁸ Flow is a process management system that interacts with other systems to transfer the data from EMP to COSMOSS. BT explained that these EBD orders were raised via the Openreach website and then manually on COSMOSS without a corresponding eCo script being created.⁵⁹
- 3.24 EMP is also referred to as Ethernet Strategic Transformation (EST). EMP was introduced as a replacement for BT's legacy provisioning systems (e.g. eCo).⁶⁰ In February 2013 the EST programme was halted and rolled back.⁶¹
- 3.25 Orders provided over EMP/EST are subject to same SMP Conditions and the SLG Direction, and are covered by the same contractual obligations.

BT's obligation to make SLG payments

- 3.26 BT is obliged under the terms of the CSA to complete orders by the CDD, which is the 30th working day of the order being validated.⁶² BT can extend the CDD beyond the 30th working day deadline, subject to the CP's consent obtained in accordance with the terms of the contract.⁶³
- 3.27 BT is required under the CSA to make SLG payments when it fails to complete orders by the CDD. The level of the SLG payment is 100% of one month's line rental on the Ethernet circuit for each day or part day of delay in provisioning beyond the CDD, up to a maximum of 60 days.⁶⁴ The CSA requires BT to make SLG payments automatically, specifically: "Any compensation payable will normally be made by deduction from the Communication Provider's next invoice unless not practicable".⁶⁵
- 3.28 The level of SLG payment to be made is determined by comparing the final CDD against the actual date the service provision was completed (the Service Completion Date or SCD). For example, if the SCD is 10 working days after the final CDD, then BT should pay 10 days of SLG payments to the customer, as it missed the CDD by

⁵⁷ BT's response to Ofcom's s191 information request. 8 October 2015, Page 4, 0418.

⁵⁸ BT's supplementary response to Question 3(i) of the 1st Notice dated 30 March 2016, 0429.

⁵⁹ BT's supplementary response to Question 3(i) of the 1st Notice dated 30 March 2016, 0429.

⁶⁰ See

[https://www.openreach.co.uk/orpg/home/products/productdevelopment/latestenhancements/latestenhancements/R1900_downloads/Ethernet%20Strategic%20Transformation%20\(EST\)%20EBD.pdf](https://www.openreach.co.uk/orpg/home/products/productdevelopment/latestenhancements/latestenhancements/R1900_downloads/Ethernet%20Strategic%20Transformation%20(EST)%20EBD.pdf)

⁶¹ BCMR 2016 Statement, paragraph 13.69 and footnote 659.

⁶² See paragraphs 2.34 – 2.37 and 3.8 – 3.9.

⁶³ See paragraphs 2.37 and 2.40 – 2.42

⁶⁴ This requirement is set out in the SLG Direction. See further paragraph 2.29 - 2.31.

⁶⁵ Contract for Connectivity Services Schedule 4 – Service Level Agreement, Schedule 4C(i), 0056.

10 days.⁶⁶ SLG payments will not be made immediately after the close of an order, but will typically be made a month (or later) in arrears. For each order, there is therefore a delay between the SCD and the making of any SLG payments for this order.

- 3.29 SLG payments are made from within the Openreach's Finance function and are typically calculated once an order has closed.⁶⁷ BT has explained that there was a sign off process (known as Designated Level of Authority or DLoA) for the approval of SLG payments prior to making a payment.⁶⁸ According to information provided by BT, from April 2013, there were a number of different levels of authority in BT's SLG payment sign off process, so that the authorisation of an SLG payment required sign off from [Employee 1], [Senior Manager 1], [Senior Manager 2] and [Senior Manager 3], (the senior manager reporting directly to [Executive 2]).⁶⁹

- 3.30 BT described the purpose of the sign off process as follows:

*"The purpose of the DLoA sign off is to ensure that all those that are part of the sign off process have the opportunity to review the orders and ask questions to ensure that all parties have confirmed that the values proposed are correct, insofar as they can be verified and checked. Those reviewing the Ethernet SLGs can request the payment details by circuit and review a sample to ensure that these payments were in line with any comments provided on relevant systems."*⁷⁰

- 3.31 BT has told Ofcom that it has mechanisms in place to ensure proactive payment of SLG payments when due⁷¹ and has informed CPs in its guidance document that SLG payments are paid automatically, without the overheads a claim system would drive.⁷²

The use of Deemed Consent in the Ethernet provisioning process

- 3.32 Deemed Consent is a contractual mechanism available to BT under Paragraph 2.3 of its CSA. In the circumstances outlined in that paragraph, BT can deem that a CP has provided consent to the extension of the CDD - in lieu of obtaining actual consent from that CP. The CSA also provides that to the extent that a CP has consented to the extension of the provisioning timetable, BT is not liable to make SLG payments.
- 3.33 BT explained in its voluntary submission to Ofcom in the Vodafone Dispute⁷³ that the Deemed Consent clause was included to cover circumstances outside of BT's reasonable control which caused a delay in the provisioning process such that the CDD needed to be extended,⁷⁴ and was aimed at "*minimising the additional time that*

⁶⁶ Typically, this is done by deducting the value of the SLG payments against the invoice, as per paragraph 6.1 of Schedule 4C of the CSA.

⁶⁷ BT's response to Q1 (part A)(ii) of the 4th Notice Dated 7 April 2016, page 5, 0434

⁶⁸ BT's response to Question 2 (a)(iii) of the 4th Notice, 7 April 2016, page 17, 0434.

⁶⁹ DLoA SLGs Ethernet, 0361.

⁷⁰ T's response to Question 2(a)(iii) of the 4th Notice, 7 April 2014, page 18, 0434.

⁷¹ BT's letter to Ofcom – response to The Vodafone Dispute, 25 September 2015, page 17, 0613.

⁷² Deemed Consent Guide for CPs, June 2012, pages 3 & 4, 0007.

⁷³ BT's letter to Ofcom – response to The Vodafone Dispute, 25 September 2015, page 3, 0613.

⁷⁴ BT's letter to Ofcom – response to The Vodafone Dispute, 25 September 2015, page 3, 0613.

would otherwise be injected into the provisioning process by obtaining explicit consent.⁷⁵

- 3.34 BT also explained in its voluntary submission that it had put in place a number of mechanisms and internal processes designed to ensure that Deemed Consent is applied according to the provisions of the CSA.⁷⁶
- 3.35 In BT's formal response to the Vodafone Dispute, it explained how these mechanisms and processes work in practice to facilitate the use of Deemed Consent. BT explained that the following steps apply to the use of Deemed Consent:⁷⁷
- 3.35.1 When the field engineers or planning staff encounter a delay that prevents them from progressing the provision order, they submit a date change request to the job controller through the COSMOSS system. The request will include full details of the reason for the request to change the CDD, including names and telephone numbers of contacts that they have called and whether the contact was made successfully. This information can then be used to verify if the request for a date change is valid or not in the event of an appeal;
 - 3.35.2 The job controller checks the notes on the order and if a request for a CDD change has been made, and is legitimate, then the job controller will amend the dates and advise the CP accordingly, as soon as is practically possible. The job controller then updates the COSMOSS notes and priority marker for the order;
 - 3.35.3 Once the CP has confirmed that the issue triggering the Deemed Consent is resolved, the job controller must progress the order as normal so that the provision process can continue. Notes are entered into COSMOSS and eCo to ensure any future audit of the circuit provides clear information as to why the CDD has been amended; and
 - 3.35.4 Once the matter causing the delay has been resolved, a system message is sent to the planner or field team to direct them to the updated note on COSMOSS. Any legitimate date movement by Openreach would be completed using the eCo system and an email would be sent to the CP with the relevant information.
- 3.36 In BT's voluntary submission⁷⁸ and its formal response⁷⁹ under the Vodafone Dispute, BT gave a series of responses to complaints about its Deemed Consent processes.
- 3.37 First, BT told Ofcom that it did not have a policy or process for moving the CDD for reasons other than that which is stated by the Deemed Consent code description. Deemed Consent had to be applied against a scenario or event and only against those scenarios documented in the CSA.⁸⁰ In its voluntary submission BT explained that since the Deemed Consent provisions were introduced in 2008, it has put in place processes and mechanisms designed to ensure that it complies with the

⁷⁵ *Ibid*, page 5, Paragraph 10, 0613.

⁷⁶ *Ibid*, page 7, Paragraph 18 0613.

⁷⁷ BT's response to Ofcom's s191 information request, 8 October 2015, pages 4 and 5, 0418.

⁷⁸ BT's letter to Ofcom – response to The Vodafone Dispute, 25 September 2015, 0613.

⁷⁹ BT's response to Ofcom's s191 information request, 8 October 2015, 0418.

⁸⁰ BT's response to Ofcom's s191 information request, 8 October 2015, page 15, 0418.

contract.⁸¹ BT also said that it acknowledges that errors in the application of Deemed Consent occur from time to time on an order by order basis; however, it does not believe that this is either systemic or material.⁸²

- 3.38 Second, BT said that its policy was to give notice to a CP within a ‘reasonable time period’ when Deemed Consent was applied on a circuit which resulted in a change of CDD, and that its process did not provide for a situation when no notice was given to deem consent for a change of CDD.⁸³ BT explained in its voluntary submission that its policy and practices would require job controllers to provide an email to the CP (via its eCo system) when a date change was appropriate.⁸⁴ BT accepted there were some circumstances when no communication was provided at all. In these instances, BT said that it had made SLG payments on the basis that failing to communicate was a failure to comply with the CSA.⁸⁵
- 3.39 Third, BT said that if it is to apply Deemed Consent, its policy is to notify CPs 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. Deemed Consent cannot apply retrospectively if it is not done in good time, allowing the CP to inform the end-customer.⁸⁶
- 3.40 BT’s formal Response also described the circumstances in which Deemed Consent would be applied retrospectively:

“It is not common practice to retrospectively apply DC, and it only applies in exceptional circumstances. Retrospective application of DC is only usually made when there is a dependence on a third party, for example a local authority permitting Traffic Management. In these scenarios, a date range can only be applied once confirmed by the relevant authority. We therefore do not apply DC to a circuit until the authority responds to the request. This can be extremely variable between authorities and geographies. During the application process BT endeavours to keep the CP updated throughout the order journey. Any new CDD given is as close as reasonably practical to the original date.”⁸⁷

- 3.41 Fourth, BT said that “Vodafone has not identified a single instance where the notifications have occurred after handover, and there is no evidence that there was a deliberate aim of minimising SLG payments at the end of the provisioning process.”⁸⁸

Openreach guidance on Deemed Consent

- 3.42 Openreach has produced external and internal documents about how Deemed Consent is applied. These comprise a Deemed Consent Guide produced for CPs, an internal manual for job controllers, job control briefings from members of the senior

⁸¹ BT’s letter to Ofcom – response to The Vodafone Dispute, 25 September 2015, page 3, 0613

⁸² *Ibid*, page 5

⁸³ BT’s response to Ofcom’s s191 information request, 8 October 2015, page 14, 0418.

⁸⁴ BT’s letter to Ofcom – response to The Vodafone Dispute, 25 September 2015, page 21, 0613

⁸⁵ *Ibid*, (0613)

⁸⁶ BT’s response to Ofcom’s s191 information request, page 14, 8 October 2015, 0418

⁸⁷ *Ibid* (0418)

⁸⁸ BT’s letter to Ofcom – response to The Vodafone Dispute, 25 September 2015, page 22, 0613

management team and internal training materials. These documents represent statements by BT about how Deemed Consent should be applied.

- 3.43 The Deemed Consent Guide for CPs is an external document dating from June 2012 that describes to CPs what Deemed Consent is and how it will be applied.⁸⁹

- 3.44 The purpose of the Deemed Consent Guide to CPs is described in the document as follows:

“We have created this document to help Communication Providers (CPs) understand what Deemed Consent is, why it has been provided and principles we will adopt in the practical application of the provisions.

*This document will be used by planners and Job Controllers as a **single** reference for discussing applications...*⁹⁰

- 3.45 The guidance includes extracts from the CSA which set out the relevant conditions in relation to the application of Deemed Consent and some of the circumstances where BT can apply Deemed Consent.⁹¹ BT explains Deemed Consent in the following terms:

*“Deemed Consent is the name given to our permitted ability to set a non standard contractual Delivery Date (CDD) on an order, or to change the CDD once set without first gaining the agreement of the CP. Instead, for the agreed list of circumstances, Openreach may deem we have the consent of the CP and confirm the revised or new date as soon as possible.”*⁹²

“Deemed Consent can be applied whenever any of the permitted clauses in the contract occur. These clauses typically cater for delays introduced by our customers, their customers or third parties. If late delivery is as a result of the given clause, we do not have to make Service Level Guarantee (SLG) payments on circuits where late delivery has been caused by matters provided for in the contract.

*“This enables a business model where there can be reasonable predictability around likely delivery dates for customers with automatic payment of SLGs and no overheads a claim system would drive.”*⁹³

- 3.46 The guidance sets out some principles on how BT approaches certain circumstances that may arise which would justify the application of Deemed Consent⁹⁴ and includes the following note to CPs about BT’s general approach:

⁸⁹ Deemed Consent Guide for CPs, June 2012, 0007

⁹⁰ Deemed Consent Guide for CPs, June 2012, page 3, 0007

⁹¹ Deemed Consent Guide for CPs, June 2012, pages 5 & 6, 0007

⁹² Deemed Consent Guide for CPs, June 2012, page 3, 0007

⁹³ Deemed Consent Guide for CPs, June 2012, pages 3 & 4, 0007

⁹⁴ See Deemed Consent Guide for CPs, June 2012, pages 4 & 5, 0007. These principles include: BT will make three attempts to contact the named customer contact within 24 hours before declaring a

- *“We will make reasonable efforts to contact a CPs nominated point of contact prior to applying deemed consent.”*
 - *We will always aim to meet the earliest possible CDD*
 - *Deemed Consent itself will only be used where applicable*⁹⁵
- 3.47 In the “*Frequently Asked Questions*” section of the guidance, BT notes that “*Application of deemed consent is a last resort*” and “*in all cases we consistently apply the rules outlined in the relevant contract*”.⁹⁶
- 3.48 The guidance makes provision for CPs to challenge an application of Deemed Consent via an appeals process.⁹⁷ We explain the appeals process below, and consider BT’s application of the appeals process in relation to Deemed Consent appeals in section 6.
- 3.49 BT also provided internal guidance to job controllers on how to carry out their role in the provision of Ethernet services. The primary guidance document is the Job Control Manual.⁹⁸ This makes clear that COSMOSS and eCo contain the evidence about what has happened in the delivery journey of an individual order (which is relevant to our review of orders and findings in section 5). It also clearly sets out that job controllers must notify CPs, via eCo, when a CDD is changed. It provides examples of situations that are “*Valid Reasons for a Date change*” and provides a list of DC codes (e.g. DC22), the relevant section of the CSA to which each code is intended to relate (e.g. 2.3 ii), and an example of the reason for the delay for which each code may be used (e.g. Spine cable builds).⁹⁹
- 3.50 In addition to the Job Control Manual, BT has provided Ofcom with 30 “*Ethernet Job Control Briefings*”, dated between 26 April 2013 and 31 July 2014.¹⁰⁰ The briefings were issued to the job control community, using the standard format for communications from the NI senior management team. They provided updates and guidance on matters concerning Openreach’s approach to the use of Deemed Consent.¹⁰¹

failed contact; if BT discovers during the planning window something that it could reasonably have been expected to find on a test rod, it will not use that to apply Deemed Consent.

⁹⁵ Deemed Consent Guide for CPs, June 2012, page 6, 0007

⁹⁶ Deemed Consent Guide for CPs, June 2012, page 7 and 8, 0007

⁹⁷ Deemed Consent Guide for CPs, June 2012, pages 6 & 7, 0007

⁹⁸ Job Control Manual, 1 March 2013, 0001.

⁹⁹ BT’s internal Job Control Manual, 1 March 2013, Section 5, 0001

¹⁰⁰ BT’s 3rd response to the 1st Notice, 23 December 2015, 0423. Specific briefings are: Ethernet Job Control Briefings: “Briefing 001, 26 April 2013, 0010”, “Briefing 002, 29 April 2013, 0011”, “Briefing 004, 3 May 2013, 0012”, “Briefing 006, 10 May 2013, 0013”, “Briefing 007, 14 May 2013, 0014”, “Briefing 009, 30 May 2013, 0015”, “Briefing 010, 28 May 2013, 0016”, “Briefing 011, 7 June 2013, 0017”, “Briefing 013, 23 June 2013, 0018”, “Briefing 014, 15 July 2013, 0019”, “Briefing 017, 23 July 2013, 0020”, “Briefing 018, 25 July 2013, 0021”, “Briefing 018a, 25 July 2013, 0022”, “Briefing 019, 25 July 2013, 0023”, “Briefing 021, 30 July 2013, 0024”, “Briefing 024, 13 August 2013, 0025”, “Briefing 024a, 13 August 2013, 0026”, “Briefing 024m, 13 August 2013, 0027”, “Briefing 025, 28 August 2013, 0028”, “Briefing 32, 8 October 2013, 0029”, “Briefing 35, 28 October 2013, 0030”, “Briefing 036, 22 November 2013, 0031”, “Briefing 41, 31 January 2014, 0032”, “Briefing 42, 31 January 2014, 0033”, “Briefing 43, 5 February 2014, 0034”, “Briefing 44, 11 February 2014, 0035”, “Briefing 45, 13 February 2014, 0037”, “Briefing 46, 13 March 2014, 0038”, “Briefing 47, 1 May 2014, 0040”, “Briefing 49, 7 July 2014, 0041”, “Briefing 50, 31 July 2014, 0042”, “Briefing 50a, unknown, 0043”

¹⁰¹ See paragraphs 4.54 to 4.62 below.

- 3.51 We have also reviewed internal training materials which were used during the Original Relevant Period for training job controllers. The Ethernet New Recruit Training slides,¹⁰² which were used for training new recruits to job control,¹⁰³ identify the need for job controllers to be careful when setting the CDD because once it has been set, it can't be moved backwards: *"Be careful / accurate, remember the C.D.D. can't (at present) be brought back in on COSMOSS. If you move it too far out by mistake you're stuck!"*¹⁰⁴ The practical effect of BT not being able to revise CDDs backwards to an earlier date was that in some cases SLG payments, including those following a successful Deemed Consent appeal, were being calculated based on incorrect final CDDs. We discuss the implications of this issue in more detail in section 6.
- 3.52 The slides also identify that CPs *"must be informed straight away, via eCo x, on ALL occasions dates are altered on in flight orders. There are NO exceptions"* and that CPs *"must be notified via eCo at the time of the C.D.D. amendment."*¹⁰⁵
- 3.53 BT's Deemed Consent Guide for CPs was included as part of the Ethernet New Recruit Training in November 2013, April 2014 and December 2014. In November 2013 and December 2014, an internal Deemed Consent training document dated June 2013¹⁰⁶ was also included as part of the training *"to be used alongside the Deemed Consent [Computer Based Training] CBT"*.¹⁰⁷
- 3.54 BT's CBT was designed for BT staff who would be involved in the application of Deemed Consent, to give the *"confidence to apply it consistently and fairly"*.¹⁰⁸
- 3.55 On 29 September 2016, BT issued job controllers with a revised Job Control Handbook¹⁰⁹ which updated its existing guidance on how to apply Deemed Consent.¹¹⁰
- 3.56 There is evidence in BT's updated handbook that BT had changed its approach to the application of Deemed Consent following the Vodafone Dispute Determination on 8 January 2016.
- 3.57 The updated handbook instructs job controllers to only apply Deemed Consent and amend the CDD after the individual delay has ended. The guidance notes that previously, job controllers applied Deemed Consent on a rolling basis which caused uncertainty for CPs and their end customers because the CDD would keep moving.¹¹¹ It stipulates that:

"...from 29 September 2016, for all circuit orders (regardless of whether they are new or already open), you should now only apply

¹⁰² Ethernet New Recruit Training Part 3 Amending the CDD using the Deemed Consent Codes dated November 2013 (issue 3), April 2014 (issue 4) and December 2014 (issue 5). 0004, 0006, 0009

¹⁰³ BT's response to the 1st Notice, 23 December 2015, page 5, 0423

¹⁰⁴ Ethernet New Recruit Training Part 3, see for example Issue 3, November 2013, slide 19, 0004.

¹⁰⁵ Ethernet New Recruit Training Part 3, see for example Issue 3, November 2013, slides 37 and 42, 0004.

¹⁰⁶ Deemed Consent internal guidance (within CBT), 25 June 2013, 0008

¹⁰⁷ BT's response to the 1st Notice, 23 December 2015 (see table of documents provided in response to question 4), 0423

¹⁰⁸ Deemed Consent CBT, slides 2, 0046

¹⁰⁹ Email from [Senior Manager 4] (BT) to [Principal 1] (Ofcom), 21 September 2016, 0622.

¹¹⁰ Ethernet Job Control Handbook, 21 September 2016, Section 5, 0623.

¹¹¹ Ethernet Job Control Handbook, 21 September 2016, Section 5, 0623.

*deemed consent and amend the CDD of a circuit after the individual delay has ended...*¹¹²

3.58 The new process means that job controllers will apply Deemed Consent in two stages:

3.58.1 At stage one, job controllers must notify the CP of an intention to apply Deemed Consent by updating the CP as soon as possible that there is going to be a delay (or BT thinks there is going to be a delay) in delivering their circuit. At this stage, BT provides the CP with as much information as required in order to let the CP and end-customer understand the cause of the delay. At this point there would be no change to the CDD/CCD but an appropriate Deemed Consent Code should be used. Whilst the delay is on-going, job controllers must continue to keep the CP informed about the circuit's progression and provide estimates of when the delay will be resolved.

3.58.2 Once the delay (attributable to the Deemed Consent Code) has been resolved, job controllers can then apply Deemed Consent to extend the CDD/CCD for the number of days that the delay caused.¹¹³

3.59 The new process in the Revised Job Control Handbook is not the subject of this investigation, and we do not make any findings in relation to it. However, BT said that it was revising its guidance to job controllers *"to try and minimise ambiguity as much as possible"*.¹¹⁴ It also said that this would be a *"different way of working"* and *"[a] significant change to working practice that will take place is a move away from "in-life date management."* It explained that the new way of working would improve certainty (because the CDD is moved once per individual delay) and that this new approach should deliver a better customer experience.¹¹⁵

Ofcom's observations in relation to BT's use of Deemed Consent

3.60 BT's Deemed Consent Guide for CPs informs them that Deemed Consent is applied as a *"last resort"* and *"will only be used where applicable"*.¹¹⁶ In the course of this investigation we have found that the use of Deemed Consent in the provision of Ethernet services is routine.

3.61 During the Original Relevant Period, BT completed over 92,000 Provide orders¹¹⁷ for EAD (including EAD Local Access), EBD, WES (including WES Local Access and WES Aggregation), BES and WEES.¹¹⁸ Of these orders, BT applied Deemed Consent in over 65,000. In short, around 70% of completed Provide orders were

¹¹² *Ibid*, 0623.

¹¹³ Ethernet Job Control Handbook, 21 September 2016, Section 5, 0623.

¹¹⁴ Briefing: ETH055/16 Ethernet Job Control Handbook (section 5) – Deemed Consent & Delay Management, 23 September 2016, 0629.

¹¹⁵ Briefing: ETH055/16 Ethernet Job Control Handbook (section 5) – Deemed Consent & Delay Management, 23 September 2016, 0629.

¹¹⁶ See paragraphs 3.47 – 3.48.

¹¹⁷ A Provide order is where BT is asked to provide the relevant service, whether that be EAD, EBD, WES BES or WEES, or variants of those services (such as WES Local Access, or WES Aggregation).

¹¹⁸ Ofcom analysis of BT's response to the 14th BCMR Notice, 11 November 2015, 0621.

subject to at least one date move using Deemed Consent during the Original Relevant Period.¹¹⁹

- 3.62 In total, Deemed Consent was used more than 300,000 times in Provide orders for EAD (including EAD Local Access), EBD, WES (including WES Local Access and WES Aggregation), BES and WEES.¹²⁰
- 3.63 Therefore, during the Original Relevant Period, it was more common for a Provide order to be subject to an application of Deemed Consent than not. Multiple applications of Deemed Consent in a single order were also commonplace.

The Deemed Consent Appeals Process

- 3.64 In the following paragraphs we describe the process that allows CPs to appeal an application of Deemed Consent.
- 3.65 When applying Deemed Consent, BT should send a notification to the CP setting out the relevant Deemed Consent code and a more detailed explanation of the reasons for deeming consent. The CP can then use this information to decide whether or not it believes that the application of Deemed Consent is valid.
- 3.66 The Deemed Consent Guide for CPs, issued in June 2011 and reissued in June 2012, set out a mechanism for a CP to challenge the application of Deemed Consent – the Deemed Consent Appeals Process - where the CP concludes that the application of Deemed Consent is not valid or where it considers the explanation provided is not acceptable. The process is described in both versions of the document as follows:

“Escalations should always commence by contacting the job controller via the appropriate 0800 number as detailed on page 5 of the Ethernet Customer Service plan (CSP). Please clearly state your reason for the challenge being made and reconsider the original application of Deemed Consent.

“If, once you have considered the rationale offered, you still believe we have applied Deemed Consent incorrectly, please contact the job control manager via email clearly stating your case and supplying all evidence in order for this to be logged and suitably addressed. You can find the email address for the job control manager also on page 5 of the CSP.

“Following this you will receive a reference acknowledging the appeal by the end of the next working day and the job control manager will respond with a final decision, including rationale, within 5 working days of the appeal being acknowledged.”¹²¹

- 3.67 Table 3.2 sets out the responsibilities of various job roles in the making and revising of decisions under the Deemed Consent Appeals Process:¹²²

¹¹⁹ Ofcom analysis of BT's response to the 14th BCMR Notice, 11 November 2015, 0621.

¹²⁰ Ofcom analysis of BT's response to the 14th BCMR Notice, 11 November 2015, 0621.

¹²¹ Deemed Consent Guide for CPs, June 2011, page 6, 0005 and Deemed Consent Guide for CPs, June 2012, page 7, 0007. See also BT's internal Job Control Manual 1 March 2013, section 5.6, 0001.

¹²² BT's 1st response to the 4th Notice, 7 April 2016, pages 18-19, 0434.

Table 3.2: Responsibilities of job roles in making and revising Deemed Consent Appeals Process decisions

Role	Making and Reviewing decisions under the Deemed Consent Appeals Process
Managing Director	Policy only – no review of Deemed Consent appeals.
Director	Only if escalated by a CP e.g. via an Industry Forum and / or Senior account review.
General Manager	Only for escalations not resolved at SOM/OM level.
Senior Operations Manager	Escalations not resolved at OM level.
Operational Manager (Job Control Manager)	CP request to review original Team Member Decision.
Team Member (Job Controller)	Responsible for providing the initial response to CP appeal requests.

- 3.68 Under this decision-making structure, decisions made under the Deemed Consent Appeals Process may have been made by members of the senior management team of the NI business unit as well as at an operational level by job controllers and managers of regional job control teams.¹²³
- 3.69 BT informed us that *“it is worth noting that most CPs do not choose to use the Deemed Consent Appeals Process even though this is the industry agreed process, set out in the Customer Service Plan. They instead raise any issues through other routes (for example through the SLG appeals process or by raising disputes after the order has been closed).”*¹²⁴
- 3.70 The Deemed Consent Appeals Process discussed above has now been changed, as part of BT’s new Job Control Manual, which was issued to job controllers on 29 September 2016, and has also been shared with CPs. We are not aware that there was any alternative appeals system in place from the end of the Original Relevant Period.

Openreach’s structure

- 3.71 In this part we give an overview of:
- Openreach’s structure and governance during the Original Relevant Period in relation to the provision of Ethernet services and the calculation and processing of SLG payments.
 - The Openreach business units which have been the focus of our investigation: the NI business unit, which was responsible for the management and delivery of

¹²³ See paragraphs 3.78 – 3.84 and Annex 9.

¹²⁴ Email from [Senior Manager 4] (Openreach) to [Principal 1] (Ofcom), 10 June 2016, 0625.

Ethernet orders; and the Finance business unit, which was responsible for the calculation of the invoices to CPs for these services, including the calculation of any deductions made in respect of SLG payments due as a result of a delivery after the CDD. We describe how these business units were organised on a day to day basis and identify various specialist teams that were set up in each of them during the Original Relevant Period. These teams are discussed in more detail in the next part of this section.

- 3.72 This part also explains the governance mechanisms that were in place, in addition to the Openreach Executive, during the Original Relevant Period to oversee the delivery of Ethernet services and monitor Openreach's liabilities in relation to SLG payments. These included a number of groups involving one or more members of the Executive and senior managers from the NI and Finance business units. This information informs our findings in sections 4 and 6 on the extent to which senior managers were aware of the conduct that we identify in those sections as giving rise to contraventions of BT's SMP obligations.

The Openreach Executive

- 3.73 Openreach has a separate senior management team, known as the Openreach Executive, responsible for Openreach's performance and its strategic direction.
- 3.74 During the Original Relevant Period, the positions on the Openreach Executive included: [redacted].
- 3.75 During the Original Relevant Period, the Openreach Executive met on a monthly basis and were typically presented with a slide pack, covering a range of different topics and business areas, including BT's performance in relation to the provision of Ethernet services.¹²⁵
- 3.76 We have also obtained "Network Investment Executive Briefing" slide packs for every month between March 2014 and November 2014.¹²⁶ These slide packs contain information concerning BT's performance in relation to the provision of Ethernet services and proposals for operational improvements. These slide packs were all provided to the Openreach Executive.¹²⁷

Relevant operational divisions within Openreach

- 3.77 For the purposes of this investigation, the key divisions within Openreach were:
- the **NI business unit** which was responsible for the provision of Ethernet services to CPs;¹²⁸ and

¹²⁵ BT's 5th Response to question 3 of the 5th 2016 BCMR Notice, 3 December 2014, page 4, 9937. This response records that the slide packs for the meetings in every month between November 2012 and April 2014 contained material relating to the provision of Ethernet services and in all but two of the slide packs, this material "proposes process or other operational improvements to improve performance".

¹²⁶ BT's response to Question 4b) of the 4th Notice, 7 April 2016, 0434; see documents 0256, 0260, 0263, 0266, 0269, 0272, 0275, 0278 and 0281.

¹²⁷ BT's response to Question 2 of the 8th Notice, 18 October 2016, 0458.

¹²⁸ The Network Investment ("NI") business unit was the predecessor to the "Business & Corporate Delivery" unit - see BT's 1st response to the 4th Notice, 7 April 2016, page 3, 0434. See also BT's response to Ofcom's s191 information request, 8 October 2015, page 4, 0418.

- the **Finance business unit**, which was responsible for SLG payments, including decisions to authorise SLG payments and the amount of such payments and the making and reviewing of decisions on disputes relating to SLG payments.¹²⁹

Network Investment business unit

3.78 The NI business unit was responsible for delivering Ethernet services to CPs. BT has provided the organograms at Annex 9, which provide a snapshot of the structure of the NI business unit at various points in time in 2013 and 2014.¹³⁰

Senior management team

3.79 During the Original Relevant Period the overall structure of the senior management team of the NI business unit remained broadly consistent: the Senior Operations Managers (who headed the job control teams) reported to the General Manager, who in turn reported to the Director, the direct report of [Executive [X]].¹³¹

3.80 In addition to [Executive [X]], members of the senior management team were involved in governance and operational decisions that are relevant to our investigation, including several General Managers and Directors and a Senior Operations Manager.

Job control teams

3.81 The delivery of Ethernet services by the NI business unit involved a number of different Openreach personnel. The overall process was managed on a day to day basis by job controllers, who acted as the interface between the planning and field engineers 'on site' and the CPs. Job controllers were responsible for updating CPs with any issues affecting the delivery of their circuits and decisions to apply Deemed Consent to Ethernet orders.¹³²

3.82 The organograms show that there were various changes to the job control structure during the Original Relevant Period. However, throughout the period, job controllers were organised into teams in 10 different regions.¹³³ Each of the regions had one team of job controllers, with the exception of Bristol, which had two, and Dartford, which had four from January 2014.¹³⁴ The number of job controllers in each team varied, with the organograms showing that numbers ranged from 15 to 24.¹³⁵

¹²⁹ BT's response to Question 1(a)(ii) of the 4th Notice, 7 April 2016, pages 4 and 5, 0434.

¹³⁰ We note that these are not contemporaneous documents but have been constructed by BT ex-post, using two different methodologies, for the purpose of responding to the 4th information request. See BT's response to Question 1(a) (i) and (iii) of the 4th Notice, 7 April 2016, pages 3 – 4, 0434. We note that there are inconsistencies in the information provided in these organograms and therefore we rely on them only to the extent that they are consistent with other information we have gathered.

¹³¹ See Annex 9, pgs 1 - 3.

¹³² BT's response to Ofcom's s191 information request, 8 October 2015, page 4, 0418.

¹³³ See Annex 9 [JC structure Sep 12, Aug 13, Jan 14, Sept 14]. The regions were: Ealing, Uxbridge, Bournemouth, Brentwood, Bristol, Dartford, Brighton, Sevenoaks, Crawley, High Wycombe.

¹³⁴ See Annex 9 pgs 1 – 3 of organogram pdf

¹³⁵ See Annex 9, pg 7 of organogram pdf.

- 3.83 According to the organograms, each of the regional teams was headed by an Operations Manager, a position which also appears to be referred to by BT as an 'Ethernet Job Control Manager'.¹³⁶
- 3.84 From the information contained in the organograms, it appears that the management structure immediately above the job control teams evolved over the Original Relevant Period. Between September 2012 and August 2013, there was one Senior Operations Manager, overseeing all the job control teams;¹³⁷ but the number of posts at this level increased to 4 by January 2014, with three of the Senior Operations Managers each having oversight of between two and seven job control teams.¹³⁸

Insight and Analysis team

- 3.85 In addition to the job control teams, the NI business unit also included a team of personnel, the Business and Corporate Delivery Insight and Analysis team, that gathered data about Openreach's performance in the delivery of Ethernet services. The team appears on two of the NI organograms provided by BT. In one, the team's manager reported to the [Senior Manager 5]¹³⁹ In the second, the team's manager was in a management structure led by [Senior Manager 10].¹⁴⁰
- 3.86 The primary function of the team was "*to produce and report KPIs to the business and industry*"¹⁴¹ but they were also responsible for compiling reports about Ethernet circuits that had failed their CDD and the reasons for this.¹⁴² These reports were used for the calculation of SLG payments due on orders by the Finance team.¹⁴³ In addition, the evidence we have gathered indicates that the data prepared by this team, including the root cause analysis of individual orders that had not met their CDD, was used in the SLG Weekly Reviews conducted by [Executive 1] and senior managers from both the NI and Finance business units¹⁴⁴ and by the SLG Triage Team, a specialist team that operated in the Finance business unit during the Original Relevant Period.¹⁴⁵ We discuss the SLG Weekly Reviews and the conduct of the SLG Triage Team in more detail in Section 4.

Specialist teams

- 3.87 During the Original Relevant Period, a number of specialist, temporary teams were established in the NI business unit. These included: the Failed Completions Team, the National Backlog Team, the Validation Team and the War Room. There is a chronology at Annex 3 which sets out when each of these teams were operating. BT has provided a separate organogram in relation to the War Room for the period June - September 2014, which shows a team headed by a General Manager.¹⁴⁶

¹³⁶ See Annex 9, pg 1-3, 12 & 13 of pdf.

¹³⁷ See Annex 9, pg 1-2, pdf

¹³⁸ See Annex 9, pg 3 pdf

¹³⁹ See Annex 9, pg 10 pdf. We believe the reference to [X] may be an error by BT and that the person filling this post at this time was [Senior Manager 5].

¹⁴⁰ See Annex 9, pg17 pdf.

¹⁴¹ BT's response to Q1(a)(ii) and (iv) of the 4th Notice, 7 April 2016, page 5, 0434.

¹⁴² BT's response to Q1(a)(ii) and (iv) of the 4th Notice, 7 April 2016, page 5, 0434.

¹⁴³ BT's response to Q1(a)(ii) and (iv) of the 4th Notice, 7 April 2016, page 5, 0434.

¹⁴⁴ See paragraphs 4.40 to 4.43 below.

¹⁴⁵ See paragraph 4.46 to 4.50 below.

¹⁴⁶ See Annex 9.

- 3.88 The evidence that we have gathered shows that each of these teams was tasked with dealing with orders that had failed to meet their delivery timetable. This is examined in more detail in section 4.

Finance business unit

- 3.89 The Finance business unit was responsible during the Original Relevant Period for the authorisation and calculation of SLG payments which were due under paragraph 4.1 of the Schedule to the CSA and taken into account when CPs were invoiced for their Ethernet services. [Executive [§<]] was head of the Finance business unit.¹⁴⁷
- 3.90 BT has provided the organograms at Annex 10, which show the structure of the Finance business unit (to the extent relevant to the authorisation and calculation of SLG payments) at three points in time - January 2013, January 2014 and from approximately mid-2014.¹⁴⁸ These show the senior management and operational teams dealing with SLG payments.

Senior management team

- 3.91 In the context of this investigation, the senior management during the Original Relevant Period comprised [Senior Manager 3] who reported directly to [Executive [§<]], [Senior Manager 2], [Senior Manager 6], and [Senior Manager 1]. The evidence that we have gathered (and referred to in more detail in Section 4) shows that the members of this senior management team, in addition to [Executive [§<]], were involved in governance and operational decisions that are relevant to our investigation,¹⁴⁹ including, [Senior Manager 3], [Senior Manager 2], [Senior Manager 6], [Senior Manager 1] and [Employee 1].

Operational teams

- 3.92 During the Original Relevant Period, the team within the Finance business unit with primary responsibility for the calculation and authorisation of SLG payments was the SLG Payments Team.¹⁵⁰ This is the team shown on the Finance organograms at Annex 10 pages 1 -3.
- 3.93 The organograms at Annex 10 show that the SLG Payments Team expanded during the Original Relevant Period. In January 2013, there were 41 people at the operational level of the team, comprising [§<] offshore members and 7 onshore members.¹⁵¹ By mid-2014 to the end of the Original Relevant Period, this had increased to 73 people, comprising 66 offshore “validators” and 7 onshore members.¹⁵²
- 3.94 We set out in paragraphs 3.28 to 3.31 above the decision-making process for SLG payments and at paragraphs 3.64 to 3.70 above the process for disputes raised by CPs in relation to SLG payments.

¹⁴⁷ Annex 10 pg 1 – 3 Finance organogram pdf

¹⁴⁸ BT’s response to Question 1a (ii) and (iv) of the 4th Notice, 7 April 2016, pages 4 – 5, 0434.

¹⁴⁹ The governance and operational decisions which we have analysed are discussed in more detail in section 4.

¹⁵⁰ BT’s response to Question 1(a) (ii) and (iv) of the 4th Notice, 7 April 2016, pages 4 – 5, 9, 0434.

BT refers to this team in its response as the “SLG team”.

¹⁵¹ See Annex 10, page 1 of finance organogram.

¹⁵² See Annex 10, page 2 of finance organogram.

Specialist team

- 3.95 During the Original Relevant Period a specialist, temporary SLG Triage Team was established in the Finance business unit. Page 3 of the finance organogram at Annex 10 shows the SLG Triage Team as a separate team under the [Senior Manager 6]. It is recorded in the organogram at Annex 10 as having been established in April 2013. The structure and activities of the SLG Triage Team are considered in more detail in section 4 (paragraphs 4.46 to 4.50).

NI and Finance interactions and shared governance forums

- 3.96 BT told us that the Finance business unit and the NI business unit interacted with one another, in particular in order for the Finance team to calculate SLG payments and to review SLG payment appeals brought by customers under the dispute resolution process.¹⁵³ For example, the SLG Payments Team within the Finance business unit used information provided by the NI Insight and Analysis team when calculating SLG payments.
- 3.97 We have also found evidence that members of the senior management teams of both the NI business unit and the Finance business unit were involved in governance forums and decisions in relation to the Ethernet provision and SLG liabilities. The governance forums we have identified involving senior managers from both the NI and Finance business units are:
- 3.97.1 the **Programme Steering Group** and the **Operational Review Board** in relation to the Ethernet provisioning process [§] review project. This was a project to look at the Ethernet provisioning process ([§]) with a view to designing and implementing an improved process which would deliver a number of performance metrics, including reducing SLG payments.¹⁵⁴ It was carried out in the last quarter of 2012 with a joint [§]Consultant[§] and Openreach team, and led to a report on Phase One (the [§]Consultant [§] report) dated 26th November 2012. BT has told us that the [§]Consultant[§] report was not formally provided to the Openreach Executive via the regular monthly meetings. We note that certain members of the Openreach Executive of the time did receive a copy at the time of its production, and both the Programme Steering Group and the Operational Review Board included members of the Openreach Executive;
 - 3.97.2 the **SLG Weekly Review** meetings, which took place from March 2013 to December 2014.¹⁵⁵ These were weekly meetings, conducted until at least September 2014 (by way of a conference call),¹⁵⁶ involving [Executive 1],

¹⁵³ BT's response to Question 1a (ii) and (iv) of the 4th Notice, 7 April 2016, page 5, 0434.

¹⁵⁴ [§]Consultant[§]Openreach Ethernet Provisioning Process [§]Review, 26 November 2012, page 11, 9960.

¹⁵⁵ BT has said that from around September 2014, the nature of the SLG review meetings changed and the *slides were more working level reviews to go through root cause analysis with the operational leads [General Managers and Job Controllers]*. We do not consider that this observation is borne out by the evidence that BT has provided. BT has provided us with email correspondence sent between September and December 2014, which relates to the matters set out in the SLG Weekly Slide Packs, and this shows that there continued to be correspondence throughout that period from or to individuals we have identified in the senior management teams of the NI and Finance business units.

¹⁵⁶ See, for example: email regarding SLG Weekly Review from [Senior Manager 6] to [Executive 1] and others, 22 March 2013, pages 2 – 3, 0240; email regarding SLG Call Friday from [Senior Manager 6] to [Senior Manager 3] and [Employee 2], 3 May 2013, pages 2 – 3, 0245; email regarding

members of their management team and senior members of the Finance division¹⁵⁷ that reviewed SLG liabilities and payments on the basis of a slide pack prepared each week from data collated by a senior member of the Finance business unit.¹⁵⁸ The slide pack was prepared from data provided in a set of Excel spreadsheets.¹⁵⁹ The data in these spreadsheets included data about orders which had been delayed and the expected SLG liability, a breakdown of SLG liabilities by reference to the cause (planning, job control etc.), and graphs tracking SLG liabilities against the backlog of orders and completions.¹⁶⁰ Based on the documentation prepared for the purposes of these weekly reviews which we have obtained, it appears that their objective was to track SLG liabilities and examine the reasons for delays in delivery for orders giving rise to the largest exposures to SLG liability.¹⁶¹

3.97.3 the **KIL calls**, which took place in June and July 2013. These were daily calls concerning Ethernet performance, which involved members of the Openreach Executive and other senior Openreach managers, referred to as the “Ethernet Recovery KIL Call”. From the email minutes we have seen, the attendees on the call varied from day to day. Over the course of the month, the following attended one or more of the calls: [Executive 3], [Executive 1] and other senior managers from the NI team, and [Senior Manager 3] from the Finance team.¹⁶² The email minutes of each call and an action log¹⁶³ were circulated to this group and, in addition, to a number of others, including [Executive 4] and [Executive 2] and senior managers from the Finance team.¹⁶⁴ It is clear from the circulation list of the emails and from the attendees on the calls that the issues relating to Ethernet performance that were discussed on the calls were of concern at the most senior levels of management within Openreach.

3.97.4 the **Ethernet Steering Group**, which met monthly between March and July 2014.¹⁶⁵ BT has provided a list of 13 individuals who were members of the

SLG slides for 5.30pm call from [Senior Manager 7] to [Executive 1] and others, 6 September 2013, 0108.

¹⁵⁷ Email regarding SLG Weekly Review - Chair: [Executive 1], 8 February 2013, page 3, 0240.

¹⁵⁸ [Senior Manager 6] was the sole or co-author of the majority of the SLG Weekly Review Slide Packs we have obtained from BT (see, for example, the SLG Weekly Review Slide Packs for 4 April 2014, 2 May 2014, 6 June 2014, 5 September 2014, 3 October 2014 and 7 November 2014 (0257, 0270, 0287, 0315, 0323, 0335)).

¹⁵⁹ See BT’s response to the 4th Notice, 7 April 2016, page 25, 0434.

¹⁶⁰ See, for example, Excel Spreadsheet used in the preparation of the SLG Weekly Review Slide Pack, 31 October 2014, 0334.

¹⁶¹ These documents include: SLG Weekly Review Slide Pack, 28 June 2013, 0417; 36 SLG Weekly Review Slide Packs from 4 April 2014 to 12 December 2014 see, for example, the SLG Weekly Review slide packs listed at fn 193; 39 Excel spreadsheets used in preparation of these slide packs for example, 0259, 0262, 0265 and 0268; an SLG Summary slide pack, 21 March 2013, 0242; and root cause analyses dated 14 June 2013, 0224, 0225, 0226, and 23 September 2013, 0112, 0113.

¹⁶² See for example emails from [Senior Manager 8], 15 July 2013 at 09:31 (0122); 23 July 2013 at 18:06 (0194); 24 July 2013 at 23:11 (0196); and 26 July 2013 at 01:18 (0201).

¹⁶³ See, for example, email from [Senior Manager 8], 1 July 2013 at 20:59 and attached action log, 0512 and 0511.

¹⁶⁴ See Email regarding Ethernet Recovery KIL Call minutes 15/07/2013, 16 July 2013, 0122; Email regarding Ethernet KIL Minutes, 23/07/2013, 23 July 2013 0194; Email regarding Ethernet KIL Minutes 24/07/2013, 24 July 2013 0196; and Email regarding Minutes of Ethernet KIL Call 25/07/2013, 26 July 2013, 0201.

¹⁶⁵ BT’s 5th response to Question 3 of the 5th BCMR Notice 3 December 2014, page 5, 9937

Ethernet Steering Group,¹⁶⁶ including senior managers from the NI business unit and [§<][a senior manager][§<] from the Finance business unit. BT has noted that “*others joined the Ethernet Steering Group / ETE Ethernet Governance Forum for ad hoc updates or to cover the main members*”.¹⁶⁷ BT has told Ofcom that the Ethernet Steering Group “*did not report up into a wider organ or individual within BT*” and that the remit of the forum was: “*...to review key service statistics and deliverables, assess recovery on completions and any orders in the ‘backlog’ or ‘tail’ (i.e. aged orders) as well as the number of orders received and cancelled. Product performance (i.e. sales) was also reviewed and customer feedback discussed. Representatives across the business involved in the Ethernet process and delivery were also invited to present on key topics.*”¹⁶⁸ Slide packs put before the Ethernet Steering Group¹⁶⁹ included:

- Ethernet order and delivery performance data including information about orders in “backlog” and orders which have passed their CDD;¹⁷⁰
- the “Ethernet recovery programme dashboard”, which included data about the daily and weekly SLG liabilities incurred and the weekly target for SLG liabilities with a note that the “*SLG Target will be subject to 15% Triage reduction target*”;¹⁷¹
- information about CP concerns about the application of Deemed Consent. The list of CP concerns included in the slide pack for May 2014 record a significant increase in “*challenges and general grumbles*” by [§<], which is driven by “*poor quality updates*” that do not provide clear explanations for why the Deemed Consent code (DC22) has been applied. The note goes on to record that “*There is some evidence that where the DC22 caveat below is being used, it is seen as carte blanche to DC for absolutely anything and everything*”;¹⁷²
- slides from the packs prepared for the weekly Ethernet SLG review meetings (see paragraph 3.97.2 above).¹⁷³ The June 2014 slides drawn from the Ethernet SLG review meetings include a list of “*Key Actions underway to tackle SLGs*”. This includes a reference to the “*Triage team picking up £[§<] per week savings*” with the action to “*Deliver recruitment plan and expand on triage team*”;¹⁷⁴ and
- proposals to improve Ethernet performance, including a proposal to [§<].¹⁷⁵

¹⁶⁶ BT’s response to Question 4 of the 8th Notice, 17 October 2016, pages 11 & 12, 0596.

¹⁶⁷ BT’s response to Question 4 of the 8th Notice, 17 October 2016, pages 11 & 12, 0596.

¹⁶⁸ BT’s response to Question 4 of the 8th Notice, 17 October 2016, page 12, 0596.

¹⁶⁹ BT’s response to Ofcom’s 8th BCMR Notice, 15 January 2015, 9942.

¹⁷⁰ See, for example, Ethernet Steering Group slide packs for March 2014, 9955.

¹⁷¹ Ethernet Steering Group slide packs for March 2014 and April 2014, 9955 and 9954.

¹⁷² “Actually, issues with late CDD and lack of confidence in Deemed Consent mean that CPs are no longer focussed on On Time delivery”, Ethernet Steering Group slide pack for July 2014, page 10, 9951.

¹⁷³ Ethernet Steering Group slide packs for March, June and July 2014, 9955, 9952 and 9951.

¹⁷⁴ Ethernet Steering Group slide packs for June 2014, slide 26, 9952.

¹⁷⁵ See, for example, Ethernet Steering Group slide pack for July 2014, 9951.

- 3.98 We analyse the evidence about the matters these oversight bodies considered in more detail in section 4.¹⁷⁶
- 3.99 This evidence shows that the senior management teams of the NI and Finance business units exercised oversight of the Ethernet Recovery Plan in 2013 (notably via the KIL calls) and, via the forum of the Ethernet Steering Group, the Ethernet Recovery Plan 2014.
- 3.100 Finally, the evidence we have gathered about the conduct of the SLG Triage Team shows that this team, which was set up in the Finance business unit, worked closely with job controllers and the Insight and Analysis team from the NI business unit.¹⁷⁷

¹⁷⁶ The findings of the [REDACTED] Consultant [REDACTED] Review are set out at paragraphs 4.122 – 4.129; the activities of the SLG Weekly Review are described at paragraphs 4.30 – 4.45; the KIL calls are described at paragraphs 4.142 – 4.149 and 4.185 – 4.194; and the matters considered by the Ethernet Steering Group are set out at 4.156 below.

¹⁷⁷ See Process Map for Commercial SLG Review, attachment to email from [Senior Manager 6], SLG Triage Team Training Pack, 1 July 2013, 0417 and email from [Employee 3] to [Senior Manager 2], email concerning SLG Triage Process Briefing Documents, 4 April 2016, 0420

Section 4

Practice 1: Retrospective use of Deemed Consent to reduce SLG payments

Introduction

- 4.1 We find that from January 2013 to December 2014 (the Practice 1 Breach Period) BT breached the Relevant Regulatory Obligations by engaging in the conduct of retrospectively using Deemed Consent. The purpose of this conduct was to minimise BT's liabilities to make SLG payments to CPs as a result of the late delivery of Ethernet services.
- 4.2 In this section, we set out the evidence on which we rely to show that:
- BT's operational teams systematically and frequently used Deemed Consent retrospectively in relation to closed and open orders;
 - this was deliberate conduct, overseen by the Openreach Executive; and
 - the conduct caused harm to CPs.
- 4.3 At the end of this section, we set out the contraventions of the Relevant Regulatory Obligations that we have identified as a result of this conduct and the extent of the remedial action that BT has taken in relation to these breaches.
- 4.4 Before setting out our substantive findings, we explain what we mean by the retrospective application or retrospective use of Deemed Consent.

The retrospective use/application of Deemed Consent

- 4.5 As set out at paragraph 2.48, a fundamental aspect of BT's compliance with the provisioning timeframe within the CSA is that the CP concerned is informed of any extensions so that it is able to manage a delay in the provision of its own service and/or challenge the application of Deemed Consent to extend the CDD. BT's obligation under the CSA to notify the CP of its intent to apply Deemed Consent as soon as reasonably practicable must be interpreted in accordance with this objective. We have set out at paragraph 2.49 the findings of the Vodafone Dispute Determination as to how this obligation should be applied in practice.
- 4.6 In line with the findings summarised at paragraph 2.49 above, the question of whether BT fulfilled its obligation under the CSA to notify the CP as soon as reasonably practicable where it intends to deem consent will depend on the circumstances of the delay on which the application is based. However, for the purposes of conducting our investigation in a proportionate and efficient manner (while taking account of the Vodafone Dispute Determination findings), we considered it appropriate to take a narrower view of what would constitute evidence of a retrospective application of Deemed Consent in breach of the requirements of the CSA. Specifically, we considered that where there was evidence that a

notification of Deemed Consent was sent more than one working day after the CDD, BT had acted in a way which was not consistent with the CSA's requirements.¹⁷⁸

- 4.7 The evidence on which we rely in this section is that BT used Deemed Consent in respect of closed orders, which had been delivered after their CDD, in order to reduce its SLG liabilities. The application of Deemed Consent to a closed order is necessarily retrospective since:
- the circumstances in relation to which Deemed Consent apply all concern events which occur during the provisioning process;
 - the application is made after the circuit has been delivered.
- 4.8 We also set out evidence that job control teams reviewed the history of open orders which had passed their CDD and:
- applied Deemed Consent in respect of opportunities which had been missed in the past to extend the CDD; or
 - made changes to previous applications of Deemed Consent for orders which had passed their CDD in order to increase the number of days accounted for by the applications.
- 4.9 The application of Deemed Consent in these cases is, by its nature, retrospective. Furthermore, the evidence shows that the applications were made in respect of orders which had already passed their CDD and therefore confirms this analysis.
- 4.10 We also rely on evidence that specialist teams applied Deemed Consent in respect of open orders that had passed their existing CDD in order to extend the CDD to a date in the future so that SLG liabilities no longer accrued. We consider that these applications are also retrospective and in breach of the CSA. Because the order has already passed its CDD, the application of Deemed Consent to extend that date will necessarily be retrospective.
- 4.11 As with closed orders, our analysis of the evidence is that the application of Deemed Consent to open orders in these circumstances was carried out for the purpose of mitigating BT's SLG liabilities.

Assessment of the evidence

- 4.12 Our assessment of BT's conduct in this section is based on a large number of documents that BT has provided to us in response to formal information requests.

¹⁷⁸During our review of the Sample (see paragraph 5.20), there were some exceptional cases where based on a close examination of the relevant COSMOSS and eCo records for an individual order, we considered it appropriate to take a different approach. These circumstances were: the CDD being amended is historic and does not represent a likely delivery date because of previous delays for which BT could not deem consent. As a result, the CDD becomes historic, and a later application of Deemed Consent for a delay that arises more than one day after the CDD will inevitably be made after the CDD. Provided there was evidence that the notification was sent as soon as reasonably practicable once BT was aware of the delay requiring the extension of the CDD (for these purposes, within one working day of becoming aware of the delay), in these exceptional cases we accepted the notification as validly sent for the purposes of our sample assessment.

These documents often use terminology which we have interpreted in accordance with the context in which it is used and in the light of the evidence as a whole.

- 4.13 For example, in the documents we have reviewed, BT frequently uses the expressions ‘date manage’ and ‘date management’. In some cases, we have read the terms within their context as meaning the application of Deemed Consent; in other instances, we consider that they are used to mean the retrospective use of Deemed Consent.
- 4.14 Similarly, BT frequently uses the expression ‘backlog’ in relation to orders for Ethernet services. We read from the context that the term means open orders which have passed their CDD and are accruing SLG liabilities.
- 4.15 We set out below some examples of how these expressions differ depending on the context in which they are used and in the light of the evidence as a whole.

‘Date management’

- 4.16 The following two extracts are taken from documents which were prepared by [Executive 1]. In the first, an internal intranet posting to job controllers dated 24 May 2013 and headed “*Setting CDD and deemed consent*”, [Executive 1] uses the term synonymously with the application of Deemed Consent:

*“On a number of recent orders we have identified problems with the consistent application of **date management** rules and the quality of notes recorded. As you know, we have a responsibility to treat all customers equivalently including providing Contractual Delivery Dates (CDDs) correctly and managing **deemed consent** accurately. In other words if a customer has placed an order with us it is deemed that they are giving their consent to moving the CDD under defined circumstances. This approach is in line with our responsibilities under the connectivity services contract and the regulation that the Ethernet products are subject to. Everyone involved in the process has a responsibility to make sure that orders are **date managed** when appropriate and the reasons are accurately and clearly recorded.*

*“We will only **date manage** where we absolutely need to, and where in line with the terms of the contract...” [our emphasis]¹⁷⁹*

- 4.17 In the second document, a slide pack dated 20 June 2013,¹⁸⁰ the context shows that [Executive 1] is using the term ‘date management’ to mean the retrospective use of Deemed Consent in respect of closed orders. Slide 12 is headed:

*“A small SLG RCA [Root Cause Analysis] team (2 FTE) has proven the opportunity to identify **Date Management opportunities** before circuit completion. Savings to date are c£[£] on top 5 weekly circuits jobs upto [sic] start of June.” [our emphasis]*

- 4.18 The slide continues:

¹⁷⁹ Loop Extra: Message from [Executive 1], 24 May 2013, 0351.

¹⁸⁰ SLG Update, 20 June 2013, 0228.

*“Since mid March, the finance team have reviewed the top 5 SLG legacy circuits each week by reviewing all COSMOSS notes to identify **date management opportunities** missed by the Job Controllers.” [our emphasis]*

- 4.19 As we discuss later, BT has told us that the SLG Triage Team was set up in the Finance business unit to apply Deemed Consent retrospectively to closed orders; the description cited above on slide 12 is consistent with the activities of the SLG Triage Team.¹⁸¹ The “*Date Management opportunities*” are “*opportunities missed by Job Controllers*” “*before circuit completion*” which, when applied, enable BT to make savings in the SLG payments it makes in relation to those circuits. Accordingly, in this context ‘date management’ means applying Deemed Consent retrospectively to a closed order in respect of events during the provisioning of that order.
- 4.20 In another document, a job control briefing from [Senior Manager 9] on 7 June 2013,¹⁸² we have interpreted the expression ‘date manage’ from the context as meaning retrospective application of Deemed Consent to open orders which have missed their CDD:

“Closure Team - CDD Failures

From Monday 10th June I will be moving our CDD failure completions to a single team. We need absolute accuracy on this function so by confining this to 4 individuals the same approach will be applied to all of our CDD failures.

*So from Monday here’s what you need to do if you pick up a comp that’s a CDD failure. Check for any **date management** and **date manage** accordingly. If it is still in failure after you’ve done this put the activity in EXC, add a note to COSMOSS stating ‘passed to the Ethernet closure team’, email to ethernetclosureteam@openreach.co.uk and then close your ATD task...” [our emphasis]*

- 4.21 This briefing relates to orders that have passed their CDD and that are “*comp*” i.e. completed, which we interpret as meaning that the work to provide the order has been completed and a SCD recorded, subject to the handover email to the customer.¹⁸³ In this context ‘date management’ can only mean the application of Deemed Consent retrospectively in respect of historic events.

‘Backlog’

- 4.22 The reduction of the ‘backlog’ was a key element of the strategy that BT pursued in 2013 and 2014 and it is referred to in a number of documents that we refer to in this section. For example, a slide pack dated 20 June 2013 prepared by [Executive 1], sets out “*Ethernet Recovery Plans*” with an objective of “*Backlog reduction to below 200 orders by the end of July.*”¹⁸⁴ The slide pack sets out that as at 19 June 2013, the “*Ethernet Pipeline*” included 828 circuits listed as “*Backlog Past CDD – SLG*

¹⁸¹ See paragraphs 4.46 to 4.50 below.

¹⁸² Ethernet Job Control Briefing 0117 June 2013, 0017.

¹⁸³ See Figure 3.1 and paragraphs 3.16 to 3.17.

¹⁸⁴ SLG Update, 20 June 2013, Slide 2, 0228.

Costs incurred” giving rise to a “£[>] SLG exposure”. The slide identifies “Priority # 1” as to “Close or “date manage” SLG CCTs to <200 in 5 weeks”.¹⁸⁵

- 4.23 In this set of slides, therefore, we find backlog has been used specifically to refer to circuits that have passed their CDD where SLG costs are incurred. These must be open circuits because they are listed as still being in the “Ethernet Pipeline”, and needing to be closed or date managed as a priority in order to get the number of circuits incurring SLG payments down to below 200.
- 4.24 In another example, from April 2014, a spreadsheet of orders described as the “Backlog for Easter review Master” was emailed to job controllers for review over Easter 2014.¹⁸⁶ The final column in the spreadsheet gives the CDD for each order. Most of the CDDs fall before 17 April 2014 (the date of the email), with some falling on 17 April 2014 itself, but none falling after this date. The email attaching the spreadsheet reads “All, With this being a crucial weekend for reducing the backlog, we must apply date management where possible using DC22 and updating the CP’s [sic] via ECO.”¹⁸⁷ In this context, we have read the references to “backlog” in this email as meaning open orders which have failed their CDD.

Substantive findings: the conduct of retrospectively using Deemed Consent

- 4.25 In this section we set out our findings that BT engaged in the conduct of retrospectively used Deemed Consent in relation to closed orders and open orders.
- 4.26 We have found that job controllers and a number of dedicated operational teams were engaged in this conduct from January 2013 to December 2014. We consider that each instance of retrospective use of Deemed Consent breaches BT’s obligation to provide Ethernet services in accordance with the Reference Offer (SMP condition HH5.9/6.9). We also consider that the evidence that the conduct was sustained and systematic is sufficient to establish a breach of the obligation to provide Ethernet services on fair and reasonable terms (SMP condition HH1.2/1.2) and of the obligation to give effect to the SLG Direction.

Retrospective use of Deemed Consent in closed orders

- 4.27 In the following paragraphs, we set out the evidence on which we rely to show that from 17 March 2013 until 2 January 2015,¹⁸⁸ BT engaged in the conduct of reviewing closed orders that had accrued SLG payments in order to identify missed opportunities to deem consent. Where such opportunities were identified, BT’s conduct until at least September 2014¹⁸⁹ was to reduce the SLG payments by

¹⁸⁵SLG Update, 20 June 2013, Slide 4, 0228.

¹⁸⁶ Attachment – Backlog for Easter review master, 17 April 2014, 0094.

¹⁸⁷ Email regarding Backlog work over Easter 2014, 17 April 2014, 0093.

¹⁸⁸ 039 [Executive 1] Slides Prep File WE 02 Jan 2015.xlsx, 02 January 2015, 0346. This is one of three spreadsheets provided by BT that date from after 5 December 2014 and are described as used in the preparation of SLG Weekly Review slide packs. According to the sheet labelled “Ethernet SLG Trend 14-15” “Top 25 Review Savings” and “Triage Team Savings” of SLG payments identified up until 2 January 2015 for the financial years 13/14 and 14/15 totalled £[>].

¹⁸⁹ BT told us: “After September 2014, the team members in the SLG Triage team were then tasked with carrying out Root Cause Analysis (RCA) of circuits where a high value SLG payment had been made. In this role they continued to provide insight into where failures (in relation to the delivery of circuits) had occurred and why. No savings adjustments were made after the original SLG Triage team function was discontinued. We have been able to determine from the reports and audits

reference to the number of days that would have been accounted for if Deemed Consent had been applied before making a payment to the customer.

4.28 We set out below a hypothetical example to illustrate how this conduct worked.

Box 6.1 Illustration of retrospective use of Deemed Consent to reduce SLG payments in closed order

BT commences work on an order for the provision of Ethernet services on 3 February 2014. The original CDD was 30 working days after this, falling on 17 March 2014. During the course of providing the order, it notifies the customer that it will use Deemed Consent to extend the CDD to 4 August 2014. It completes the work for the order on 18 August 2014, making this the SCD. This is 10 working days after the last CDD, which means that BT would be required to pay 10 working days of SLG payments, based on the difference between the SCD and the order's final CDD.

In this case, SLG payments are made a month in arrears, by a deduction from the CP's invoice for the Ethernet service to be issued in September 2014. This provides BT with a window of opportunity in which to retrospectively use Deemed Consent to reduce its SLG liabilities for the order.

During the period between completing the order and issuing its invoice, BT undertakes a review of the COSMOSS notes for that order to identify instances where it could have applied Deemed Consent, but failed to do so. It finds that in March 2014, the job controller responsible for the order had missed an opportunity to move a CDD by 5 days for a delay in obtaining access to the customer site (DC7C) during the course of provision.

Using this historic delay as justification, BT reduces the amount of SLG payments by the equivalent of 5 days. BT does not inform the customer that it considers Deemed Consent was applicable in respect of these 5 days nor that a reduction in the SLG payment has been made.

4.29 The conduct of applying Deemed Consent retrospectively in this way to closed orders was instigated by the SLG Weekly Review and led to the establishment of the SLG Triage Team. The SLG Weekly Review continued to exercise oversight of the activities of the SLG Triage Team throughout 2013 and 2014. BT has stated that the purpose of the SLG Triage Team was to review closed orders with a view to applying Deemed Consent retrospectively and reducing the SLG payments that would otherwise have been due.¹⁹⁰

provided in response to the 4th Notice that the last month where a saving was made as the result of SLG Triage team activities was September 2014." See BT's response to question 7 of the 6th Notice, 06 July 2016, page 13, 0437. However, the spreadsheet 039 [Executive 1] Slides Prep File WE 02 Jan 2015.xlsx, 02 January 2015, 0346 notes SLG savings made by the "Top 25 Review" until 2 January 2015.

¹⁹⁰ See BT's 1st response to the 4th Notice, Question 4 (part B), 07 April 2016, 0434. BT told us: "We have evidence that the SLG Triage team reviewed closed circuits for situations where Deemed Consent was not applied, where it could have been applied during the circuit provision process, and then implemented reductions in the SLGs paid to customers as if that deemed consent had been applied."

SLG Weekly Review

- 4.30 On 8 February 2013, the SLG Weekly Review was set up by [Executive 1],¹⁹¹ with the first meeting scheduled for 22 March 2013. It continued to operate until December 2014.¹⁹² Typically, senior managers from the NI and Finance business units, including [Executive 1], [Senior Manager 3] and [Senior Manager 6], met weekly with the objective of tracking Openreach's SLG liabilities and the reasons for them.¹⁹³
- 4.31 Ahead of the first meeting held on 22 March 2013, participants of the meeting undertook root cause analyses of high value circuits (i.e. those that were to be subject to high SLG payments) in order to identify "*potential areas for improved management of deemed consent*".¹⁹⁴ This information appears to have then been

¹⁹¹ Email regarding SLG Weekly Review - Chair: [Executive 1], 24 March 2013, 0240.

¹⁹² BT provided, and we reviewed, the following documents dating from 2013: Email regarding slides for SLG Weekly Review – Chair: [Executive 1], 24 March 2013, 0240; Email regarding slides for SLG Weekly Review – Chair: [Executive 1], 14 June 2013, 0223; slide pack regarding SLG Weekly Review Call 28 June v2, 28 June 2013, 0399; Email regarding slides for SLG Weekly Review call 19 July, 26 July 2013, 0143; Email regarding slides for SLG Weekly Review call 30 August, 23 September 2013, 0111. BT also provided, and we reviewed, the following documents evidencing weekly meetings between 04 April and 05 December in 2014: 001 Weekly SLG Review call 04 Apr 2014, 04 April 2014, 0257; 002 Weekly Review call 11 Apr 2014, 11 April 2014, 0261; 003 Weekly Review call 18 Apr 2014, 18 April 2014, 0264; 004 Weekly Review call 25 Apr 2014, 25 April 2014, 0267; 005 Weekly Review call 02 May 2014, 02 May 2014, 0270; 006 Weekly Review call 09 May 2014, 09 May 2014, 0273; 007 Weekly Review call 16 May 2014, 16 May 2014, 0276; 008 Weekly Review call 23 May 2014, 23 May 2014, 0279; 009 Weekly Review call 30 May 2014, 30 May 2014, 0282; 010 Weekly Review call 06 Jun 2014, 06 June 2014, 0287; 011 Weekly Review call 13 Jun 2014, 13 June 2014, 0289; 012 Weekly Review call 20 Jun 2014, 20 June 2014, 0291; 013 Weekly Review call 27 Jun 2014, 27 June 2014, 0293; 014 Weekly Review call 04 Jul 2014, 04 July 2014, 0295; 015 Weekly Review call 11 Jul 2014, 11 July 2014, 0297; 016 Weekly Review call 18 Jul 2014, 18 July 2014, 0299; 017 Weekly Review call 25 Jul 2014, 25 July 2014, 0301; 018 Weekly Review call 01 Aug 2014, 01 August 2014, 0303; 019 Weekly Review call 08 Aug 2014, 08 August 2014, 0305; 020 Weekly Review call 15 Aug 2014, 15 August 2014, 0305; 021 Weekly Review call 22 Aug 2014, 22 August 2014, 0311; 022 Weekly Review call 29 Aug 2014, 29 August 2014, 0313 (see further copies/versions at 0460 and 0462); 023 Weekly Review call 5 Sep 2014, 05 September 2014, 0315 (see further copy/version at 0465); 024 Weekly Review call 12 Sep 2014, 12 September 2014, 0317 (see further version at 0468, and covering email at 0467; 025 Weekly Review call 19 Sep 2014, 19 September 2014, 0319; 026 Weekly Review call 26 Sep 2014, 26 September 2014, 0321; 027 Weekly Review call 3 Oct 2014, 03 October 2014, 0323; 028 Weekly Review call 10 Oct 2014, 10 October 2014, 0325; 029 Weekly Review call 17 Oct 2014, 17 October 2014, 0327; 030 Weekly Review call 24 Oct 2014, 24 October 2014, 0331; 031 Weekly Review call 31 Oct 2014, 31 October 2014, 0333; 032 Weekly Review call 7 Nov 2014, 07 November 2014, 0335; 033 Weekly Review call 14 Nov 2014, 14 November 2014, 0337; 034 Weekly Review call 21 Nov 2014, 21 November 2014, 0339; 035 Weekly Review call 28 Nov 2014, 28 November 2014, 0341; 036 Weekly Review call 05 Dec 2014, 05 December 2014, 0343.

¹⁹³ See the recipients of the following documents: Email regarding SLG Weekly Review from [Senior Manager 6] to [Executive 1] and others, 22 March 2013, pages 2 to 3, 0240; Email regarding SLG Call Friday from [Senior Manager 6] to [Senior Manager 3] and [Employee 2], 3 May 2013, pages 2 to 3, 0245; Email regarding SLG slides for 5.30pm call from [Senior Manager 7] to [Executive 1] and others, 6 September 2013, 0108. We note that [Executive 2] was one of the copy recipients of the slide pack under cover of the email of 6 September 2013, 0108.

¹⁹⁴ Email regarding SLG Weekly Review – Chair: [Executive 1], 22 March 2013, page 2, 0240.

discussed at the meeting, as shown by the slide pack and list of actions¹⁹⁵ circulated after the first meeting on 24 March 2013¹⁹⁶

4.32 The slide pack includes the following entries as “actions”:

“[Senior Manager 10] to review MBORC [Matters Beyond Our Reasonable Control] over the last few days (c23/3/13) to identify any opportunities to date manage.”

“[Senior Manager 6] to agree payment process with [Employee 1] to ensure we can park circuits under review before payment is progressed the following month.”

“Stop & review orders on EST”. The owner of this action was [Senior Manager 5]. The following entry appears in the “status” column against this action: “On-going. Now in place and the first set of orders (last weeks) are in the process of being checked. Early signs encouraging wit [sic] c30% of suggested SLG being removed through retrospective application of deemed consent. Hope to have some numbers later, but process in place, so action complete.”

4.33 This third action set out above clearly specified that for the review of orders on EST (a platform used for provision of certain Ethernet services), SLG payments were “*removed through retrospective application of deemed consent*”. This is a direct acknowledgement that retrospective application of Deemed Consent was used to save SLG payments, and that this matter was discussed at the SLG Weekly Review Meeting.

4.34 The second action set out above also indicates that [Senior Manager 6] (who became [X]¹⁹⁷) was to agree a process to “*park circuits under review before payment is progressed the following month*”. We also note that the slide pack identified [Senior Manager 6] as responsible for the action of setting up a “*Governance process on sign off...for commercial challenge and scrutiny*”.¹⁹⁸ The slide pack records that “*implementation of better review points before payment of SLGs are being put in place. Weekly review points set up for w/c 18/3/13 based of [sic] circuit list from [Senior Manager 10]*”.¹⁹⁹

4.35 We understand that these two actions fed into the creation of the SLG Triage Team in April 2013, shortly after the first SLG Weekly Review. As we go on to explain below, the SLG Triage Team’s function was to review closed orders before SLG payments were made in order to action opportunities to retrospectively apply Deemed Consent.

¹⁹⁵ Attachment – SLG Summary, 21 March 2013, 0242; attached to Email regarding SLG Weekly Review – Chair: [Executive 1], 24 March 2013, 0240.

¹⁹⁶ Circulated under cover of email regarding SLG Weekly Review – Chair: [Executive 1], 24 March 2013, 0240. Also attached to this email was a spreadsheet Attachment – SLG full list of circuits prioritised based on commercial SLG exposure, 24 March 2013, 0241. The spreadsheet appears to list circuits that are still open. This tends to suggest the SLG Weekly Review, at least initially, also had some role in reviewing open orders.

¹⁹⁷ BT’s response to Q1 of the 4th Notice, 7 April 2016, page 5, 0434.

¹⁹⁸ Attachment – SLG Summary, 21 March 2013, Slide 6, 0242,

¹⁹⁹ Attachment – SLG Summary, 21 March 2013, 0242; attached to Email regarding SLG Weekly Review – Chair: [Executive 1], 24 March 2013, 0240.

- 4.36 Reviews of closed orders were conducted and information relating to these reviews continued to be provided to SLG Weekly Review, with the participants on the calls overseeing the realisation of opportunities to apply Deemed Consent retrospectively to closed orders in order to reduce SLG liabilities. This was typically referred to as “date management”.²⁰⁰
- 4.37 An example slide pack for the SLG Weekly Review Meeting on 28 June 2013²⁰¹ shows that the meeting reviewed such activity. It notes orders that were closed in the previous week, and provides detail of the opportunities that had been found to reduce SLG payments by ‘date management’:

“We reviewed 15 circuits this week with a value of £[redacted] which was [redacted]% of the total SLG attracting circuits closed in the week.

“We identified a saving of £[redacted] on one circuit from an additional review of the date management. ([redacted]) This brings the savings made from the reviews to £[redacted] since the start of the financial year.”

- 4.38 Slides 6 to 8 set out the detailed root cause analysis for the top 15 circuits. For most circuits there was “No third party involvement so no opportunity to reduce SLG”, but for circuit number [redacted] there is noted “Approx £[redacted] return from DM review” due to “non DM of Traffic Management”. We take ‘DM’ to mean ‘date management’. These detailed notes help to confirm that the SLG Weekly Review was informed of opportunities where Deemed Consent could have been applied during the lifetime of the order – since Deemed Consent can only be used where there is a delay caused by a third party.

- 4.39 In another example, in an email dated 6 August 2013, sent to the members of the circulation list for the SLG Weekly Review, a senior manager in the NI business unit wrote:

“As promised some detailed RCA on Planning failures

“[redacted] £[redacted] additional date management opportunity from 20/6 to 28/7 7), may be [sic] more...

“[redacted] £[redacted] delayed access on initial survey not managed. Ridiculous “21 day dispute” between JC and Planning around ECCs (£[redacted]). Worth a look

Unfortunately the others all appear to be due to default dates set on D14 without planning complete or a conversation taking place between JC and planner ☺

²⁰⁰ See, for example, Email regarding SLG Weekly Review – Chair: [Executive 1], 14 June 2013, 0223 and its attachments [redacted] SLG RCA.xlsx, 14 June 2013, 0225, [redacted] SLG RCA.xlsx, 14 June 2013, 0224 and [redacted]2 SLG RCA.xlsx, 14 June 2013, 0227 and Email regarding SLG slides for 530pm call, 23 September 2013, 0108 and its attachments [redacted] SLG RCA.xlsx, 23 September 2013, 0110 and [redacted] SLG RCA.xlsx, 23 September 2013, 0109.

²⁰¹ SLG Weekly Review Call 28 June v 2, 28 June 2013, 0399

"I also got the team to look at the cct below, original RCA of "incorrect records". Not sure I would agree with this and looks to be an opportunity to retrospectively data [sic] manage....

[X] £[X]".²⁰²

4.40 In this text, opportunities to "date manage" orders for historic delays are noted, along with the SLG liability for each order. Again, this demonstrates that the SLG Weekly Review had oversight of the work being done to identify opportunities to retrospectively apply Deemed Consent in closed orders.

4.41 Other email correspondence sent by the same senior manager in the NI business unit about the SLG Weekly Review contains similar references to date management in relation to the circuit reviews being conducted. For example:

- an email dated 14 June 2013 addressed to [Senior Manager 6] forwarded root cause analyses (or 'RCA') for three orders with the comment: *"Details RCA on [X] which I think supports the case for date management around way leave / manhole cover. I've also attached two other [sic] which I think we have a strong case on [...] every little helps"*.²⁰³
- an email to [Senior Manager 7] dated 23 September 2013 forwarded root cause analyses for two orders (described as "high value ccts") with the comment: *"Definitely date management opportunities in both of these – OVD back in 2012 and 13-22 CDD changes each!!"*²⁰⁴
- an email to [Senior Manager 7] dated 02 October 2013 forwarded root cause analyses for six orders with the comment: *"some really good RCA completed by my team on some of the highest SLG payments attributed to Planning over the last couple of weeks, all have date management opportunities.... Incl two where I don't think we should pay anything at all!"*²⁰⁵

4.42 An email from [Employee 2] to members of the SLG Weekly Review dated 3 May 2013²⁰⁶ attaches a spreadsheet²⁰⁷ described as *"the output from the weekly Ethernet circuit review for week ending 28th April for your call later today."* The spreadsheet sets out in detail the outcome of the reviews of 20 circuits. The information given for each circuit includes the date on which the circuit was completed, which in each case is later than the date given in the spreadsheet as the CDD for the relevant circuit. The spreadsheet also includes detail on whether date management could be applied, and the impact on SLG payments. For example, the entry against circuit ID [X] states:

"there is no evidence that the CP has followed the correct procedure of advising that power was available, this is done via an amend request on E-co as it provides an auditable trail. SLG's are not applicable". The entry in the final column, headed *"Recommendation / Action"* for this circuit states: *"Good News - Saving of £[X]"*.

²⁰² Email regarding Notes and actions from SLG review call 2 Aug 2013, 6 August 2013, 0149.

²⁰³ Email regarding SLG Weekly Review – Chair: [Executive 1], 14 June 2013, 0223.

²⁰⁴ Email regarding SLG slides for 5:30pm call, 23 September 2013, 0108

²⁰⁵ Email regarding SLG RCA, 2 October 2013, 0114.

²⁰⁶ Email regarding SLG call Friday 030513 for w/e 28/04/13 circuits, 6 May 2013, 0245.

²⁰⁷ Attachment – SLGs WE 28 Apr2013v2 ([Employee 2] NOTES) FRI AM, 6 May 2013, 0246.

- 4.43 Throughout the period of its existence, the SLG Weekly Review continued to oversee the conduct of retrospectively applying Deemed Consent to closed orders. A slide pack was typically produced each week for the meeting, with a slide incorporating summary findings of root cause analyses for the “Top 15” or “Top 25” circuits by SLG value, setting out the SLG payment liability for each order and whether there was an opportunity to date manage or “no opportunity to reduce SLGs”.²⁰⁸
- 4.44 We believe that the information that was provided to the SLG Weekly Review in relation to the retrospective application of Deemed Consent was from the work of the SLG Triage Team.²⁰⁹
- 4.45 We therefore find that the SLG Weekly Review was involved in overseeing the conduct of retrospectively using Deemed Consent in relation to closed orders.

SLG Triage Team

- 4.46 The SLG Triage Team was a team within the Finance business unit. It was established in April 2013.²¹⁰ As noted above, it was set up following the first meeting of the SLG Weekly Review. The SLG Triage Team was headed by a senior member of the Finance unit within Openreach, specifically [Senior Manager 6].²¹¹
- 4.47 BT has reported that the SLG Triage Team was involved in retrospectively applying Deemed Consent to closed orders. It has told us that:
- “the SLG Triage Team reviewed closed circuits for situations where Deemed Consent was not applied, where it could have been applied during the circuit provision process, and then implemented reductions in the SLGs paid to customers as if that deemed consent had been applied.”*²¹²
- 4.48 This description is confirmed in contemporaneous documents provided by BT.²¹³
- 4.49 The SLG Triage Team carried out reviews of closed orders in line with those initiated by the SLG Weekly Review. Initially, the team comprised only two members²¹⁴ but in July 2013, it increased in size to 8 employees in the UK and 8 employees overseas.²¹⁵ In June 2014, the minutes of the Ethernet Steering Group, which we discuss further below, noted the “[£<] per week” savings of the “Triage team” and

²⁰⁸ See, for example, Ethernet SLG Weekly Review, 28 June 2013, page 6, 0399; Ethernet SLG Weekly Review, 18 April 2014, page 18, 0264; Ethernet SLG Weekly Review, 9 May 2014, pages 24 to 28, 0273; Ethernet SLG Weekly Review, 6 June 2014, pages 22 to 26, 0287.

²⁰⁹ We note that the information provided to the SLG Weekly Review appears to match the description of the information described in document 0420, Email regarding SLG Triage process/briefing documents etc, 4 April 2016, an internal BT communication relating to preparing a response to Ofcom’s 4th Notice, and its attachments.

²¹⁰ BT’s response to Q1 of the 4th Notice, 7 April 2016, page 5, 0434.

²¹¹ BT’s response to Q1 of the 4th Notice, 7 April 2016, page 5, 0434.

²¹² BT’s response to Question 4 (part B) of the 4th Notice, 7 April 2016, page 26, 0434.

²¹³ See Process Map for Commercial SLG Review, attachment to email from [Senior Manager 6], SLG Triage Team Training Pack, 1 July 2013, 0417.

²¹⁴ SLG Update, 20 June 2013, page 12, 0228.

²¹⁵ SLG Triage Team spreadsheet, 1 July 2013, attached to email from [Senior Manager 6], SLG Triage Team Training Pack, 1 July 2013, 0417.

stated an action to “[d]eliver recruitment plan and expand on triage team”.²¹⁶ We consider this to be referring to the SLG Triage Team.

- 4.50 We note that while the SLG Triage Team did not action any savings after September 2014, we understand that it continued to identify potential savings through to December 2014. For example, a Network Investment SITREP slide pack dated 31 October 2014 notes that the “*SLG Target will be subject to 15% Triage reduction target*”.²¹⁷ The evidence suggests that the reasons that these savings were not actioned was because of concerns raised by Openreach’s regulatory team.²¹⁸ The evidence from the SLG Weekly Review slide packs is that senior members of the NI and Finance business unit remained keen to bank the savings identified by the SLG Triage Team at least up until December 2014.²¹⁹

Retrospective use of Deemed Consent in open orders

- 4.51 In addition to the conduct of retrospectively using Deemed Consent to reduce SLG payments for closed orders, we also find that BT engaged in the conduct of retrospectively applying Deemed Consent to move CDDs in open orders in order to reduce SLG payments. As with the retrospective use of Deemed Consent in closed orders, BT would review the order for missed opportunities to deem consent and then apply Deemed Consent after the fact. However, this was done before the order had completed, i.e. before the handover email to the CP confirmed the order had been completed.
- 4.52 We set out below a hypothetical example of how this worked.

Box 6.2: Illustration of retrospective use of Deemed Consent to reduce SLG payments in an open order

BT commences work on an order for the provision of Ethernet services on 3 February 2014. The CDD is set at 4 August 2014. However, BT fails to meet this CDD. They continue to work to progress the order, and ultimately it is completed on 18 August 2014. This makes the SCD 18 August 2014. This means that BT would be required to pay 10 working days of SLG payments, based on the difference between the last CDD that was set before the order closed and the SCD.

Before sending a handover email to the customer and closing the order, BT reviews the COSMOSS notes for that order to determine if it has missed an opportunity to deem consent at some point in the provisioning process. It finds that in April 2014, the job controller responsible for the order had missed an opportunity to move a CDD by 10 days for a blocked manhole (DC24) during the course of provision.

Using this historic delay as justification, BT applies Deemed Consent on 18 August 2014 to move the CDD by 10 days, bringing it to 18 August 2014, which is also the

²¹⁶ Ethernet Steering Group Pack, 18 June 2014, Page 26, 9952

²¹⁷ See, for example, Network Investment SITREP Review, 31 October 2014, page 7, 9981.

²¹⁸ A slide pack of 21 November 2014 reports a decision by “Regulatory” to prevent the savings identified by the SLG Triage Team from being realised following a “letter of complaint from CPs”. See 034 SLG Weekly Review call 21 Nov 2014, 21 November 2014, page 3, 0339.

²¹⁹ See 034 SLG Weekly Review call 21 Nov 2014, 21 November 2014, page 3, 0339; 035 SLG Weekly Review call 28 Nov 2014, 28 November 2014, page 2, 0341; 036 SLG Weekly Review call 05 Dec 2014, 5 December 2014, page 2, 0343.

SCD.²²⁰ There is therefore no difference between the CDD and the SCD, and so BT does not have to make SLG payments.

- 4.53 We have found that, during the Practice 1 Breach Period, there were a number of teams in place whose functions included reviewing open orders for opportunities to retrospectively apply Deemed Consent for historic delays, and then retrospectively applying Deemed Consent to those orders accordingly. The teams we have found were engaged in this activity were the Failed Completions Team, the National Backlog Team and the Validation Team. We also consider the role of job controllers in applying Deemed Consent retrospectively for historic delays.

Job controllers

- 4.54 We have explained that the primary internal guidance document for job controllers on applying Deemed Consent was the Job Control Manual.²²¹ This was supplemented by briefings from the senior management team in the NI business unit, providing updates and guidance to the job control community on matters concerning the use of Deemed Consent.²²² Around a third of the 30 briefings we have reviewed focus on ‘date management’ and a number of these demonstrate that job controllers were instructed to apply Deemed Consent retrospectively to open orders.
- 4.55 For example, a briefing from 3 May 2013 shows that job controllers working at the weekend were being asked to apply Deemed Consent wherever appropriate to open orders ‘in the tail’ that were past the CDD:

“From Tuesday our Jeopardy Reps are going to be driving the regions to progress those orders currently past their contractual delivery date. To do this efficiently they need a clear view of those orders that are genuine failures and not hidden amongst those that should be date managed. To achieve this, we are going to focus on our tail list again this weekend.

“For those of you working this Saturday, please look out for the tails list on Friday that will have your name aligned to a list of circuits. It’s essential that we do a quality job on these, so please make sure that all date changes are made accurately with attention paid to priority codes and application of deemed consent where appropriate...”²²³

- 4.56 This quote distinguishes between orders that are “*genuine failures*” and those where the CDD can be “*date managed*”. In this context, we interpret the term “*date managed*” as meaning the retrospective application of Deemed Consent since it refers to orders that have already passed their CDD – applying Deemed Consent in these circumstances to extend the CDD would not have been as soon as reasonably practicable.
- 4.57 A similar instruction came a week later in the briefing of the 10 May 2013:

²²⁰ We note that the retrospective use of Deemed Consent in open orders can also take place before the SCD.

²²¹ See paragraph 3.50 above

²²² See paragraph 3.51 above.

²²³ Ethernet Job Control Briefing 004, 3 May 2014, 0012.

"In-life date management has never been so important. Our regional are extracting data from the 'one truth' report every day to chase through out failed circuits but unfortunately their data is muddled by those that have not been date managed out of the tail by job control yet.

In order that we can see clearly how many genuine failures we currently have and get them focusing only on these and not those delayed by the customers we have aligned additional resource today to reviewing those order in the tail to ensure we move out any that shouldn't be there..."²²⁴

- 4.58 Again, this instruction implies that within the group of orders which have missed their CDD and for which SLG payments will be accruing (the "*failed circuits*"), there will be a set to which job controllers can apply Deemed Consent to move the CDD to take the orders out of the backlog of "*genuine failures*". In this context, we understand that this was an instruction to job controllers to apply Deemed Consent retrospectively.²²⁵

- 4.59 A further example is a briefing in relation to the closure of the Failed Completions Team, sent in November 2013:

"From Monday, when you are assigned a COMP [completion] that has a failed CDD, please check the order thoroughly for any missed date management from day 1 and apply this to the order prior to closing it down. Also add clear notes on COSMOSS and to the eCo update on the action you have taken."²²⁶

- 4.60 This is a clear instruction to job controllers to apply Deemed Consent retrospectively: it refers to checking completed orders which have missed their CDD to look for "*any missed date management*" (i.e. missed opportunities to apply Deemed Consent) from the start of the provisioning process ("*day 1*") and then to "*apply this*".

- 4.61 In another example, a briefing from 7 July 2014 instructs job controllers as follows:

"Directive for Management of the CDD-1 Report

"We continue to have many orders falling into backlog, some of which are genuine but a lot that could have been date managed previously which makes it difficult to sift out those orders that need additional focus from the tails team and the war room. A mechanism to gather the data where this is not being done appropriately has therefore been put in place.....

"Please adhere to the ground rules as set out below for the CDD-1 daily report:

"Review all of your orders on the CDD-1 sheet daily as priority

²²⁴ Ethernet Job Control Briefing 006, 10 May 2013, 0013.

²²⁵ Ethernet Job Control Briefing 010, 28 May 2013, 0016 and Ethernet Job Control Briefing 011, 7 June 2013, 0017 contain similar instructions to job controllers to check their orders that have failed the CDD and apply Deemed Consent retrospectively wherever possible.

²²⁶ Ethernet Job Control Briefing 036, 22 November 2013, 0031.

“Apply date management as appropriate and add notes to COSMOSS/ECO as usual...”

“Where all date management has been applied and it’s still a CDD failure, add a failure note to COSMOSS. If the order is post KCI3 then transfer to the COSMOSS queue...immediately.

“Most importantly: Always carry out date management in-life whenever possible – this will ultimately reduce the amount of circuits that need to be reviewed on the CDD-1 report every day.”²²⁷

- 4.62 Like the briefings of 3 and 10 May 2013,²²⁸ this distinguishes between orders which are “genuine” failures and those which can be removed from the backlog by applying Deemed Consent to extend the CDD. As with the earlier briefings, we understand from this context that the application of “date management as appropriate” to the second set of orders entailed the retrospective application of Deemed Consent. We also note that the last paragraph of the briefing draws a contrast between “in-life” date management and the application of date management to orders on the CDD-1 sheet. This confirms our interpretation that it is instructing job controllers to apply Deemed Consent retrospectively to orders on the CDD-1 sheet.
- 4.63 In addition to these briefings, we also have evidence from email correspondence sent by a job control manager to a group of job controllers in April 2014 which corroborates the interpretation of the briefings we have set out above and confirms the purpose for which it was done, namely to minimise BT’s SLG liabilities.²²⁹
- 4.64 The first email informs job controllers that due to the high levels of SLG payments there is an urgent need for them to complete a one-off spreadsheet recording all orders which have passed their CDDs for 50 days or more:
- “with a view to progress/date manage/escalate, to reduce payments paid for missing the CDD.*
- “There is a massive focus on these circuits that have past [sic] their CDD for 50 days which have potential high payments attached, so it is vital that extra attention is made to swiftly complete these or managed [sic] appropriately.”²³⁰*
- 4.65 Given the email is concerned with orders that have passed their CDD by 50 days, we consider that the references to “date manage” and “manage” in this extract can only mean the retrospective application of Deemed Consent.
- 4.66 The second email sent by the same job control manager on 17 April 2014 entitled “Backlog work over Easter 2014”,²³¹ attaches a spreadsheet²³² entitled “Backlog for Easter Review Master”. This has a list of orders, all of which had passed their CDD

²²⁷ Ethernet Job Control Briefing 49, 7 July 2014, 0041.

²²⁸ Ethernet Job Control Briefings 004 and 006, 0012 and 0013.

²²⁹ Email regarding Ethernet circuits with a CDD failure of more than 50 days, 8 April 2014, 0088; Email regarding Backlog work over Easter 2014, 17 April 2014, 0093; Attachment, Backlog for Easter review master, 17 April 2014, 0094; Final form spreadsheet supplied in BT’s response to question 4 (part A) of the 4th Notice, 0253.

²³⁰ Email regarding Ethernet circuits with a CDD failure of more than 50 days, 8 April 2014, 0088.

²³¹ Email regarding Backlog work over Easter 2014, 17 April, 0093.

²³² Attachment, Backlog for Easter Review Master, 17 April 2014, 0094. See also final form spreadsheet supplied in BT’s response to question 4 (part A) of the 4th Notice, 0253.

on or before 17 April 2014. The email instructs job controllers receiving the email as follows:

“With this being a crucial weekend for reducing the backlog, we must apply date management where possible using DC22 and updating the CP’s [sic] via ECO.

*“Please use the comments column correctly after reviewing each circuit and return the completed sheets updated **by COP this Monday**.....using the format below,*

“Out of Tail - if CDD has been managed to a success out of failure

“F&T “Date”–{enter date}

“Awaiting info - “brief description of what we are waiting on” (i.e. Awaiting info - planning - escalated. /Awaiting info –Waiting FMU ECD)

“CDD FAIL RCA “reason code” “brief description” please ensure failure note is added to Cosmoss (i.e. CDD Fail –RCA FO01 –Fibre faulty)

“Closed / completed”

- 4.67 Again, the email anticipates the application of Deemed Consent “*where possible*” to orders that have passed their CDD, with a view to converting them from a CDD failure to a success, i.e. to extend the CDD so that they are capable of delivery on or before the revised date. We consider that the application of Deemed Consent in these circumstances would have been retrospective.
- 4.68 There is also evidence that this instruction was implemented in practice. BT provided us with a partially completed version of the spreadsheet “*Backlog for Easter review master*”, which it had collated from information provided by the relevant job controllers.²³³ This recorded a substantial number of the orders listed on the spreadsheet as “*Out of Tail*” in the comments column, i.e. Deemed Consent had been applied retrospectively to extend the CDD. Another two orders are recorded as CDD fails, although they had been “*date managed*” to move the CDD by 54 and 40 days respectively.²³⁴
- 4.69 Taken in the round, we find that the job controller briefings cited at paragraphs 4.54 to 4.61 above and the email correspondence and spreadsheets referred to at paragraphs 4.62 to 4.68 establish that job controllers were instructed to apply Deemed Consent retrospectively to open orders and that they did so.
- 4.70 On 17 December 2014, [Senior Manager 11] issued a message to all job controllers instructing them to comply with the requirement to notify CPs when they were applying Deemed Consent. The message was headed “*URGENT - COMPLIANCE BRIEF ON eCo UPDATES FOR DATE MANAGEMENT*”.²³⁵ It noted that appeals by

²³³ Final form spreadsheet supplied in BT’s response to question 4 (part A) of the 4th Notice, 0253. See also BT’s response to question 4 (part A) of the 4th Notice, 7 April 2016, pages 23 to 24, 0434.

²³⁴ See lines 8 and 445 of Final form spreadsheet supplied in BT’s response to question 4 (part A) of the 4th Notice, 0253.

²³⁵ Urgent – Compliance Brief on eCo Updates for Date Management, 17 December 2014, 0044.

CPs of Deemed Consent applications had revealed that Openreach had not been notifying CPs “every time” it applied Deemed Consent, and explained:

“The reason we need to ensure the eCo update is sent is because the customer is within their rights to challenge any applied deemed consent where they have not been informed of date management to their orders.

“One of our customers has very recently challenged a selection of [redacted] orders that we had applied deemed consent to over a one month period. Out of these [redacted] orders, we were absolutely right to apply the deemed consent on [redacted] of these orders, so we did the right thing for the business on these. Unfortunately of the [redacted] circuits we then failed on [redacted] of them to send a follow on eCo update, so the CP wasn’t advised.

“This non-compliance to the eCo part of the process has significant financial implications for Openreach as the CP can rightly appeal for Service Level Guarantee’s [sic] to be paid. Taking this batch of [redacted] orders where we didn’t update the CP via eCo, this amounted to [redacted] days of date management across varied products. The SLG’s [sic] that we initially saved the business by applying the deemed consent was circa £[redacted], so a huge amount on a very small percentile of orders. Unfortunately we now have to roll all those dates back and potentially will have to pay SLG’s [sic] if the order is delivered later than the revised CDD. One order alone carries £[redacted] that we could have saved our business if we had complied to process and sent an eCo update.

“As you can see from the details above, it is vital that we follow through properly when we apply any date management. The impact both financially and in terms of credibility with our CP’s [sic] is very high and in Job Control we must make sure we comply to the process to close this off completely.

“Our customers regularly scrutinise date management that has been applied to their orders, so can I please ask that everyone is vigilant on this activity and ensure we are compliant going forwards.”²³⁶

- 4.71 This briefing is an acknowledgement by Openreach that it did not always notify CPs when it had applied Deemed Consent. In the particular appeal of Deemed Consent applications referenced in the briefing, we note that [redacted]% of the applications which Openreach considered to be justified had not been notified to the CP. We consider it likely that some of this failure was attributable to the fact that Deemed Consent had been applied retrospectively.²³⁷
- 4.72 This was a clear instruction to job controllers to comply with the requirements of the CSA by notifying CPs when Deemed Consent had been applied. We have taken it to

²³⁶Urgent – Compliance Brief on eCo Updates for Date Management, 17 December 2014, 0044.

²³⁷ We note, in this context, that the SLG Weekly Review slide pack of 21 November 2014 records a letter of complaint from CPs about the retrospective application of Deemed Consent to closed orders. 034 SLG Weekly Review call 21 Nov 2014, 21 November 2014, page 3, 0339.

be the end date of the contravention in relation to the retrospective use of Deemed Consent.

Failed Completions Team

- 4.73 BT has told us that it set up the Failed Completions Team on a temporary basis in January 2013, and disbanded it in November 2013.²³⁸
- 4.74 BT told us that *“Typically, this team dealt with orders that had already failed their CDD, and where possible took corrective action to minimise the extent of the failure. They looked specifically at orders that were at the [fit and test] stage... The aim was to determine what issues could be recovered or resolved on or immediately after the day when installation was due.”*²³⁹
- 4.75 BT also told us that the Failed Completions Team would *“review Deemed Consent that had already been applied to the circuit to determine whether all delays had been accurately documented.”*²⁴⁰
- 4.76 We consider that this means the Failed Completions Team was involved in retrospective application of Deemed Consent. The fit and test stage is one of the final stages of provision. At fit and test stage, Openreach will access the relevant customer sites and test the installation to ensure that it is working properly. Following fit and test, assuming no issues have been identified, Openreach will record that the order is complete in COSMOSS and send a handover email to the customer informing them that the service is installed and working, as well as confirming the final CDD and the SCD.
- 4.77 At this point in the provisioning of the order, the only significant way for BT to identify *“corrective action to minimise the extent of [existing CDD] failure”*, will be to retrospectively apply Deemed Consent for a historic issue.
- 4.78 A slide pack authored by [Executive 1] dated 20 July 2013 entitled “SLG Update” notes on slide 3 that there is already a *“[h]it team working through backlog circuits”*.²⁴¹ Given what it says the *“hit team”* is doing, this may be a reference to the Failed Completions Team or to the National Backlog Team, which was in operation at this point (see further paragraph 4.82 below).
- 4.79 Our understanding that the Failed Completions Team was retrospectively applying Deemed Consent to open orders prior to handover is corroborated by a briefing which was issued following the closure of the Failed Completions Team to the Openreach job control community in November 2013. The briefing informed job controllers that the Failed Completions Team was to close and goes on to say:

“From Monday, when you are assigned a COMP [completion] that has a failed CDD, please check the order thoroughly for any missed date management from day 1 and apply this to the order prior to closing it down. Also add clear notes on COSMOSS and to the eCo update on the action you have taken.

²³⁸ BT’s response to Question 1 (part B) of the 4th Notice, 7 April 2016, page 10, 0434.

²³⁹ BT’s response to Question 1 (part D) of the 4th Notice, 7 April 2016, page 15, 0434.

²⁴⁰ BT’s response to Question 1 (part D) of the 4th Notice, 7 April 2016, page 15, 0434.

²⁴¹ SLG Update, 20 June 2013, 0228.

*"We'd like to say a big thank you to the work that the Failed Completions Team have done since its inception, saving some sizeable SLG payments at the last hour ...!"*²⁴²

- 4.80 This briefing shows that the Failed Completions Team had saved "sizeable SLG payments at the last hour" and, further, explicitly instructs job controllers to retrospectively apply Deemed Consent where possible before closing orders by "check[ing] the order thoroughly for any missed date management from day 1 and apply[ing] this to the order prior to closing it down." Day 1 is the start of an order, indicating that job controllers were told to look for opportunities to date manage from any point in the life of the order.
- 4.81 The evidence therefore shows that the Failed Completions Team facilitated the conduct of retrospectively using Deemed Consent in open orders during the period January 2013 to November 2013. Furthermore, it is also clear that job controllers were briefed to look for opportunities to retrospectively apply Deemed Consent in November 2013, indicating that Openreach sought to continue the conduct of retrospectively using Deemed Consent in open orders through the day-to-day work of job controllers.

National Backlog Team

- 4.82 BT has told us that the National Backlog Team was in place between circa January 2014 and June 2014,²⁴³ although we have found some indications that it may have existed earlier, in 2013.²⁴⁴ In our review of the Sample of orders between May and July 2014 (discussed in section 5), we found a number of orders where the COSMOSS notes indicated that the National Backlog Team was active prior to this period and had engaged in retrospective applications of Deemed Consent. The earliest example of a COSMOSS note referring to the National Backlog Team we found was from June 2013.²⁴⁵
- 4.83 BT described the purpose of the National Backlog Team as "to look at circuits that had failed the CDD, understand the causes of delay (at whatever stage in the delivery process), assess what actions could be taken to minimise the extent of delay, and manage CPs' expectations."²⁴⁶
- 4.84 Reading BT's description of the National Backlog Team in light of the other evidence, and the evidence in the Sample we have reviewed (see further section 5), we take it to mean that the purpose of the National Backlog Team was to review open circuits that had missed their CDD, and were therefore at risk of accruing SLG payment liabilities and, where possible, to go back in time to look for opportunities to retrospectively apply Deemed Consent in order to bring the CDD out of failure.
- 4.85 In one example observed from the Sample, the National Backlog Team applied Deemed Consent on 24 July 2014 to revise a CDD of 1 July 2014, justifying this with reference to a delay that had occurred between November and December 2013.²⁴⁷ The relevant note in COSMOSS for this application records: "High level description:

²⁴² Ethernet Job Control Briefing 036, 22 November 2013, 0031.

²⁴³ BT's 2nd response to Question 1 of the 4th Notice, 27 April 2016, page 3, 0435.

²⁴⁴ Our review of the Sample, discussed in section 5, indicates that the National Backlog Team may have been in existence for a longer period of time than stated by BT in its response to the 4th Notice.

²⁴⁵ Order [3<].

²⁴⁶ BT's response to Question 1 (part D) of the 4th Notice, 7 April 2016, page 15, 0434.

²⁴⁷ Order [3<].

DC7A, CDD moved by 15 days from 26/11/13 – 17/12/13 waiting customer to advise when the cabinet had been provided.”²⁴⁸ Furthermore, this application of Deemed Consent took place after the SCD of the order, but before the final CDD had been confirmed to the CP in a handover email. This is significantly after the earliest point at which BT could have sent a notification of its intent to deem consent and was a use of Deemed Consent that breached BT’s obligations. Furthermore, the fact that it took place after the SCD, when the active process of providing the order was complete, highlights that this intervention was intended to reduce the amount of SLG payments that BT was liable for on that order.

- 4.86 We set out additional examples of orders from the Sample that show the National Backlog Team applying Deemed Consent retrospectively in Annex 4.
- 4.87 These examples, alongside BT’s description of the National Backlog Team, indicate that it was a team involved in the conduct of retrospectively using Deemed Consent in open orders.

Validation Team

- 4.88 BT has told us that the Validation Team was in operation during the period June 2014 to December 2014.²⁴⁹
- 4.89 BT explained that “[t]he function of the team was to review orders that were ready for handover to the CP that had failed the CDD and where Deemed Consent had been applied through the lifecycle of the order. The team would review the historic application of Deemed Consent, and would make adjustments to the application of Deemed Consent where appropriate, and would then close the order down.”²⁵⁰ As set out above, handover takes place at the very end of an order, after the SCD for the order has been recorded in COSMOSS. Handover is when the customer is informed that service is completed, and is provided with the SCD and the final CDD for the order. There will therefore be no further delay to the provision of the order at handover stage, because the active provisioning process has completed and the circuit will have been installed.
- 4.90 We therefore consider that the “*adjustments*” which would be made by the Validation Team were retrospective adjustments to the application of Deemed Consent while the order was still open, immediately before handing over the order to the customer, in order to reduce or eliminate the SLG payments for those orders. This is corroborated by two email chains in the documents provided by BT in which the work of the Validation Team is discussed.²⁵¹
- 4.91 An email chain dated 14 to 16 July 2014 between managers in the job control hierarchy and the Validation Team management²⁵² concerns feedback from the Validation Team on a list of 24 orders which the Validation Team was able to “*convert from perceived CDD failure to successes*” by “*date management*”. The email chain notes that the Validation Team is “*managing to convert ~40% to successes*

²⁴⁸ Order no. [§<].

²⁴⁹ BT’s response to Question 1 (part B) of the 4th Notice, 7 April 2016, page 10, 0434.

²⁵⁰ BT’s response to Question 1 (part D) of the 4th Notice, 7 April 2016, page 15, 0434.

²⁵¹ Email regarding Validation Team JC Feedback, 16 July 2014, 0070, and Email regarding Validation, 24 July 2014, 0071.

²⁵² Email regarding Validation Team JC Feedback, 16 July 2014, 0070.

*that is largely underpinning our recent rise in CDD and reduction in indicative SLG payments.*²⁵³

- 4.92 The email chain shows one of the job control managers reacting that some of the orders have been “*incorrectly date managed*” by the Validation Team (which they calls the “*Back log team*”). The senior manager who initiated the email chain by sending through the Validation Team feedback in the first place responds that there are bound to be differences of opinion between job control and the Validation Team, and notes, in support of the Validation Team approach:

*“Bottom line is we need to improve CDD and reduce our SLG exposure. We have guidance on the application of Deemed Consent and related date management of CDD and we need to push the boundary.”*²⁵⁴

- 4.93 These extracts provide corroboration that the Validation Team was retrospectively applying Deemed Consent to open orders as a means of reducing SLG payments.

- 4.94 Another email chain concerning the Validation Team²⁵⁵ also corroborates our view that the team was engaged in retrospectively applying Deemed Consent to open orders. A general manager in the NI business unit reports:

“... we’re seeing re-grades coming through for validation.

“Clearly, they should be date managed and closed by the clusters. So we need this tightening up quickly please, otherwise our validation team is being kept off the big value add activities.

“FYI – we’ve saved £761k worth of SLGs by putting this process in place.[Senior Manager 12] – well done, can you get this message to your team members please.”

- 4.95 In the context of this email, it is significant to note that Regrades do not attract SLG payments.²⁵⁶ The general manager therefore appears to indicate that, while Regrades should be date managed, they should not be sent to the Validation Team, whose focus is on “*big value add activities*”. In this context, we consider that “*date managed*” means subjected to a retrospective use of Deemed Consent.
- 4.96 The email also appears to indicate that the Validation Team had already saved £761k of SLG payments by July 2014, within one month of its creation. The Validation Team continued to operate for a further five months after this email was sent.²⁵⁷
- 4.97 An email from 20 November 2014 from a member of the SLG Triage Team, also refers to the work of the Validation Team in retrospectively applying Deemed Consent.

²⁵³ Email regarding Validation Team JC Feedback, 14 July 2014, 0070.

²⁵⁴ Email regarding Validation Team JC Feedback, 16 July 2014, 0070.

²⁵⁵ Email regarding Validation, 24 July 2014, 0071.

²⁵⁶ See paragraphs 3.6 and 3.7 above. Regrades are a type of order for Ethernet services.

²⁵⁷ BT’s response to Question 1 (part B) of the 4th Notice, 7 April 2016, page 10, 0434.

"I'm out in [3<] today and had a look with the validation team for the circuit below which was a simple case of traffic management of 41 days.

*This circuit went through the validation team, but they missed the opportunity that you highlighted below. We reviewed it and it really should have been a) applied correctly at the beginning or b) caught on 2nd review."*²⁵⁸

- 4.98 It is a note that a member of the SLG Triage Team has picked up with the Validation Team that they missed an opportunity to retrospectively apply Deemed Consent to an order before it was closed – thus providing further confirmation that the Validation Team was engaged in retrospectively applying Deemed Consent.
- 4.99 The evidence therefore indicates that the Validation Team was involved in the conduct of retrospectively using Deemed Consent in order to reduce BT's SLG exposure.

Sustained and systematic nature of the retrospective use of Deemed Consent

- 4.100 We consider that BT's retrospective use of Deemed Consent was sustained and systematic. In reaching this view we take into account the establishment and resourcing over significant periods of specialist teams which applies Deemed Consent retrospectively and the number of orders to which Deemed Consent was applied retrospectively.

Establishment and resourcing of dedicated teams and periods of operation

- 4.101 BT devoted considerable resource over a sustained period to applying Deemed Consent retrospectively to closed and open orders.
- 4.102 In respect of closed orders, BT established and operated the SLG Weekly Review from February 2013 to December 2014²⁵⁹ and the SLG Triage Team from April 2013 to December 2014.²⁶⁰
- 4.103 The SLG Weekly Review typically involved seven to ten senior managers from the NI and Finance business units, including [Executive 1], [Senior Manager 3] and [Senior Manager 6]²⁶¹ each week over that period. The SLG Triage Team began as a team of two²⁶² in April 2013 and expanded out from July 2013 to a team of eight in the UK and eight "offshore".²⁶³ There is evidence that the team reduced in size after August 2013²⁶⁴ but then may have increased in size again in 2014 - the Ethernet Steering

²⁵⁸ Emailing: SLG Triage Template Week ending 14-11-14 Final.xlsx, 20 November 2014, 0586.

²⁵⁹ See paragraph 4.30.

²⁶⁰ See paragraphs 4.46 to 4.50.

²⁶¹ See, e.g. Email regarding SLG Weekly Review – Chair: [Executive 1], 22 March 2013, 0240; Email regarding SLG Weekly Review – Chair: [Executive 1], 14 June 2013, 0223; Email regarding SLG slides for 5:30pm call, 06 September 2013, 0108.

²⁶² SLG Update, 20 June 2013, page 12, 0228.

²⁶³ SLG Triage Team spreadsheet, 1 July 2013, attached to email from [Senior Manager 6], SLG Triage Team Training Pack, 1 July 2013, 0417.

²⁶⁴ BT's response to Question 2 of the 7th Notice, 20 July 2016, page 4, 0438, attaching Email regarding SLG Triage process/briefing documents etc, which notes that the SLG Triage team: "started at the beginning of April 2013 with [Employee 4] joining us at the beginning of July 2013 along with 10

Group minutes from June 2014 note an action to “[d]eliver recruitment plan and expand on triage team”.²⁶⁵

- 4.104 Further, the activities of the SLG Weekly Review and the SLG Triage Team required material levels of co-ordination and information exchange, both between themselves and with other teams in the NI business unit.²⁶⁶
- 4.105 BT also put in place specialist teams which applied Deemed Consent retrospectively to open orders which operated broadly consecutively for the duration of 2013 and 2014: the Failed Completions Team from January to November 2013; the National Backlog Team from June 2013²⁶⁷ to June 2014; and the Validation Team from June 2014 to December 2014.
- 4.106 We do not know the resource level of the Failed Completions team, but we assume it was sufficiently resourced throughout the period of its operation to enable it to work with job control teams. BT has told us the National Backlog Team was a virtual team, centrally coordinated via [X], and made up of individuals spread across the different job control areas and teams.²⁶⁸ Email chains from July 2014²⁶⁹ suggest that the Validation Team had at least five members.

Numbers of orders to which Deemed Consent was applied retrospectively

- 4.107 The evidence we have seen suggests that each week open and closed orders were reviewed for opportunities to retrospectively use Deemed Consent to reduce SLG payments. We have some data on the number of orders in respect of which Deemed Consent was used retrospectively. Our data set is incomplete but nevertheless shows sustained and frequent retrospective use of Deemed Consent and a systematic failure to comply with the SMP Conditions.
- 4.108 In relation to closed orders, slides for the Ethernet Steering Group in June 2014 referred to the “Triage team” saving “[X]k per week”.²⁷⁰ We have evidence that in the period April 2013 to September 2014, the SLG Triage Team saved SLG payments on 258 orders, a saving of at least £1,380,791, of which (accounting for successful appeals in the interim) £1,206,040 was repaid in May to July 2016.²⁷¹ We note that while the SLG Triage Team did not action any savings after September 2014, we

Offshore people and 5 other Openreach people. Appears the Offshore people were then stood down around the middle of August and the Openreach people [...] around the middle of September.”

²⁶⁵ Ethernet Steering Group Pack, 18 June 2014, page 26, 9952.

²⁶⁶ See paragraphs 3.101, 4.46 and 4.44.

²⁶⁷ See paragraph 4.82.

²⁶⁸ BT's response to Question 1 (part D) of the 4th Notice, page 15, 0434.

²⁶⁹ Email regarding the Validation Team JC Feedback, 16 July 2014, 0070; Email regarding Validation, 24 July 2014, 0071.

²⁷⁰ Ethernet Steering Group Pack, 18 June 2014, page 26, 9952.

²⁷¹ Ethernet Provision Reviewed orders - SLG refund payments (excluding interest), 06 July 2016, 0446. See the number of entries that list SLG savings in column N. NB, for orders where SLG savings were made in April May and June 2013, the spreadsheet notes these savings as having been made by [Employee 2/Employee 5], or by [Senior Manager 3/Senior Manager 2], in each case “Pre Triage Team”. However, BT told us that the Triage Team was established in April 2013. Accordingly, we consider that the activities of [Employee 2/Employee 5] and [Senior Manager 3/Senior Manager 2] in saving SLGs during April, May and June 2013 is the early work of the SLG Triage Team, before it was more fully staffed.

understand that it continued to identify potential savings through to December 2014.²⁷²

- 4.109 There is also evidence that the SLG Triage Team, overseen by the SLG Weekly Review, took a systematic approach to the closed orders that they reviewed, focussing their attention on those circuits attracting the highest SLG payments, typically the “*Top 25*” or “*Top 15*”.²⁷³
- 4.110 In relation to open orders, we know that job control teams were retrospectively applying Deemed Consent to these orders, but we do not know how many orders were affected or the value of the SLG payments saved during the Original Relevant Period by job control teams.
- 4.111 In terms of savings made by the Failed Completions Team, we do not have a clear picture of the number of orders to which it applied Deemed Consent, during the period of its operation, or of the value of savings it achieved. However, we have seen reference to it having saved “*sizeable SLG payments at the last hour*”.²⁷⁴
- 4.112 Again, for the National Backlog Team, we do not know the precise number of orders to which it applied Deemed Consent, during the period of its operation, or of the value of savings it achieved. We have seen evidence, however, that the National Backlog Team were involved in retrospective applications of Deemed Consent in a number of the orders included in the Sample that we reviewed.²⁷⁵
- 4.113 For the Validation Team, there is a note that in its first month it saved SLG payments of £761k.²⁷⁶ The team was in operation for a further five months, so we can assume that its total level of SLG payments saved significantly exceeded this amount.

Findings on the existence of conduct in breach of BT’s regulatory obligations

- 4.114 We have found that for a period of almost 2 years, BT carried out systematic reviews of closed orders, looking for instances where Deemed Consent could have been applied but was not. Where it identified such instances in respect of an order, it then reduced the amount of SLG payments due in line with the number of days for which it concluded Deemed Consent could have been applied during the provisioning of that order.
- 4.115 We have also found that from January 2013 to December 2014, BT systematically reviewed open orders which were at risk of incurring SLG payments for missed opportunities to apply Deemed Consent. Where these were identified, Deemed Consent was applied retrospectively and the CDD was adjusted, or ‘date managed’, before the circuit was handed over to the customer. The purpose of this conduct was to reduce SLG payments that might otherwise be due once the circuit was delivered.

²⁷² See paragraph 4.50.

²⁷³ SLG Weekly Review Call 28 June v 2, 28 June 2013, pages 6 to 8, 0399. See also Ethernet SLG Weekly Review, 28 June 2013, page 6, 0399; Ethernet SLG Weekly Review, 18 April 2014, page 18, 0264; Ethernet SLG Weekly Review, 9 May 2014, pages 24 to 28, 0273; Ethernet SLG Weekly Review, 6 June 2014, pages 22 to 26, 0287.

²⁷⁴ Ethernet Job Control Briefing 036, 22 November 2013, 0031.

²⁷⁵ See paragraph 4.84 to 4.86 and Annex 4.

²⁷⁶ Email regarding Validation, 24 July 2014, 0071.

- 4.116 This conduct was systematic and sustained and this is sufficient on its own to establish breaches of each of the Relevant Regulatory Obligations.
- 4.117 We consider that the retrospective application of Deemed Consent to an individual order is in breach of the terms of the CSA and therefore amounts to a breach of SMP condition HH5.9/6.5.²⁷⁷
- 4.118 In addition, taking account of our finding that this conduct was sustained and systematic, and adversely affected a significant number of orders between January 2013 and December 2014, we consider that BT failed to provide Ethernet services on fair and reasonable terms in breach of HH1.2/1.2. These features also mean that BT failed to give effect to SLG Direction and therefore also breached these requirements.
- 4.119 There is also clear evidence that BT engaged in this conduct deliberately, as part of its strategy to minimise its SLG liabilities and we set this out in the following paragraphs.

The deliberate nature of the conduct to retrospectively apply Deemed Consent

- 4.120 We have identified a deliberate strategy by BT to apply Deemed Consent retrospectively in order to minimise SLG payments. In addition to the matters set out at paragraphs 4.100 to 4.119 above, we also rely on the following evidence:
- 4.120.1 a report by [X]a Consultant[X] in November 2012 which identified a strong correlation between Deemed Consent and the cost of SLG payments (although we note that this report itself makes no mention of the practice of retrospectively applying Deemed Consent);
 - 4.120.2 internal briefings to job controllers, instructing them to apply Deemed Consent retrospectively;
 - 4.120.3 email correspondence from NI senior managers revealing evidence of the deliberate nature of the conduct;
 - 4.120.4 Openreach Executive briefings in May 2013 and an 'SLG Update' slide pack in June 2013 setting out a recovery plan for Ethernet provision;
 - 4.120.5 the establishment of the KIL calls - daily calls in June and July 2013 to monitor the achievement of the recovery plan targets;
 - 4.120.6 Openreach Executive briefings in March, April and May 2014 setting out the targets of a second recovery plan for Ethernet provision;
 - 4.120.7 the establishment of the Ethernet Steering Group and the War Room to oversee the implementation of the second recovery plan; and
 - 4.120.8 the establishment of dedicated teams in the NI and Finance business units to carry out the strategy.
- 4.121 We discuss this evidence in paragraphs 4.122 to 4.159 below.

²⁷⁷ See paragraph 2.45 above.

[REDACTED]Consultant[REDACTED]report

- 4.122 BT's focus on the use of Deemed Consent as a means to manage its SLG liabilities followed shortly after the findings of the [REDACTED]Review[REDACTED]. This was a study BT commissioned from [REDACTED]a Consultant[REDACTED] to look at the Ethernet provisioning process with a view to designing and implementing an improved process and performance metrics, including reducing SLG payments. The [REDACTED]Consultant[REDACTED] report was dated 26 November 2012.²⁷⁸
- 4.123 The following data about delivery times, SLG payments and the application of Deemed Consent were recorded in the [REDACTED]Consultant[REDACTED] report:
- the average delivery time was 62.6 days;²⁷⁹
 - SLG payments for the year up to September 2012 were £[REDACTED];²⁸⁰
 - in September 2012, Deemed Consent was applied to 80% of orders, on average 4.6 times per order;²⁸¹ and
 - an application of Deemed Consent pushed the CDD back by 7.5 days on average.²⁸²
- 4.124 The report concluded that BT's Ethernet provisioning process was "*fundamentally not capable of meeting CDD.*"²⁸³ It noted a "*strong correlation*"²⁸⁴ between Deemed Consent and the cost of SLG payments, such that at times when applications of Deemed Consent were below average frequency, SLG payments tended to be higher, whereas at times when applications of Deemed Consent were above average frequency, SLG payments were lower.
- 4.125 It described Deemed Consent as enabling "*the management of CDD and SLG payments*" and went on to observe "*[b]eing unable to apply Deemed Consent is a cause of high SLG's.*"²⁸⁵
- 4.126 The report made a series of recommendations aimed at reducing the mean time taken to provision Ethernet services, and at reducing SLG payments. The recommendations included, in the short term, establishing a "*containment team*" to "*analyse orders based on triggers likely to lead to CDD failure and re-prioritise the work-stack on this basis.*"
- 4.127 Shortly after the [REDACTED]Consultant[REDACTED] report, BT took action to increase the use of Deemed Consent and to use it as a mechanism for reducing BT's SLG liabilities. For example, on 24 May 2013, [Executive 1] issued a message on the Openreach intranet headed "*Setting CDD and deemed consent*" and subtitled "*Your urgent focus and action is needed on date management*".²⁸⁶ The message continued:

²⁷⁸ [REDACTED]The Consultant report[REDACTED], 26 November 2012, 9960.

²⁷⁹ [REDACTED]The Consultant report[REDACTED], 26 November 2012, page 11, 9960.

²⁸⁰ [REDACTED]The Consultant report[REDACTED], 26 November 2012, page 11, 9960.

²⁸¹ [REDACTED]The Consultant report[REDACTED], 26 November 2012, page 43, 9960.

²⁸² [REDACTED]The Consultant report[REDACTED], 26 November 2012, page 43, 9960.

²⁸³ [REDACTED]The Consultant report[REDACTED], 26 November 2012, page 37, 9960.

²⁸⁴ [REDACTED]The Consultant report[REDACTED], 26 November 2012, page 43, 9960.

²⁸⁵ [REDACTED]The Consultant report[REDACTED], 26 November 2012, page 43, 9960.

²⁸⁶ 240513 Loop Extra Message from [Executive 1], 25 May 2013, 0351.

“With immediate effect we need to make sure that all Ethernet orders are managed consistently and apply all appropriate date management rules. This note is to ask you to make sure that this is done with immediate effect.

“Why is this so important to us?

“...Everyone involved in the process has a responsibility to make sure that orders are date managed when appropriate and the reasons are accurately and clearly recorded.

“We will only date manage where we absolutely need to, and where in line with the terms of the contract, but the number of deemed consents has fallen by around 40% over the last year. We have made a commitment to our customers to reduce the applications of deemed consent, but when we looked more closely at the drop, a lot of these examples should have been managed differently. It’s therefore important that reductions to deemed consent are not made at the price of incorrect application of deemed consent (either within Openreach, or attributable to CPs).

“Part of date managing properly is to communicate with the customer on what is going on with their order and why we are applying deemed consent. There is a great opportunity to improve notifications to the customer and update them via our systems....”

- 4.128 The message emphasises the importance of consistency with the requirements of the CSA in relation to the application of Deemed Consent. It also represents an encouragement to apply Deemed Consent whenever appropriate in order to ensure that *“reductions to deemed consent are not made at the price of incorrect application of deemed consent”*. This message was sent after the [REDACTED]Consultant[REDACTED] report, which found that BT’s provisioning process was *“fundamentally not capable”* of meeting the 30 working day CDD and highlighted the correlation between SLG payments and Deemed Consent applications.²⁸⁷ We note in this regard that [Executive 1] was the sponsor of the project that led to the [REDACTED]Consultant[REDACTED] report.
- 4.129 Other actions taken by BT which followed on from these findings include: the establishment of the Failed Completions Team in January 2013 to apply Deemed Consent retrospectively to open orders to reduce SLG liabilities; the setting up of the SLG Triage Team in April 2013 (overseen by the SLG Weekly Review) to apply Deemed Consent retrospectively to closed orders to mitigate SLG payments; and the Ethernet Recovery Plan 2013. As discussed at paragraphs 4.134 to 4.149 below, the retrospective use of Deemed Consent to mitigate SLG liabilities was a material part of the strategy set out in that plan.

Briefings to job controllers

- 4.130 As we have explained, the briefings to job controllers referred to at paragraphs 4.54 to 4.62 instruct job controllers to apply Deemed Consent retrospectively to open orders. These briefings represent formal communications by senior managers (typically senior operations managers) within the NI business unit to the job control community about how they should carry out their functions. As such, the instructions

²⁸⁷ [REDACTED]The Consultant report[REDACTED], 26 November 2012, page 69, 9960.

in the briefings are evidence that the conduct of applying Deemed Consent retrospectively was considered and deliberate.

Email correspondence from NI senior management

- 4.131 There is evidence to suggest that the drive to reduce SLG payments by the retrospective application of Deemed Consent was a priority for the senior managers involved in the SLG Weekly Reviews. In an email dated 31 July 2013, addressed to a Service Delivery Agent in the NI business unit, a Director from the NI business unit wrote, in relation to reviews of orders for the SLG Weekly Review:

"[name] – apologies for the delay. Good news is lower number this week all round, although still a small number of very expensive ccts [circuits]. I understand last week's RCA [root cause analysis] may have been completed by a variety of people and whilst it highlighted (and in almost all cases confirmed) planning was the root cause it didn't help shine a light on any opportunity to mitigate the current SLG – this was strong and very useful feature of previous weeks [sic] RCA. Now it could be that last week there just weren't any and it "was all out [sic] fault" but can you please make sure whoever is reviewing the ccts below²⁸⁸ is not just looking for where we went wrong and learning but whether there are any opportunities to improve data [sic] management. Would be great if you could get these back to me by cop next Tuesday (6 August)"²⁸⁹

- 4.132 Emails from the same individual, which are cited at paragraph 4.41 above, reveal a similar focus on using "date management" to reduce or avoid SLG payments.²⁹⁰

Ethernet recovery plans and related oversight bodies

- 4.133 In 2013 and 2014 Openreach formulated strategies, referred to as 'Ethernet recovery plans', each with related oversight bodies. Here we explain how each of these plans envisaged using Deemed Consent retrospectively to reduce SLG liabilities. This feature of the strategies and the way they were implemented establishes that the conduct of retrospectively using Deemed Consent was deliberate.

The 2013 Ethernet Recovery Plan

- 4.134 In a slide pack dated 20 June 2013, titled the "SLG Update", [Executive 1] set out an "Ethernet Recovery Plan" which is described as "an integrated programme that will deliver: - Throughput of over [≥] orders a week – Backlog reduction to below 200 orders by the end of July."²⁹¹
- 4.135 According to this slide pack, as at 19 June 2013, there were 828 circuits in backlog past their CDD (creating a £[≥] SLG payment exposure), and 1892 circuits "at risk".²⁹² BT had already spent more than its full year budget for SLG payments at the

²⁸⁸ The email includes a table setting out details of six circuits and showing that all six circuits were completed after their respective CDDs.

²⁸⁹ Email regarding (Openreach In Confidence) Ethernet Legacy Delivery & RCA Report, 6 August 2013, 0153.

²⁹⁰ See email regarding SLG Weekly Review – Chair: [Executive 1], 14 June 2013, 0223; email regarding SLG RCA, 2 October 2013, 0114

²⁹¹ SLG Update, 20 June 2013, Slide 2, 0228.

²⁹² SLG Update, 20 June 2013, Slide 4, 0228.

end of period 2, and the forecast expenditure for the full financial year on SLG payments was over £[>], more than £[>] over budget, but based on the “*current run-rate risk*” this increased to £[>].²⁹³

- 4.136 The slide pack sets out a range of different actions as part of the recovery plan, which include steps to improve provisioning performance, such as increasing planning and job control resource and targeting field resource at the busiest areas.²⁹⁴ However, the slide pack identifies “*Priority # 1*” as to “*Close or “date manage” SLG CCTs to <200 in 5 weeks*”.²⁹⁵ In other words, the objective of the plan was to reduce the number of open circuits in backlog (i.e. accruing SLG payments) to below 200 within five weeks. One of the ways that the plan proposed to achieve this was through ‘date management’, specifically retrospective application of Deemed Consent to open and closed orders, as we show below.
- 4.137 We have identified three actions specified in the recovery plan as closely linked to the achievement of this objective:
- clarifying the rules that can be applied to circuit delays;
 - ensuring that the job control backlog is eliminated; and
 - setting up the SLG Triage Team.²⁹⁶
- 4.138 The first action refers to the 40% year-on-year reduction in Deemed Consent applications and the message from [Executive 1] to job controllers of 23 May 2013 to apply “*all appropriate date management*”.²⁹⁷
- 4.139 The second action – eliminating the job control backlog – proposes to address the backlog through an increase in resource and overtime. The slide also refers to the “*Training package...to reinforce deemed consent and date management rules*” and “*New FTE teams with existing skills dedicated to backlog clearance*”.²⁹⁸ We note that there is evidence that the National Backlog Team began to operate at this time, alongside the Failed Completions Team.²⁹⁹
- 4.140 The third action – establishing the SLG Triage Team - sets out the savings made to date by the team and the action plan to increase the team using offshore staff to “*review top 50 circuits each week ...for Date Management opportunities missed*”.³⁰⁰ This is direct acknowledgment that one of the actions to be implemented as part of the Ethernet Recovery Plan was the retrospective application of Deemed Consent to closed orders in respect of “*[d]ate [m]anagement opportunities missed*”.
- 4.141 The 2013 Ethernet Recovery plan set out a strategy to reduce BT’s SLG liability, including actions to improve its delivery performance such as increasing field resources, and improving the flexibility of planning resource to tackle demand

²⁹³ SLG Update, 20 June 2013, Slide 11, 0228.

²⁹⁴ SLG Update, 20 June 2013, Slides 3, 13 to 15, 0228.

²⁹⁵ SLG Update, 20 June 2013, Slide 4, 0228.

²⁹⁶ SLG Update, 20 June 2013, Action 5, Slide 2, 0228.

²⁹⁷ SLG Update, 20 June 2013, Slide 9, 0228. See also message from [Executive 1] at paragraph 4.127 above.

²⁹⁸ SLG Update, 20 June 2013, Slide 13, 0228.

²⁹⁹ See paragraph 4.82.

³⁰⁰ SLG Update, 20 June 2013, Action 1, Slide 12, 0228.

volatility.³⁰¹ These measures are consistent with the objectives of the SLG Direction, which was put in place to incentivise BT to sustain service performance at an efficient level.³⁰² However, as set out at paragraphs 4.13 to 4.141, the strategy set out in the SLG Update also included using Deemed Consent retrospectively in relation to closed orders and open orders so as to reduce the substantial liabilities faced by BT to make SLG payments.

The KIL calls

4.142 In June and July 2013, daily calls ('KIL calls') were instigated to monitor the achievement of the 2013 Ethernet recovery plan targets.³⁰³ The date of the earliest action recorded in the KIL action log is 24 June 2013,³⁰⁴ which suggests that the KIL calls began a few days after the circulation of the SLG Update slide pack that set out the 2013 Ethernet Recovery Plan.

4.143 The KIL calls monitored the actions undertaken as part of the Ethernet Recovery Plan, including the work of the SLG Triage team. For example, the minutes of the Ethernet KIL call of 29 July 2013³⁰⁵ record that the following update was provided to participants of the call:

"SLG Triage ([[<]])"

"4 Onshore and 5 Offshore resource in place"

"Currently the team are catching up on the backlog of work but will be in a position to review every circuit shortly. Process in place which will see only circuits where a perceived saving is identified passed to JC representative to take final decision, a number have been passed to JC as of today and a saving figure will be reported to the KIL later this week"

"ACTION – report back Triage Saving Figures to the KIL later this week (WC29/07) ([[<]])"³⁰⁶

4.144 Those participating in the KIL calls and those receiving the minutes of the calls therefore knew about the existence of the SLG Triage Team, its purpose, its size and its progress in securing savings in SLG payments.

³⁰¹ SLG Update, 20 June 2013, Slides 3, 15, 20 and 21, 0228.

³⁰² See paragraph 2.19 above

³⁰³ BT provided, and we reviewed, documents evidencing KIL calls between 26 June 2013 (Email regarding Minutes of Ethernet KIL Call 26/06/2013, 26 June 2013, 0518) and 31 July 2013 (Email regarding Ethernet KIL Call Minutes 31/07/2013, 31 July 2013, 0221 and the attached action log: Attachment – KIL Actions and KIL Actions closed log, 31 July 2013, 0222, with further version at 0220). Other documents evidencing KIL calls include: 0106; 0122 to 0127; 0192 to 0198; 0200 to 0202; 0204 to 0205; 0207; 0209 to 0211; 0213; 0215 to 0218, 0510 to 0515; and 0519 to 0526.

³⁰⁴ Attachment KIL Actions and KIL actions closed log, 01 July 2013, 0511, circulated under cover of Email Minutes of Ethernet Recovery KIL Call 01/07/2013, 01 July 2013, 0510.

³⁰⁵ Email regarding Minutes of Ethernet KIL Call 29/07/2013, 30 July 2013, 0216.

³⁰⁶ Further examples of the KIL calls monitoring the SLG Triage Team are: Email regarding Minutes of the Ethernet KIL Call 11/07/2013, 12 July 2013, 0192; Email regarding Ethernet Recovery KIL Call minutes 15/07/2013, 16 July 2013, 0122; Attachment – Openreach Ethernet Recovery Programme Dashboard, 25 July, 2013, page 7, 0199.

- 4.145 In addition, the KIL calls discussed and agreed other actions relating to date management and the retrospective application of Deemed Consent. For example, the log of closed actions from the KIL action log dated 31 July 2013³⁰⁷ includes the following action:

“Feed back to the KIL output/results from early work by this specialist team on date managing backlog and date setting against potential defaults (date raised 25 June 2013).”

- 4.146 This action is marked as closed, with the comment:

“Of the 204 circuits under review, 129 have been date managed, 19 are expected to be date managed with a further 56 introduced back into the process”.³⁰⁸

- 4.147 Additionally, the same action log refers to “date managing” circuits associated with project [X].³⁰⁹ The action is recorded as: “Review the circuits listed in backlog and associated to Projects and identify the opportunities to date manage/resolve”. The action is marked “closed”, with the comment: “Review of [X] identified a large volume of circuits could be date managed – review required by JC”.

- 4.148 There is evidence that at this point in time, project [X] had been completed.³¹⁰ Accordingly the references to “date managing” must mean the retrospective application of Deemed Consent in respect of completed orders, so as to minimise the SLG payment liability.

The 2014 Ethernet Recovery Plan

- 4.149 A second ‘recovery plan’ for the delivery of Ethernet services was put in place in March 2014, with the goal of reducing the backlog of orders past their CDD to below 200 and increasing the percentage of orders which were delivered by their CDD and reducing SLG payments from £[X] to £[X] per week.³¹¹ The information presented as part of this plan includes a “problem statement” that “unacceptable” volumes of Ethernet orders were beyond CDD and incurring “high SLG payments”.³¹²
- 4.150 Key elements of the 2014 recovery plan echoed measures taken in the Ethernet Recovery Plan 2013, namely: a target to reduce the backlog of orders and a daily call to track progress – with a dedicated team known as the ‘War Room’. We recognise that aspects of the plan involved legitimate initiatives to reduce the backlog in addition to the use of retrospective Deemed Consent, including making improvements in job control and planning and field teams.

³⁰⁷ Attachment – KIL Actions and KIL Actions Closed log, 31 July 2013, 0222.

³⁰⁸ Other examples include: Email Ethernet KIL Call Meeting Minutes 05/07/13, 5 July 2013 (at 17:54), 0519; Attachment – KIL Actions and KIL Actions Closed log, 31 July 2013, 0222.

³⁰⁹ We understand “project” in this context to mean an order placed by a CP with Openreach for the provisioning of a significant number of related circuits.

³¹⁰ See SLG Update, 20 June 2016, slide 3, 0228.

³¹¹ NI Executive Briefings, March, April, May and June 2014, 0269, 0256, 0272 and 0266; Ethernet Steering Group slides, March, April and May 2014, 9955, 9954 and 9953; NI SITREP Review, 27 June 2014, 9983.

³¹² Network Investment Exec Briefing slides, [Executive 1], April 2014, slide 7, 0256.

4.151 BT has told us that it set up the War Room in February 2014, disbanding it in September 2014.³¹³ It said the War Room was initially a series of daily calls in a virtual team before moving to a physical meeting room.³¹⁴ BT explained that the purpose of the War Room was:

*“to identify reasons for service failure across the UK. The root cause analysis enabled recovery of service failure. The calls were used to drive through any issues and to discuss failures in processes. The War Room coordinated the jeopardy and backlog teams to determine their actions arising in respect of specified circuits.”*³¹⁵

4.152 There is evidence of daily calls involving the War Room in March and April 2014 in relation to the backlog.³¹⁶ In our view, this demonstrates the importance that Openreach attached to achieving the backlog target and the dedication of resource that it gave to it.

4.153 There is also evidence that the War Room worked with the Validation Team, passing over to the Validation Team orders that had failed their CDD, disseminating feedback on the reasons for failure, and monitoring the Validation Team’s weekly targets.³¹⁷ As set out above, the Validation Team was actively involved in the conduct of retrospectively applying Deemed Consent to reduce SLG payments in open orders. We therefore consider that the War Room had oversight of this conduct.

4.154 Network Investment Executive Briefings in August and September 2014 reported that the actions taken by the War Room to reduce the backlog were proving effective:

- in August 2014: *“Ethernet completions are now averaging ~ 850 per week. The physical “War Room” at Baynard House this has delivered improvement to target on both On-time delivery and backlog. (95.25% for latest week –back above target). Backlog -SLGs have improved, and backlog is below 200, however CDD movement is still having an impact on customer satisfaction.”*³¹⁸
- in September 2014: *“The “War Room” remains in place and the improvements to on-time delivery and backlog reduction have been maintained, with a step change evident in ... SLG payments.”*³¹⁹

4.155 The 2014 Ethernet Recovery Plan ran until November 2014, when it was reported that as a result of the measures taken while it was in place “SLG payments continue

³¹³ BT’s response to Question 1 (part B) of the 4th Notice, 7 April 2016, page 10, 0434.

³¹⁴ Job Control Structure Org Chart, 0410.

³¹⁵ BT’s response to Question 1 (part D) of the 4th Notice, 7 April 2016, page 16, 0434. The reference to the “backlog teams” may be a reference to the National Backlog Team which operated concurrently with the War Room – see the chronology at Annex 3.

³¹⁶ See, for example, email from [Senior Manager 10] dated 3 March 2014 at 10.00, email from [Senior Manager 13] dated 3 April 2014 at 14.16, both contained in Email regarding OUTPUT: Job Control – Backlog Call 3rd April, 3 April 2014, 0085; JC Exceptional Planning Escalation Process, date unknown, 0073, circulated under cover of Meeting request regarding Job Control to Planning Escalation – Interim Process Briefing, 23 June 2014, 0072.

³¹⁷ Email regarding Order Validation Team/WTD Performance and Weekly Target, 3 July 2014, 0059; DATE MANAGEMENT: Myths and Facts, 29 July 2014, 0045.

³¹⁸ NI Executive Briefing slides, [Executive 1], August 2014, slide 8, 0260.

³¹⁹ 009 Network Investment Exec Briefing Sep14, 01 September 2014, 0281.

at their lowest for 2 years” and the delivery of orders to their CDD “is consistently > 95%”.³²⁰

The Ethernet Steering Group

4.156 The period in 2014 when the Ethernet Recovery Plan was in place coincided with the establishment of an oversight body, the Ethernet Steering Group, which was set up in March 2014. It existed until July 2014. Slide packs presented to the Ethernet Steering Group³²¹ show that the group was provided with data about the backlog, SLG liabilities and other data about Openreach’s Ethernet delivery performance, including the work of the SLG Triage Team. For example, in the slide pack for June 2014, the slide headed “Key actions underway to tackle SLGs” records: “Triage team picking up £[redacted] per week savings”.³²² The action recorded against this entry is “Deliver recruitment plan and expand on triage team”. We consider that these entries relate to the SLG Triage Team and its activities.

Significance of the Ethernet Recovery Plans and oversight bodies

4.157 The evidence set out above in relation to the 2013 and 2014 Ethernet Recovery Plans, the KIL calls and the Ethernet Steering Group reveals that BT used the retrospective application of Deemed Consent as a tool in its strategy to mitigate its SLG liabilities and that it did so deliberately. Furthermore, the evidence shows that it dedicated a significant amount of time and resource to the implementation and achievement of its targets. The teams and groups that were involved in applying Deemed Consent retrospectively were not free agents or operating independently. Rather, their activities amounted to deliberate conduct reflecting BT’s strategy for reducing the level of its SLG payments.

Findings on the deliberate nature of the conduct

4.158 On the basis of the evidence set out at paragraphs 4.120 to 4.157, we have found that BT acted deliberately in using Deemed Consent retrospectively to reduce its SLG liability on open and closed orders.³²³

4.159 While the evidence we have referred to is sufficient to establish that BT acted deliberately, there is also evidence that the Openreach Executive were aware of the strategy and its implementation. We set this evidence out in the following paragraphs.

Involvement of Openreach Executive in overseeing the retrospective use of Deemed Consent

4.160 In the following paragraphs, we discuss the role of Openreach Executive members in relation to; the [redacted] Consultant[redacted] report; the dedicated teams which were engaged in the conduct of applying Deemed Consent retrospectively; and in development and

³²⁰ 007 Network Investment Exec Briefing Nov14, 1 November 2014, slide 3, 0275.

³²¹ Presentation slides used in the Ethernet Steering Group March 2014, April 2014, May 2014, June 2014 and July 2014 (9955, 9954, 9953, 9952, 9951).

³²² Ethernet Steering Group Meeting 18.06.14, 18 June 2014, slide 26, 9952.

³²³ For the avoidance of doubt, the evidence we have referred to does not show that BT knowingly breached the Relevant Regulatory Obligations in devising and carrying out its strategy of applying Deemed Consent retrospectively.

oversight of the Ethernet Recovery Plans in 2013 and 2014. The evidence we discuss in this regard shows that members of the Openreach Executive:

- were aware of the strategy of applying Deemed Consent retrospectively in order to minimise BT's SLG liabilities, and of its implementation;
- were directly involved in devising the strategy and its implementation; and
- exercised oversight of implementation.

4.161 Taking this evidence in the round, and having regard to the Openreach Executive's responsibility for Openreach's performance and strategic direction at the relevant time, we consider that the documents show that the Openreach Executive were aware of the strategy over a period of time.

[X]Consultant[X]report

4.162 As noted at paragraphs 4.120 and 4.122 to 4.129 above, the actions that we have identified involving the use of Deemed Consent retrospectively to reduce BT's SLG liabilities followed shortly after the findings in the November 2012 [X]Consultant[X] report that the Ethernet provisioning process was not capable of meeting CDD and that there was a strong correlation between Deemed Consent and the cost of SLG payments.

4.163 [Executive 1] was the project sponsor for the review that led to the [X]Consultant[X] report and received a copy of the report when it was produced.³²⁴ We note that [Executive 1] was also closely linked to three of the actions that we have identified in paragraphs 4.127 to 4.129 as potentially influenced by the findings, namely the Loop Extra Message of 24 May 2013,³²⁵ the establishment of the SLG Triage Team, under the auspices of the SLG Weekly Review,³²⁶ and the Ethernet Recovery Plan 2013.³²⁷

4.164 Two other members of the Openreach Executive were involved in the governance for the project.³²⁸ When the final report was produced, it was provided to a number of the Openreach Executive members in addition to [Executive 1], [Executive 3] and [Executive 2].³²⁹ We note that the [X]Consultant[X] report does not mention the retrospective application of Deemed Consent.

Dedicated teams

4.165 We have outlined at paragraphs 4.30 to 4.45 that the SLG Weekly Review had oversight of the conduct of retrospectively applying Deemed Consent to closed orders. The SLG Weekly Reviews were set up and conducted by [Executive 1]. As explained at paragraphs 4.35 to 4.49, there is evidence that the SLG Triage Team was set up as a result of actions taken as part of the SLG Weekly Review.

³²⁴ [X]The Consultant report[X], 26 November 2012, page 69, 9960; BT Response to the 8th information request, 17 October 2016, page 14, 0596.

³²⁵ See paragraph 4.127 above.

³²⁶ See paragraph 4.30 to 4.35 above.

³²⁷ See paragraph 4.134 above.

³²⁸ Specifically, [Executive 5] and [Executive 6] [X]The Consultant report[X], 26 November 2012, page 69, 9960.

³²⁹ [X]The Consultant report[X], 26 November 2012, page 69, 9960; BT Response to the 8th information request, 17 October 2016, page 14, 0596.

- 4.166 There is evidence that [Executive 2] received at least one of the slide packs prepared for the weekly calls (see paragraph 4.30 and footnote 194).³³⁰
- 4.167 There is evidence that members of the Openreach Executive knew about the work of the SLG Triage Team – through minutes of the Ethernet KIL calls that were set up to monitor the 2013 Ethernet Recovery Plan targets. For example, the minutes of the Ethernet KIL call of 29 July 2013 record that the following update was provided to participants of the call:

“SLG Triage ([redacted])

“4 Onshore and 5 Offshore resource in place

“Currently the team are catching up on the backlog of work but will be in a position to review every circuit shortly. Process in place which will see only circuits where a perceived saving is identified passed to JC representative to take final decision, a number have been passed to JC as of today and a saving figure will be reported to the KIL later this week

“ACTION – report back Triage Saving Figures to the KIL later this week (WC29/07) ([redacted])”³³¹

- 4.168 Executive members who received this email setting out the existence and work of the SLG Triage Team were [Executive 3], [Executive 2], [Executive 4] and [Executive 1]³³²

Ethernet Recovery Plans in 2013 and 2014 and other oversight bodies

Ethernet Recovery Plan 2013

- 4.169 The Ethernet Recovery Plan was formulated in three documents, two of which were produced by [Executive 1]:
- 4.169.1 a paper headed: “Network Investment - Top 10 Issues, which was presented to the Executive as a whole in May 2013;³³³
- 4.169.2 a second document, headed “Service Management – Top 10 Issues”, which was also presented to the Openreach Executive in May 2013;³³⁴ and

³³⁰ Email re SLG slides for 5.30pm call, 6 September 2013, 16:49, 0108.

³³¹ Email regarding Minutes of Ethernet KIL Call 29/07/2013, 30 July 2013, 0216.

³³² These members of the Executive also received the SLG Update which makes reference to the SLG Triage Team and its activities.

³³³ BT's response to Question 7 of the 8th Notice, 17 October 2016, page 12, 0596. This confirms that this document dates from April 2013 and was presented at the May 2013 Openreach Executive Board Meeting. The redacted minutes of the Openreach Executive Board Meeting on 23 May 2013 list 'Network Investment' as an agenda item (see Executive Board Meeting agenda and minutes, 23 May 2013, 0560). [Executive 1] was down to speak to this and our understanding is that they presented the “Network Investment – Top 10 Issues” paper.

³³⁴ Service Management – Top 10 Issues, April 2013, 0416. BT's response to Question 7 of the 8th Notice, confirming this document dates from April 2013 and was presented at the 23 May 2013 Openreach Executive Board Meeting. See BT's response to Question 7 of the 8th Notice, 17 October 2016, page 12, 0596. This appears to have been presented by [Executive 7].

4.169.3 the SLG Update slide pack, dated 20 June 2013³³⁵ which was provided to [Executive 3], [Executive 2] and [Executive 4] and discussed with [Executive 8].³³⁶

4.170 The content of each of these documents relates to BT's SLG liabilities and the actions proposed to reduce these. As discussed below, each of documents anticipates the retrospective use of Deemed Consent as a means of reducing this exposure. They provide evidence that the Openreach Executive was made aware that 'date management' was a tool for reducing SLG liabilities and, to this end, steps were to be taken to seek to apply Deemed Consent retrospectively to orders that missed their CDD.

"Network Investment - Top 10 Issues" paper

4.171 In this paper, the level of SLG payments, which the SLG Weekly Reviews tracked, were drawn to the Executive's attention:

"The most significant service impact in the quarter is Ethernet, which I give details of the recovery plan below. SLG's on Ethernet are also financially significant, at c£[redacted]/week ([redacted]% due to ADSL connect, [redacted]% due to planning). We are looking at all the activities we can now do to protect margin. This includes: [redacted] There will be a separate plan to ensure correct handling of Ethernet SLG's. [redacted] [...]"³³⁷

4.172 Under the heading, "ETHERNET – Red flag", the paper says "CDD is currently [redacted]%" (we assume that this means that [redacted]% of orders were delivered to their CDD). The paper lists actions to address this:

"6. SLG's are around £[redacted]/week. For the last 5 weeks there has been an activity to review SLG's. This has identified that much more action needs to be taken around this, with the need for

"A. 100% of all SLG failures to be reviewed.

"B. Reasons for date management to be re-briefed to the job control community.

£[redacted] has been saved to date and there is the potential to save more. Note that date management has dropped from 500/week to 300/week since January."³³⁸

4.173 We note the following points from this extract. First, it is our understanding that the reference to "activity to review SLG's" in "the last 5 weeks" means the circuit reviews conducted for the SLG Weekly Reviews. Second, the proposal put to the Openreach Executive was to extend these reviews to all "SLG failures". We take this to mean all Ethernet orders that failed to meet their CDD, so incurring SLG liabilities for BT. Third, the actions proposed to reduce BT's SLG liabilities were focussed on "date management" (which, as discussed at paragraphs 4.15-4.24, can in some instances

³³⁵ SLG update, 20 June 2013, 0228.

³³⁶ SLG update, 20 June 2013, 0228.

³³⁷ Network Investment – Top 10 Issues, April 2013, 0412.

³³⁸ Network Investment – Top 10 Issues, April 2013, 0412

be a reference to retrospective use of Deemed Consent) and the savings that this can secure. In addition to the proposal to re-brief the reasons for date management to job controllers, a link is drawn between the scope to make more SLG savings and the observation that the level of “*date management has dropped*”.³³⁹

“Service Management – Top 10 Issues”

- 4.174 This paper made further reference to the issues surrounding the provision of Ethernet services. Under the sub-heading “*Ethernet Service Recovery*”, the following actions were identified:

*“We are taking a number of actions in Job Control: 1. Work with NI on RCA and ensure all failures down to Job Control in the backlog are actioned [...] 5. Deemed Consent rules checked by managers on all failed CDDs to minimise SLG exposure”*³⁴⁰

- 4.175 The end of this quote makes an explicit reference to the application of Deemed Consent to orders that have failed to meet their CDD in order to reduce SLG liabilities.

SLG Update

- 4.176 The contents of this slide pack are described at paragraphs 4.134 – 4.141 above. We consider that the slide pack describes a deliberate strategy that includes, among legitimate activities to improve process and reduce backlog (e.g. assigning more resource to job planning), applying Deemed Consent retrospectively to open and closed orders in order to reduce BT’s SLG liabilities.

- 4.177 The slide pack setting out the 2013 Ethernet Recovery Plan was provided to [Executive 4] and to [Executive 2] on 20 June 2013.³⁴¹ [Executive 1], [Executive 2] and [Executive 4] also attended a meeting on 20 June 2013 at which the slide pack was discussed with [Executive 8]. A copy of the slide pack was sent by [Executive 1] after the meeting to [Executive 3].³⁴² This email shows that [Executive 8] had reviewed the plan and that it was revised in line with comments they had provided.

- 4.178 On 25 June 2013, [Executive 3] signed off on an internal communication to job controllers and field staff working on Ethernet orders, announcing an incentive to reach the plan’s targets, including the reduction in the number of Ethernet circuits incurring SLG liabilities to 200 a week.³⁴³

“Hi everyone, I am sure you are all aware of the great focus we are placing on reducing both Ethernet and Copper tails and reducing our expenditure on SLG’s which is a financial drain on our business.

“I want to tell you about an incentive I will be launching to help reward great work on driving down these tails

³³⁹ This focus on the reduction in the number of Deemed Consent applications is consistent with the finding in the [X]Consultant[X] report that there was a strong correlation between Deemed Consent and SLG costs and that where Deemed Consent applications were below the average frequency, SLG payments are higher than where applications are above average frequency.

³⁴⁰ Service Management – Top 10 Issues, April 2013, 0416.

³⁴¹ Email regarding SLG recovery plan, 20th June, 20 June 2013, 0227.

³⁴² Email – [Executive 8] Presentation Openreach Ethernet SLGs, 20 June 2013, 0529.

³⁴³ Email from [Executive 3], RE: Ethernet Incentive, 25 June 2013, 20:05, 0517.

“This what we want to achieve

“We want to focus on increasing our Ethernet throughput every week up to [X] completions.

“We want to reduce the number of Ethernet circuits in backlog where we are paying SLG’s down by 200 a week...

“This how you can help me and win a prize...

“If you work in the field and work on Ethernet and books time to [X] and as a team we hit [X] completions a week you will be entered into the weekly prize draw. If you are recognised by your manager or colleague, or you recognise a colleague as doing great work and going the extra distance to help deliver the Ethernet number, then the great work can win an additional entry into the weekly prize draw.

“If you work in the controls and work on Ethernet and as a team we hit our backlog reduction target of 200 a week you will be entered into the weekly prize draw.

“If you are recognised by your manager or colleague, or you recognise a colleague as doing great work and going the extra distance to help deliver the Ethernet number, then the great work can win an additional entry into the weekly prize draw...

“What you can win

“We have 6 iPad Mini’s as prizes and every week for the next 8 weeks. Every week we could have 6 luck winners.”³⁴⁴

4.179 Given that this sign-off happened five days after [Executive 3] had reviewed the 2013 Ethernet Recovery Plan set out in the “SLG Update” slide pack,³⁴⁵ which stated that “Priority #1” in relation to backlog circuits was to “[c]lose or ‘date manage’ SLG CCTs [circuits] to <200 in 5 weeks”,³⁴⁶ we consider that [Executive 3] intended the incentive scheme to encourage and reward teams for retrospectively applying Deemed Consent to orders, to get them out of the backlog.

4.180 We have outlined that one of the key goals of the 2013 Ethernet Recovery Plan was to reduce the Ethernet backlog. On 27 June 2013, at the request of [Executive 2], all the members of the Openreach Executive were sent an email setting out a target glide path for backlog reduction over time in order to achieve that goal.³⁴⁷ This showed that on 27 June 2013, the number of orders in backlog (i.e. which had missed their CDD) was over 800. The ‘glide path’ illustrated the level of backlog reduction week on week that would need to be achieved in order to reduce SLG payments to an “outlook” (budgeted forecast) level of £[X] per week or less by September 2013. This level of SLG payments would equate to a backlog of [X] circuits. From this document, we understand the Openreach Executive to have had oversight of the reduction of the backlog of open circuits that failed their CDD. As set

³⁴⁴ Email from [Senior Manager 14], RE: Ethernet Incentive, 25 June 2013, 19:11, 0517.

³⁴⁵ SLG Update, 20 June 2013, 0228.

³⁴⁶ SLG Update, 20 June 2013, Slide 4, 0228.

³⁴⁷ Email from [Senior Manager 6], FW: SLG Glidepath, 27 June 2013, 13:09, 0539.

out above, the strategy for reducing this backlog included the retrospective use of Deemed Consent.

- 4.181 A finance presentation to the Openreach Executive in August 2013³⁴⁸ provides further evidence of the Executive's oversight of the implementation of the Ethernet Recovery Plan 2013, specifically the application of Deemed Consent retrospectively to open circuits that had passed their CDDs.
- 4.182 Slide 27 contains a table prepared at the beginning of August 2013, coinciding with the target date for the delivery of the Ethernet Recovery Plan 2013. This sets out actual and forecast weekly figures for SLG payment liabilities, backlog and number of "circuits failing" (we believe this means failing CDD) for the period July to September 2013.
- 4.183 The message at the top of the table is that the forecast for Ethernet SLG liabilities at the end of September 2013 was £[redacted] higher than the "outlook" (which we take to mean the budgeted forecast). The headline goes on to say that "*Continued date mgt of older circuits in backlog is still critical. We can drive to recover the £[redacted] by go [sic] further into back log, c100 by end of August.*"³⁴⁹ In respect of the period from 1 July 2013 to 5 August 2013 (the period during which the Ethernet Recovery Plan 2013 was running), the slide states that at the end of that period there was a variance in the "outlook" for the year to date of £[redacted]m, and comments "*Avg backlog Qtr to date indicates c208 more circuits hit backlog than fcst. Worth £[redacted]m, but minimised to £[redacted] due to date mgt of older circuits*".³⁵⁰ We understand that during the period 1 July 2013 to 5 August 2013 BT applied Deemed Consent retrospectively to circuits that had already passed their CDDs with the aim of reducing the amount of SLG payments that would otherwise have been payable on such circuits.
- 4.184 This presentation provides evidence that the Openreach Executive were updated on progress in relation to the backlog reduction target set as part of the Ethernet Recovery Plan. It also shows that the Openreach Executive were provided with information that this reduction was being achieved through the "date mgt" of circuits which had passed their CDD.³⁵¹ As explained at paragraph 4.6, for the purposes of this investigation we consider that the application of Deemed Consent in these circumstances to extend the CDD will be retrospective save that exceptional circumstances may justify notification the day after the CDD.

KIL calls

- 4.185 The KIL call minutes and action log, and emails circulating them, show that [Executive 1] participated in several of the daily calls, [Executive 3] participated in at least one,³⁵² and that the minutes of the calls were circulated to these two, [Executive 4], and to [Executive 2].³⁵³

³⁴⁸ Openreach P4 – 2013/14 Exec Finance Presentation August 2013, 0415.

³⁴⁹ Openreach P4 – 2013/14 Exec Finance Presentation August 2013, 0415.

³⁵⁰ Openreach P4 – 2013/14 Exec Finance Presentation August 2013, 0415.

³⁵¹ Openreach P4 – 2013/14 Exec Finance Presentation August 2013, 0415.

³⁵² Based on the selection of minutes for KIL calls that we have obtained. See KIL Action log email from [Senior Manager 8], 24 July 2013, 0196.

³⁵³ See for example KIL Action log email from [Senior Manager 8], 15 July 2013 at 09:31 (0122); KIL Action Log, 23 July 2013 at 18:06 (0194), Minutes of Ethernet KIL Call 24/07/2013, 24 July 2013 at 23:11 (0196) and 26 July 2013 at 01:18 (0201).

- 4.186 The topics discussed on the KIL calls included the work of the SLG Triage team and the savings that they were identifying (see paragraph 4.136 to 4.148 above) and the “*date management*” of circuits to remove them from the backlog.³⁵⁴
- 4.187 In addition, the deliberate conduct to use Deemed Consent retrospectively as a key part of delivery of the Ethernet Recovery Plan 2013 was clearly set out in an e-mail exchange between [Executive 1] and [Executive 3].³⁵⁵ [Executive 3] emailed [Executive 1] to ask for “*thoughts*” on the “*Bad news on weekly completions*.”³⁵⁶ [Executive 1] replied that [Executive 1] understood that all work that was ready to be completed had been completed, and: “*If that is the case we must relook at fluidity, especially on the backlog circuits and ensure we are applying deemed consent to everything we can’t progress*.”³⁵⁷ [Executive 3] replied: “*Worrying. Thanks for the update*.”³⁵⁸ We read this exchange to relate to open circuits that have passed their CDD and the response of [Executive 1] meaning that Deemed Consent was to be applied to these circuits retrospectively.
- 4.188 An email circulating KIL call minutes sent on 05 July 2013 notes that the number of completions (i.e. completed circuits) has increased to 616 from 540 the previous week, that the backlog (i.e. the number of circuits in backlog) has stayed broadly static at 791 compared to 795 the previous week, and, under the heading “*SLG highlights*,” that:
- “[t]he value of SLGs in the week ended 30th June (£[REDACTED]) has decreased slightly from the previous week (£[REDACTED]) and the volumes decreased from 202 to 167 which is a move in the right direction. We reviewed 15 circuits this week with a value of £[REDACTED] which was 41% of the total SLG attracting circuits closed in the week. We identified a saving of £[REDACTED] on three circuits from an additional review of the date management. This brings the savings made from the top 10% reviews to £[REDACTED] since the start of the financial year.”*³⁵⁹
- 4.189 [Executive 3] comments: “*Thanks for all your efforts. Good news on throughput, seriously worrying on backlog and SLGs*.”³⁶⁰ This shows [Executive 3] was monitoring the KIL call meeting outputs, and the extent to which the 2013 Ethernet Recovery Plan was securing a reduction in the number of orders missing their CDD and the level of SLG payments, including the amount of savings being secured by the application of Deemed Consent.
- 4.190 An email circulating KIL call minutes sent on 23 July 2013 (at 06:50) suggests that the Openreach Executive as a whole considered progress made under the 2013 Ethernet Recovery Plan on or around 22 July 2013:

“I circulate minutes of the Ethernet call [the Ethernet KIL call minutes of 22 July 2013 plus accompanying action log]. This followed a

³⁵⁴ See, for example, the performance update in the minutes for the Ethernet KIL call of 29 July 2013, email regarding KIL Dashboard and Agenda 30/07/2013, 30 July 2013, 0213.

³⁵⁵ Email Minutes of Ethernet Recovery KIL Call 01/07/13, 0521.

³⁵⁶ Email Minutes of Ethernet Recovery KIL Call 01/07/13, 1 July 2013 (at 22:11), 0521.

³⁵⁷ Email Minutes of Ethernet Recovery KIL Call 01/07/13, 2 July 2013 (at 06:03), 0521.

³⁵⁸ Email Minutes of Ethernet Recovery KIL Call 01/07/13, 2 July 2013 (at 07:34), 0521.

³⁵⁹ Email Ethernet KIL Call Meeting Minutes 05/07/2013, 5 July 2013 (at 17:54), 0519.

³⁶⁰ Email Ethernet KIL Call Meeting Minutes 05/07/2013, 5 July 2013 (at 20:17), 0519.

review with the exec which is not covered in these minutes. I think it is important to understand both.

*"The exec session was difficult and they can see the programme has slipped a week. There is also great concern that as we are reducing the backlog more slowly than [sic] hoped, our throughput has dropped which leads to revenue delays...."*³⁶¹

- 4.191 The minutes of the KIL calls also indicate that the Openreach Executive considered a proposal to retrospectively apply Deemed Consent because of delays caused by infrastructure build in respect of open orders which had missed their CDD.³⁶²

- 4.192 This action appears related to an item recorded in the KIL call minutes for 18/07/13:³⁶³

"The Finance team have analysed potential date management rule sets for the backlog. There are 75 ccts (13%) in the backlog that have been defaulted and have the infrastructure code attached – we could date manage according to the same process as for new and in-flight. Need to confirm whether this option should still be considered following discussions at today's Exec."

- 4.193 The same chain of e-mails also contains e-mails from [Executive 3] in response to this minute. In the first e-mail, [Executive 3] asks whether the circuits referred to in the minute have passed their CCD³⁶⁴ yet.³⁶⁵ [Executive 1] confirms that all the circuits have passed their CCD, and that "[Senior Manager 15] advised that date managing these will cause a strong customer reaction".³⁶⁶ [Executive 1] goes on to say: "I think we need to value the SLG and see what it is worth first. In the current climate not a decision to take lightly".³⁶⁷ [Executive 3] then replies: "We agreed at the exec not to do anything past CCD",³⁶⁸ to which [Executive 1] agrees, confirming: "We agreed that we would bring any circuit like this back to the exec.... before we did anything."³⁶⁹
- 4.194 Our understanding of these documents is that the Openreach Executive rejected infrastructure delay as a justification for retrospective use of Deemed Consent in open circuits that had passed their CDD.³⁷⁰ However, the evidence is also consistent with the Executive understanding the significance of applying Deemed Consent to an order after it had passed its CDD and exercising oversight in relation to the circumstances in which this was done. The evidence therefore confirms that the

³⁶¹ Email regarding Ethernet KIL Call minutes 22/07/2013, 23 July 2013 (at 06:50), 0124.

³⁶² Ethernet KIL Call Minutes 29/7/2013, 29 July 2013, 0210.

³⁶³ Email regarding Ethernet Recovery KIL Call minutes 18/07/2013, 18 July 2013 (at 21:43), 0526.

³⁶⁴ CCD is the equivalent of the CDD for Ethernet orders made on the EMP platform and falling under Schedule 4C(ii) of the CSA.

³⁶⁵ Email regarding Ethernet Recovery KIL Call minutes 18/07/2013, 18 July 2013 (at 22:09), 0526.

³⁶⁶ Email regarding Ethernet Recovery KIL Call minutes 18/07/2013, 18 July 2013 (at 22:13), 0526.

³⁶⁷ Email regarding Ethernet Recovery KIL Call minutes 18/07/2013, 18 July 2013 (at 22:13), 0526.

³⁶⁸ Email regarding Ethernet Recovery KIL Call minutes 18/07/2013, 18 July 2013 (at 22:14), 0526.

³⁶⁹ Email regarding Ethernet Recovery KIL Call minutes 18/07/2013, 18 July 2013 (at 22:19), 0526.

³⁷⁰ The action log for the KIL call of 29 July 2013 includes the following entry: "Look whether we retrospectively apply infrastructure code and date manage." This action is closed with an entry that records: "Revisiting the CP is a difficult contractual position and hard to manage back to the customer.... This will not take place – instruction from the Exec." KIL Actions Closed, 0209.

Executive were aware of, and exercised oversight in relation to the use of retrospective Deemed Consent as a means of reducing SLG exposure.

Ethernet Recovery Plan 2014

- 4.195 As set out above we believe that the evidence shows that this plan included retrospective use of Deemed Consent in open and closed orders. The Openreach Executive were briefed on the plan by [Executive 7] in March 2014.³⁷¹ Workstream 2 of the plan outlined for the Openreach Executive, the “*On-time Delivery & Reduced Lead-Times*” workstream, included in Q1 “*War Room removes backlog*” and in Q2 “*Job Control & Jeopardy Management improvements reduce CDD fails*.”³⁷² The success metrics for this workstream included “*Improve O/T [on time] CDD from 79% to 95%*.”³⁷³ Then in April 2014, the information presented to the Openreach Executive included a “*problem statement*” that “*unacceptable*” volumes of Ethernet orders were beyond CDD and incurring “*high SLG payments*”.³⁷⁴
- 4.196 The Network Investment Executive Briefing to the Openreach Executive in May 2014 identifies the issue as follows: “*Weekly SLG spend has remained at elevated levels noting the trailing 4 week average has been just under £[>] per week. This has been attributed to a plateau in the backlog with continued efforts to clear and realise outstanding SLGs.*”³⁷⁵ It goes on to set out the solution in the following terms:

*“Comprehensive recovery plan built to reduce backlog to below 200 orders and our On Time Delivery to above 95% by 31st July.”*³⁷⁶

- 4.197 This suggests that the Openreach Executive was sighted on the aims of the 2014 Ethernet Recovery Plan.

Findings on role of the Openreach Executive

- 4.198 The Openreach Executive is responsible for Openreach’s performance and strategic direction. The evidence is that it was made aware of its unsatisfactory performance in the delivery of Ethernet services and high SLG exposure during the Original Relevant Period and that the creation of the strategy to address this was drawn up by one of its members, [Executive 1].
- 4.199 The strategy to reduce Openreach’s SLG exposure included the retrospective use of Deemed Consent. The evidence shows that individual members of the Openreach Executive (notably [Executive 3], [Executive 2], [Executive 4] and [Executive 1]) were involved in overseeing the implementation of this strategy. The Openreach Executive as a whole were briefed on the “Recovery Plans” and the scope to make savings through date management.
- 4.200 Taking account of this and the evidence of the dedication of significant resources to the retrospective application of Deemed Consent by the establishment of specialist teams and oversight by senior managers, we therefore find that the Openreach

³⁷¹ Openreach Executive Monthly Update – Executive Session on Service, [Executive 7], March 2014, 0258

³⁷² Openreach Executive Monthly Update – Executive Session on Service, [Executive 7], March 2014, slide 11, 0258

³⁷³ Openreach Executive Monthly Update – Executive Session on Service, [Executive 7], March 2014, slide 11, 0258

³⁷⁴ Network Investment Exec Briefing slides, [Executive 1], April 2014, slide 7 0256.

³⁷⁵ Network Investment Executive Briefing slides, [Executive 1], May 2014, slide 4, 0272.

³⁷⁶ Network Investment Executive Briefing slides, [Executive 1], May 2014, slide 4, 0272

Executive were aware of and actively considered the strategy of applying Deemed Consent retrospectively in order to reduce SLG liabilities.

- 4.201 The involvement of the Openreach Executive in the development, implementation and oversight of the strategy of applying Deemed Consent retrospectively in order to reduce BT's SLG liabilities is a relevant factor in our finding that the breaches are particularly serious, although we have seen no evidence that any members of the Openreach Executive knowingly and intentionally sought to breach the Relevant Regulatory Obligations.

The impact of BT's retrospective use of Deemed Consent on CPs

- 4.202 In addition to taking into account our findings that BT's retrospective use of Deemed Consent to minimise SLG payments was deliberate conduct, we also take into account the impact of the conduct on CPs, their end customers and ultimately consumers.
- 4.203 The purpose of BT's SMP obligation to provide Ethernet services in accordance with the terms of the CSA was to give CPs visibility about the terms and conditions on which other providers purchase Ethernet services and enable them to make informed decisions about purchasing the services.³⁷⁷ The requirements of the SLA in the CSA, in line with the SLG Direction, provide the CP with a pre-defined level of performance by BT, giving certainty about the delivery timeframe and the compensation the CP will receive in the event that the contractual timeframe is not met.³⁷⁸ Further, as noted at paragraph 2.48 it is a fundamental aspect of BT's compliance with the timeframes specified in the SLA that the CP concerned is informed of any extensions to the CDD so as to be able to manage the delay in the provision of its own services with its own customer or to challenge the extension.
- 4.204 BT's conduct in applying Deemed Consent retrospectively in a sustained and systematic manner undermined these objectives since it:
- 4.204.1 undermined the contractual requirement to deliver Ethernet services by the CDD of 30 working days or in line with an extension to which the CP's consent had been validly obtained;
 - 4.204.2 was designed to reduce the amount of compensation due to the CP as a result of the late delivery of the Ethernet service;
 - 4.204.3 compromised the ability of the CP to manage delays in the provision of its own services or to challenge extensions to the CDD.
- 4.205 Therefore, as a matter of principle, the conduct harmed CPs purchasing Ethernet services from BT during the Practice 1 Breach Period. Further, we consider that the harms suffered by CPs would also have adversely affected their end-customers and ultimately consumers, including those purchasing broadband services for home or business use.

³⁷⁷ See <https://www.ofcom.org.uk/consultations-and-statements/category-2/business-connectivity-mr> paragraphs 12.339 and 12.349

³⁷⁸ See paragraph 2.19 above.

- 4.206 There is evidence to confirm that there was harm to CPs in practice, both in terms of the financial loss they incurred and the loss of certainty in relation to the delivery of their Ethernet services.
- 4.207 In relation to financial harm, BT has provided evidence that in the period April 2013 to September 2014, the SLG Triage Team saved SLG payments totalling £1,380,791, though BT paid compensation to affected CPs in relation to these savings in May to July 2016.³⁷⁹ The Failed Completions Team was reported as having saved “sizeable SLG payments at the last hour”³⁸⁰ and there is evidence that the Validation Team saved SLG payments totalling at least £761k in its first month of operation.³⁸¹ The savings that it secured are likely to be substantially higher than this, given that it continued to operate for a further five months.³⁸² We consider that the SLG savings made by BT as a result of the totality of its conduct of applying Deemed Consent are likely to correspond closely to the underpayment of SLG payments suffered by CPs as a result of the conduct.³⁸³
- 4.208 There is also evidence of CP concerns which are consistent with the loss of certainty resulting from BT’s conduct of applying Deemed Consent retrospectively. Eight customers were interviewed for the [redacted] Consultant [redacted] report in November 2012 and their observations included: criticisms about the quality and accuracy of information during the delivery process provided by BT; the complaint that information provided in the event of delay is insufficient and “*requires constant chasing*”; and the observation that “*Deemed Consent is applied inappropriately causing CPs to feel abused by the system*”.³⁸⁴
- 4.209 Further, there is evidence that these concerns were still being voiced in 2014. For example, in May 2014, BT reported [redacted]’s concern about the delivery timetable as follows: “[redacted] *are actually less worried about the CDD performance but more concerned as the late Date Management of orders*”.³⁸⁵
- 4.210 A job control briefing in March 2014 reveals that this concern was widely shared by BT’s customers:

“Date Management

³⁷⁹ Ethernet Provision Review orders - SLG refund payments (excluding interest) xls, 06 June 2016, 0446. See the number of entries that list SLG savings in column N. NB, for orders where SLG savings were made in April and May, the spreadsheet notes these savings as having been made by [Employee 2/Employee 5], or by [Senior Manager 3/Senior Manager 2], in each case “Pre Triage Team”. However, BT told us that the Triage Team was established in April 2013. Accordingly, our understanding that the activities of [Employee 2/Employee 5] and [Senior Manager 3/Senior Manager 2] in saving SLG payments during April and May 2013 is the early work of the SLG Triage Team, before it was more fully staffed.

³⁸⁰ Ethernet Job Control Briefing 036, 22 November 2013, 0031.

³⁸¹ Email regarding Validation, 24 July 2014, 0071.

³⁸² BT’s response to the 4th Notice, page 10, 0434.

³⁸³ We note that the amount of compensation that BT has paid to CPs as a result of the activities of the SLG Triage Team matches the SLG savings secured by the team.

³⁸⁴ [redacted] The Consultant report [redacted], 26 November 2012, page 14, 9960.

³⁸⁵ Ethernet Steering Group Meeting 21.05.14, 21 May 2014, page 15, 9953. See also the NI Exec Briefing, August 2014, page 3, 0260, which reported that “CDD movement is still having an impact on customer satisfaction”.

You're all aware that there's been an extra focus recently on making sure we apply date management at the appropriate time on all orders. In case there's any ambiguity, here's why.

...Our customers and regulators have been putting increasing pressure on Openreach that we need to be more predictable with when we deliver service and advise our customers for any delays as soon as we know. In particular, our customers are not happy if we advise them after CDD about delays that we had known about in advance. We should as standard process amend the date and advise the customer as soon as the delay occurs.”³⁸⁶

- 4.211 We therefore conclude that BT's conduct of applying Deemed Consent retrospectively in order to minimise its SLG payments had a material adverse impact on CPs both in terms of financial harm and in relation to the loss of certainty associated with the conduct. We also consider that these harms would have adversely affected CPs' end-customers and, ultimately, consumers, including those purchasing broadband services for home or business use.

Breach findings

- 4.212 We find that BT engaged in the conduct of retrospectively using Deemed Consent that was sustained and systematic and that breached the Relevant Regulatory Obligations.
- 4.213 We find that BT engaged in this conduct deliberately, that it did so with oversight from the Openreach Executive. The conduct also harmed CPs, their end-customers and ultimately consumers.
- 4.214 We set out below our findings that BT contravened each of the Relevant Regulatory Obligations.

The SLG Direction

- 4.215 The objective of the SLG Direction was to give BT a strong enough incentive to sustain service performance at an efficient level. Where BT failed to meet the required service level in its provision of Ethernet services, the SLG Direction required BT to make compensatory payments directly reconcilable to late provision.³⁸⁷ We said in the Vodafone Dispute Determination that it was not sufficient for BT to amend the CSA to comply with the SLG Direction, it must be implemented in practice.³⁸⁸
- 4.216 Our assessment of the evidence is that BT systematically and frequently used Deemed Consent retrospectively in both open and closed orders from January 2013 to December 2014 for the purpose of reducing its SLG liabilities in respect of those orders. As a result, the ability of CPs affected by the conduct to manage delays in the provision of their own services and to challenge the extensions to their delivery dates was compromised and they failed to receive compensatory payments directly reconcilable to the late provision of their services. These issues would also have adversely affected the CPs' end-customers and ultimately consumers, including those buying broadband services for home or business use.

³⁸⁶ Ethernet Job Control Briefing 46, 13 March 2014, 0038.

³⁸⁷ See paragraph 2.19 above.

³⁸⁸ Vodafone Dispute Determination, paragraph 3.56.

4.217 Therefore, we find that BT failed to give effect to the SLG Direction in practice.

4.218 Further, we have found that:

4.218.1 BT's conduct in applying Deemed Consent retrospectively to reduce SLG liabilities was deliberate, and overseen by the Openreach Executive; and

4.218.2 the conduct adversely affected CPs, their end-customers and ultimately consumers.

4.219 Accordingly, we have found that BT's conduct in using Deemed Consent retrospectively from January 2013 to December 2014³⁸⁹ was a contravention of its obligations under the SLG Direction.

Obligation to provide Ethernet services in accordance with a Reference Offer (SMP Conditions HH5.9/6.9)

4.220 We have found that BT applied Deemed Consent retrospectively in relation to open and closed orders from January 2013 to December 2014.

4.221 Each time that BT failed to provide a notification as soon as reasonably practicable of its intention to apply Deemed Consent in respect of the orders to which this evidence relates, it failed to comply with its obligations under paragraph 2.3 of Schedule 4C(i) and Schedule 4C(ii) to the CSA.

4.222 There is evidence that the use of Deemed Consent in relation to completed orders by the SLG Triage Team resulted in BT underpaying the amount of SLG payments due to CPs in respect of these orders. We find that BT would also have incorrectly calculated the SLG payments due to CPs in respect of other Ethernet orders where BT applied Deemed Consent retrospectively during the provisioning process. In each case where BT failed to pay the correct amount of compensation, it failed to comply with its obligations under paragraphs 3.1 and 4.1 of Schedule 4C(i) and Schedule 4C(ii) to the CSA.

4.223 We find that in respect of each Ethernet order where these failures occurred, BT failed to comply with its obligation to provide Ethernet services in accordance with the terms of the CSA, in breach of its SMP obligations under HH5.9/6.9.

Obligation to provide Ethernet services on fair and reasonable terms (SMP Condition HH1.2/1.2)

4.224 We also consider that BT failed to provide its Ethernet services on fair and reasonable terms in breach of its SMP obligations under HH1.2/1.2. By systematically and frequently applying Deemed Consent retrospectively in order to minimise its SLG liabilities, in breach of its obligations under the CSA, BT undermined the transparency of its published terms and conditions and compromised the ability of CPs to make informed decisions about Ethernet purchases. Further, as set out at paragraph 4.204, the conduct undermined certainty about delivery

³⁸⁹ The end date of our breach finding is based on the date of the document "Urgent – Compliance Brief on eCo Updates for Date Management, 17 December 2014, 0044. This document urged job controllers to ensure that notifications were sent in relation to all applications of Deemed Consent. We also note that December 2014 was the month in which the Validation Team and SLG Weekly Review ceased.

timeframes, thereby compromising the ability of CPs to manage delays in the provision of their own services and/or to challenge extensions to the CDD. The conduct also undermined certainty about the payment of compensation in the event of late delivery. These harms arising from BT's conduct would also have adversely affected the CPs' end-customers, and ultimately consumers, including those buying broadband services for home or business use.

4.225 Accordingly, we find that the conduct of applying Deemed Consent retrospectively contravened BT's SMP obligation to provide Ethernet services on fair and reasonable terms.

4.226 Further, we find that:

4.226.1 BT's conduct in applying Deemed Consent retrospectively to reduce SLG liabilities was deliberate,

4.226.2 the strategy of applying Deemed Consent retrospectively and its implementation was overseen by the Openreach Executive; and

4.226.3 the conduct adversely affected CPs, their end-customers and consumers.

4.227 We therefore find that the conduct pursued by BT from January 2013 to December 2014 was a contravention of the obligation under HH1.2/1.2 to provide Ethernet services on fair and reasonable terms.

Remedial steps taken to date

4.228 On 21 April 2016, BT informed Ofcom³⁹⁰ that it had found evidence of the existence of the SLG Triage Team, that the SLG Triage Team had engaged in the conduct of reviewing closed circuits for circumstances in which it would have been appropriate to apply Deemed Consent, and reducing SLG payments to CPs as if the Deemed Consent had been applied, without informing CPs. BT said it was quantifying the amount owed to CPs and would keep Ofcom informed. On 6 July 2016, BT confirmed³⁹¹ that it had reviewed the activity of the SLG Triage Team and had concluded that it should make £1,206,040 of SLG payments to CPs that had been affected by the work of the SLG Triage Team.³⁹² Over the period 31 May to 1 July 2016, BT paid this principal amount to CPs, as well as interest payments of £25,301.³⁹³

4.229 We note that BT had already made an earlier payment to [X] in relation to the SLG Triage Team of £[X] that is not accounted for in these payments.³⁹⁴ Furthermore, several of the orders manipulated by the SLG Triage Team were subject to successful appeals which resulted in SLG payments.³⁹⁵

4.230 With the exception of these repayments we are aware of no further remedial payments made by BT in relation to its retrospective use of Deemed Consent.

³⁹⁰ Email from Openreach to Ofcom, 21 April 2016, 0612.

³⁹¹ BT's response to Q6 of the 6th Notice, 6 July 2016, 0442.

³⁹² See the total in column G of 0445.

³⁹³ See the total in column T of 0446.

³⁹⁴ See the total in column S of 0446 and response to Q8i which indicates payment was made in November 2015.

³⁹⁵ See the total in column N of 0446.

Section 5

Practice 2: Failure to provide adequate notification when applying Deemed Consent

Introduction

- 5.1 In this section we set out how we reviewed information relating to specific Ethernet orders to identify whether or not BT gave adequate notification of its application of Deemed Consent, i.e. whether it met the procedural requirements for applying Deemed Consent in accordance with its SMP obligations.
- 5.2 In order to do this, we obtained from BT information relating to all Ethernet orders which were completed during the period May to July 2014 (the “Sample Period”). This was over 8,600 orders. From this, we constructed a representative sample (the “Sample”) of the orders completed in the Sample Period. We set out the methodology used to create the Sample in Annex 5.
- 5.3 Based on our assessment of the Sample, we have calculated the proportion of applications of Deemed Consent made in relation to orders which completed in the Sample Period where BT failed to:
- a) send a notification of Deemed Consent;
 - b) send a notification of Deemed Consent as soon as reasonably practicable; or
 - c) provide an adequate explanation for the application of Deemed Consent (e.g. a Deemed Consent code or explanation in lieu of a DC code) in the notification.
- 5.4 Our statistical analysis is that between 18.6%, and 19.4% of all applications of Deemed Consent on orders completed during the period May to July 2014 were not adequately notified.
- 5.5 On this basis, our finding is that BT breached conditions HH5.9/6.9, HH1.2/1.2 and the SLG Direction. In terms of duration of the breaches, we find from our assessment of the Sample and other evidence we have gathered in our investigation, that BT failed to fulfil the procedural requirements for applications of Deemed Consent which were made during the Sample Period May to July 2014, as well as during the wider period between January 2013 and December 2014 (the Practice 2 Breach Period).

Ofcom’s selection of the Sample Period

- 5.6 During the period September 2012 to December 2014, BT applied Deemed Consent to over 65,000 Provide orders for Ethernet services, alone.³⁹⁶ To progress the investigation in a timely and resource effective manner, we decided to limit our review to a sample of orders. We selected the period May to July 2014 from which to

³⁹⁶ See paragraph 3.62 above.

create a sample as we understood this to be a period of time where the use of Deemed Consent was slightly higher than had historically been the case.

- 5.7 BT provided Ofcom with all information it held on its eCo, COSMOSS and Flow systems in respect of orders completed during the period May to July 2014.³⁹⁷
- 5.8 We then created the Sample, which was representative of all orders completed during this period where Deemed Consent was applied. We only looked at orders where BT reported that Deemed Consent was applied. This allowed us to ascertain from the information provided by BT, in respect of those orders, whether BT had fulfilled the procedural requirements when applying Deemed Consent in compliance with its SMP obligations. See Annex 5 for further details.
- 5.9 In the Sample, we looked at all types of order, including Provide, Regrade, Shift, Remove and Rearrange. While “Provide” is the only category of order for which SLG Payments are payable, the SMP obligations apply to all types of order for Ethernet services.

Ofcom’s assessment of the Sample evidence

- 5.10 We reviewed every application of Deemed Consent within the Sample by answering the following three questions:
 - a) Did BT provide the relevant CP with a notification of its intent to deem consent?
 - b) Did Openreach provide any reasoning when notifying its intent to deem consent?
 - c) Was the Deemed Consent notification sent to the CP as soon as reasonably possible?
- 5.11 In order to answer these questions, we reviewed the COSMOSS and eCo information for each order in the Sample.

Step 1: Did BT provide notification of its intent to apply Deemed Consent?

- 5.12 We began by reviewing every application of Deemed Consent in order to ascertain whether any notification of Deemed Consent had been sent to the CP. This included looking for evidence of non-written notification recorded in eCo and COSMOSS.
- 5.13 When seeking to identify whether or not a notification was sent, we considered the following:
 - a) **BT notifies the CP that Deemed Consent “may” apply:** If a notification stated that Deemed Consent may apply to an order, we considered that it would usually not be sufficient to act as notification of Deemed Consent. For example, where BT stated in an email that “*Infrastructure build dependencies (DC22) have been identified which may affect your CDD*”, we did not consider this to be a clear and unambiguous notification of Deemed Consent.
 - b) **BT notifies a new CDD and appears to deem consent for that CDD at the same time:** In some cases, BT notified a CP that Deemed Consent had been used to change the CDD to a new date and, in that same notification, included

³⁹⁷ BT’s response to Q3 of the 1st Notice. Responses received on 4 February 2016, 4 March 2016, 18 March 2016 and 30 March 2016.

text that indicated that Deemed Consent would also apply to the new CDD. For example, BT might notify the CP that DC24 had been used to amend a CDD from 25/05/13 to 04/06/13 and in the same email, state: *"Please note this will impact upon the current CDD - close of business on 04/06/2013 00:00:00, for this order."* We found that this text was included even in instances where the subsequent application of Deemed Consent did not relate to the issue identified in the previous notification or where the reason for deeming consent cited had been resolved. We considered that such an email would be a clear notification that Deemed Consent had been used to move the CDD to the new date, but would not generally serve as a notification of Deemed Consent to amend the new CDD.

5.14 The exception to this was where such an email made clear that there was an ongoing issue that had not been fully resolved, and the notification was clear that the delay would impact the CDD provided in that email. Where the new CDD being provided was then moved for the same reason at a later date, we considered that the email could act as notification for both the extension to the new CDD and a notification of Deemed Consent to amend that new CDD.

- a) **Express CP consent:** Where we found evidence that the CP or customer had explicitly requested a delay that went beyond the CDD being revised, we considered that the CP or customer had effectively provided express consent for delivery after the CDD being revised. This might occur where a customer specifically asked for access on a certain date after the CDD, or suspended an order until after the CDD had passed. We found a number of applications which fell within this latter category where BT had not notified the CP of Deemed Consent until the order was taken out of suspension.
- b) **Inferred CP consent:** Where it was clear from a previous notification of Deemed Consent that the CDD had been extended in order for an action to be completed by the CP or customer (for example, notifying BT of the date when access would be given), and that action had not been completed by the date of the new CDD, we inferred from the failure to complete the action in question that the CP had consented to a further extension of the CDD (even in the absence of a notification of Deemed Consent in relation to that subsequent extension).
- c) **Notifying new CDD without explanation that this was a result of Deemed Consent:** Where the only communication relating to an application of Deemed Consent is the email from BT notifying the CP of a new CDD, but without making it clear that this new CDD was a result of an application of Deemed Consent, we considered that this was not a notification of Deemed Consent.

Step 2: Did BT provide explanation for the application of Deemed Consent?

- 5.15 Where we identified a relevant notification, we then checked to see if it contained a Deemed Consent code or explanation in lieu of a code. If neither of these were present, we considered that the notification was inadequate, as it contained no explanation supporting the application of Deemed Consent.
- 5.16 For example, if there was only a general statement that Deemed Consent would or had been applied, but without a code or explanation in support of that statement, we considered that the notification was inadequately notified due to lack of reasoning.
- 5.17 If the notification contained either a Deemed Consent code or explanation in lieu of a code, we did not go on to consider whether or not that code was adequate within the context of that application of Deemed Consent.

- 5.18 There were very few applications of Deemed Consent where we identified a notification of Deemed Consent but found that no explanation for the application was provided.

Step 3: Did BT provide notification of its intention to apply Deemed Consent as soon as reasonably practicable?

- 5.19 For the purposes of determining whether a notification of intention to apply Deemed Consent was sent ASARP, the test that we applied in respect of most notifications in the Sample was whether it was sent no later than one working day after the current CDD.
- 5.20 However, during our review of the Sample, we identified specific circumstances where we considered it appropriate to find that a notification provided more than one working day after the CDD was sent ASARP. These circumstances were:

- a) the CDD being amended is historic and does not represent a likely delivery date because of previous delays for which BT could not deem consent: in some cases, BT will miss a CDD because it has encountered a delay for which it cannot deem consent. As a result, the CDD becomes historic, and a later application of Deemed Consent in real time will inevitably be sent after the CDD. For example:

A CDD is set at 28 April 2014, but BT is unable to send an engineer to undertake work until 10 May 2014. It cannot move the CDD using Deemed Consent, as this is BT caused delay. BT therefore misses the CDD, but continues to progress the job. The CDD no longer represents a likely delivery date.

Later, on the 10 May 2014, BT encounters a delay in gaining access to a customer site, and is able to deem consent for this reason. It sends out a notification of intent to deem consent on 10 May 2014, which sets out that it will use Deemed Consent to move the CDD of 28 April 2014, as justified by the new delay in gaining access. The CP advises that access will be given in 7 days and so the new CDD is set for 5 May 2014 (28 April + 7 days). As the CDD was last set at 28 April 2014, BT has sent the notification of intent to deem consent more than one working day after the CDD being revised. Further, any subsequent application of Deemed Consent to move the revised CDD of 5 May 2014 will also be sent more than one working day after this because the CDD has been set in the past.

In these circumstances, we sought to identify the relevant event triggering the application of Deemed Consent since the CDD did not represent an appropriate measure to assess the timeliness of the notification. Where BT notified its intent to deem consent after the CDD being revised, this was acceptable provided BT sent the notification ASARP, i.e. within one working day of becoming aware of the delay requiring it to extend the CDD..

- b) **CP request:** Where a CP specifically requested an action take place after the CDD, we were of the view that the CP had provided express consent to the date move. Where a late notification was sent in this context, we did not treat this as an inadequate notification.

- 5.21 On this basis, we considered that all cases where the notification to apply Deemed Consent was provided later than 1 working day after the CDD would not be ASARP, unless the specific circumstances above were applicable.

Findings from the Sample assessment

- 5.22 Having reviewed the Sample, we collated our findings together and applied weights, as set out in Annex 5. Using these weights, we are able to extrapolate our conclusions from the Sample to reach findings on all orders completed in the period 1 May 2014 to 31 July 2014.³⁹⁸
- 5.23 We found that in 19% of applications of Deemed Consent in the Sample, BT failed to provide adequate notification. As the Sample is representative of all orders completed during the period May to July 2014, the proportion of applications of Deemed Consent which were not adequately notified in orders completed during that period is between 18.6% and 19.4%.³⁹⁹
- 5.24 We have also considered the specific order type “Provide”, as the CSA and the SLG Direction require BT to make SLG payments for this type of order where BT fails to provide the Ethernet services ordered by the CP, by the CDD. For Provide orders, we found that 19% of applications of Deemed Consent in the Sample were not adequately notified. As the Sample is representative of Provide orders in the period May to July 2014, the proportion of applications of Deemed Consent which were not adequately notified in orders completed during that period is between 18.5% and 19.3%.⁴⁰⁰
- 5.25 The proportion of orders in the Sample where we identified at least one application of Deemed Consent which was not adequately notified, was 40%. As the Sample is representative of all orders completed during the period May to July 2014, our statistical analysis is that between 37% and 44% of orders completed during the Sample Period had at least one application of Deemed Consent which did not meet the procedural requirements.⁴⁰¹
- 5.26 This demonstrates that during the Sample Period, a material number of applications of Deemed Consent were not adequately notified.

Duration of the breach finding

- 5.27 We have established that there was a failure adequately to notify a material number of applications of Deemed Consent in the Sample Period, which was May to July 2014. We believe that the failure adequately to notify Deemed Consent which we have identified in the Sample Period existed for a longer period, specifically throughout the Practice 2 Breach Period, from 10 January 2013 to 17 December 2014.

³⁹⁸ Our findings do not apply to orders for EBD, as these were not included in our sample.

³⁹⁹ This range accounts for the confidence interval for our findings from the Sample. See Annex 5 for an explanation of the Sample methodology.

⁴⁰⁰ This range accounts for the confidence interval for our findings from the Sample. See Annex 5 for an explanation of the Sample methodology.

⁴⁰¹ This range accounts for the confidence interval for our findings from the Sample. See Annex 5 for an explanation of the Sample methodology.

- 5.28 We consider that there is evidence that the failings we identified from the Sample endured from January 2013 to December 2014. For example, in briefings that were sent to job controllers during this period, BT identified that it was failing to provide adequate notifications when applying Deemed Consent, including one sent in May 2013 by [Executive 1]⁴⁰² and one in December 2014.⁴⁰³
- 5.29 This view is supported by the fact that in reviewing the Sample, we reviewed applications of Deemed Consent which took place during 2013. This is because several orders which were closed in the period May to July 2014 were ongoing before this period of time. We therefore identified instances where applications of Deemed Consent were not adequately notified before May 2014.⁴⁰⁴ For example, we found over 280 inadequate notifications which related to CDDs falling before May 2014. This supports our view that there was a failure to provide adequate notification of applications of Deemed Consent outside of the Sample Period.
- 5.30 Finally, we note that we observed the work of the National Backlog Team in our review of the Sample. We set out at 4.82 - 4.87 that the National Backlog Team was involved in the conduct of retrospectively applying Deemed Consent. From our Sample, we have identified inadequate notifications of Deemed Consent associated with the work of the National Backlog Team.⁴⁰⁵ The National Backlog Team was involved in the management of orders from June 2013 and there is evidence that it was engaged in applying Deemed Consent retrospectively. Accordingly, we consider that the work of this team would have caused inadequate notifications outside of the Sample Period.
- 5.31 Accordingly, we find that there was a failure consistently to provide adequate notifications when applying Deemed Consent between January 2013 to December 2014.

Ofcom's finding that BT failed to provide network access in accordance with the terms and conditions in BT's Reference Offer

- 5.32 Each of the failures that we assessed in our approach amount to a departure from the CSA. Under the terms of the CSA, BT must ensure that it provides a notification of Deemed Consent to the CP as soon as reasonably practicable, and that notification must include at least a DC code.⁴⁰⁶
- 5.33 BT has either failed to provide notification, failed to provide a DC code (or explanation in lieu of a code), or failed to provide any notification as soon as reasonably practicable in 19% of those applications of Deemed Consent assessed in

⁴⁰² Loop Extra: Message from [Executive 1] 24 May 2013. This briefing identified that "On a number of recent orders we have identified problems with the consistent application of date management rules and the quality of notes recorded

⁴⁰³ Urgent – Compliance Brief on eCo Updates for Date Management, 17 December 2014, 0044. This briefing to job controllers was sent on 17 December 2014. It said that "we [BT] endeavour to keep our CP customer updated on any date changes that are driven by deemed consent in real time" but goes on to say that "after appeals on certain orders, it is clear we have not been doing this every time." It also notes that in 39 orders recently challenged by a CP, BT was right to apply Deemed Consent but "failed to send a follow on eCo update, so the CP wasn't advised." We note that this is the basis of the end date of our finding.

⁴⁰⁴ The earliest CDD where we found that the relevant application of Deemed Consent was inadequately notified was 10 January 2013. This is the basis of the start date of our finding. See order [3<]

⁴⁰⁵ See Annex 4 for examples of the work of the National Backlog Team.

⁴⁰⁶ See paragraphs 5.14, 5.44 and 5.88 of the Vodafone Dispute Determination

the Sample. Each of these instances constitutes a departure from the CSA. We therefore find that in respect of each such departure, BT has breached conditions HH5.9 and 6.9.

Ofcom's finding that BT failed to provide network access on fair and reasonable terms

- 5.34 In the Vodafone Dispute Determination, we said that the ability of a CP to manage a delay in the provision of its own services or to challenge an extension of the delivery date for BT's services is an important element of securing that BT provides Ethernet services on fair and reasonable terms, in accordance with SMP Conditions HH1.2 and 1.2. The provision of a notification of intent to deem consent, sent as soon as reasonably practicable, which contains an explanation that is sufficient for the CP to understand the reason for the delay, is a fundamental requirement for a CP to be able to manage a delay in the provision of its own services or to challenge an extension of the delivery date.
- 5.35 We said that failure to provide notification of Deemed Consent, failure to provide sufficient explanation of Deemed Consent, and/or retrospective application of Deemed Consent (i.e. failure to send notification of Deemed Consent as soon as reasonably practicable) could amount to a breach of SMP Conditions HH1.2 and 1.2 subject to a number of factors.⁴⁰⁷ These factors included:
- 5.35.1 whether there is evidence of a failure by BT to put the right mechanisms and processes in place to ensure compliance with its regulatory obligations; and/or
 - 5.35.2 the frequency of the conduct; and/or
 - 5.35.3 the potential impact of the conduct on CPs.
- 5.36 As set out at paragraph 5.23, we found that between 18.6% and 19.4% of applications of Deemed Consent in orders provided during the period May 2014 to July 2014 were not adequately notified. This amounts to almost one in five applications of Deemed Consent. The proportion of orders completed in the Sample Period where we found that at least one application of Deemed Consent was defective was between 37% and 44% of orders. Accordingly, we find that the frequency of the failures that we have identified in the Sample Period is material and sufficiently high to amount to conduct that is not fair and reasonable.
- 5.37 In addition, the scale of the failure we found is likely to have had a significant impact on CPs. As set out above, the specific failures that we identified fundamentally undermine a CP's ability to manage the delay in the provision of its own service and/or to challenge the application of Deemed Consent. A successful challenge by a CP of a Deemed Consent application may result in a reduction in the delay that would otherwise have occurred and/or an SLG payment in compensation. Accordingly, we find that the rate of failures that we have identified during the Sample Period could have adversely affected CPs to a considerable degree, both financially and, by compromising their ability to manage the delay, in relation to their ability to compete with BT in the provision of Ethernet services. We consider these harms would also have adversely affected the CPs' end-customers and ultimately consumers, including those buying broadband services for home or business use.

⁴⁰⁷ Vodafone Dispute Determination, paragraph 3.52

- 5.38 We find that these failings endured from January 2013 to December 2014. We base this on the evidence we have set out at paragraphs 5.27 to 5.31 above, including:
- 5.38.1 the fact that BT's processes and systems facilitating the use of Deemed Consent during the Sample Period were fundamentally the same as those in place during the period January 2013 to December 2014;
 - 5.38.2 the proportion of applications of Deemed Consent during the Sample Period that we have found failed to meet the basic procedural requirements under the CSA;
 - 5.38.3 evidence from job control briefings about inadequate CP communications;
 - 5.38.4 the fact that the orders we considered included applications of Deemed Consent in the period preceding the Sample Period;⁴⁰⁸ and
 - 5.38.5 the existence of the National Backlog Team prior to May 2014 and its role in relation to inadequate notifications of Deemed Consent that we are aware of in relation to section 4 and have observed in our Sample.
- 5.39 Therefore, we find that BT has breached SMP Conditions HH1.2 and 1.2. We find that this breach occurred during the Sample Period of May to July 2014 and that it occurred throughout the wider period from 10 January 2013 to 17 December 2014.

Ofcom's finding that BT failed to comply with its obligations under the SLG Direction

- 5.40 In our assessment of the Sample we have considered whether Practice 2 had the effect of undermining the requirements of the SLG Direction.
- 5.41 The SLG Direction required BT to amend the CSA so as to:
- 5.41.1 require BT to provide reasons to justify an extension to the CDD;
 - 5.41.2 make the extension of the CDD subject to the CP's consent; and
 - 5.41.3 require BT to make SLG payments in the event that it delivers the Ethernet order after the CDD.
- 5.42 BT implemented the SLG Direction by amending the terms of the CSA so that it required:
- 5.42.1 BT to provide Ethernet services by a CDD of the 30th working day unless the CP consents to a delay or BT uses Deemed Consent to move the CDD;
 - 5.42.2 BT notifies the CP as soon as reasonably practicable if it intends to apply Deemed Consent in accordance with the CSA in order to extend the CDD; and

⁴⁰⁸ While the Sample only comprised orders which completed during the Sample Period, the applications of Deemed Consent which we reviewed in our assessment typically occurred in the months and years preceding this.

- 5.42.3 to pay compensation to the CP by way of SLG payments in the event it failed to deliver the Ethernet services by the CDD.
- 5.43 As set out above, we found that in almost one in five applications of Deemed Consent BT has either failed to provide notification, failed to provide a DC code (or explanation in lieu of a code), or failed to provide any notification as soon as reasonably practicable. The proportion of orders completed in the Sample Period where we found that at least one application of Deemed Consent was defective was between 37% and 44% of orders.
- 5.44 As set out above we have also found that the evidence BT sent defective notifications of Deemed Consent throughout the period January 2013 to December 2014.
- 5.45 Accordingly, taking account of the frequency of the failures that we have identified in the Sample Period, we find that:
 - 5.45.1 there was a sustained failure by BT to send adequate notifications to CPs when it applied Deemed Consent to extend the CDD;
 - 5.45.2 as a result of these failures, BT extended the CDD without securing the CP's consent in accordance with the CSA;
 - 5.45.3 the failure is likely to have resulted in BT failing to pay accurate compensation to CPs by way of SLG payments for failure to deliver an Ethernet service by the CDD;
- 5.46 Accordingly, the failures that we have identified have the effect of undermining the requirements of the SLG Direction and therefore BT is in breach of its obligations under that Direction.
- 5.47 We find that this breach occurred during the Sample Period of May to July 2014 and that it occurred throughout the wider period from 10 January 2013 to 17 December 2014.

Section 6

Practice 3: Failure to make correct SLG payments following Deemed Consent appeals

Introduction and summary findings

- 6.1 During the Original Relevant Period and subsequently, BT's Deemed Consent Guide for CPs made provision for CPs to challenge the application of Deemed Consent by BT under the Deemed Consent Appeals Process.
- 6.2 On the basis of the evidence provided by BT, we find that BT failed to ensure that SLG payments accurately reflected the outcome of a successful appeal by a CP and as a result BT breached its obligations under HH1.2/1.2/1.3, HH5.9/6.9 and 5.10 and the SLG Direction.
- 6.3 In summary, we have found that during the period 24 October 2013 to 26 August 2016 (the "Practice 3 Breach Period"), there was a failure by BT to put in place the right mechanisms and processes to enable proper account to be taken of successful Deemed Consent appeals in order to correctly calculate SLG payments due to the CP. This resulted in a frequent failure to properly account for successful Deemed Consent appeals in the making of SLG payments, which led to an underpayment of SLG payments by BT in respect of 161 orders, amounting in total to £719,000.⁴⁰⁹
- 6.4 Ofcom notes that, as a result of our investigation, BT has taken a number of remedial steps to ensure that SLG payments would accurately reflect the outcome of a successful appeal. We set these remedial steps out at paragraphs 6.31 below.

Deemed Consent appeals

Why did BT's systems fail to properly account for successful Deemed Consent appeals?

- 6.5 We have set out the Deemed Consent Appeals Process at paragraphs 3.60-3.70 in Section 3. We set out below what happened in practice when there was a successful appeal of Deemed Consent and how this resulted in underpayment of SLG payments.
- 6.6 The Job Control Manual and Deemed Consent Guidance do not set out the consequences of a successful appeal. For example, they do not explain whether the CDD should be moved or how the fact of a successful appeal should be recorded and accounted for in SLG payments.
- 6.7 BT has explained that its "*system does not allow the CDD to be brought forward*" in the event of a successful Deemed Consent appeal.⁴¹⁰ It said that in the event of a

⁴⁰⁹ BT's response to Question 1 of the 9th Notice, 4 November 2016, 0610 and 0611.

⁴¹⁰ BT's response to Question 2 (part A)(iv) of the 4th Notice, 7 April 2016, page 18, 0434

successful appeal, “the Target Completion Date⁴¹¹ (TCD) may be adjusted – where this is appropriate”,⁴¹² but it did not set out a clear process for revising the TCD, nor did it set out those circumstances where it would be appropriate to revise the TCD.

- 6.8 BT’s training materials for job controllers, issued in November 2013, flagged that a CDD cannot be revised backwards “Be **careful/accurate** [when amending the CDD using deemed consent], remember the C.D.D can’t (at present) be brought back in on COSMOSS. If you move it too far out by mistake you’re stuck!”.⁴¹³ These slides do not provide further guidance on what should be done if a CDD is set incorrectly or needs to be revised back.
- 6.9 In its response to the 7th Notice on 20 July 2016, BT provided a copy of a report prepared by an external auditor⁴¹⁴ in relation to the process and practices being followed within Openreach in relation to the use of Deemed Consent in Ethernet Orders (the “Audit Report”). The audit was carried out during the period 27 July 2015 to 12 August 2015 and the Audit Report was issued on 31 August 2015⁴¹⁵.
- 6.10 One of the findings touched upon what happened in the event that a CDD needed to be revised backwards:

“Once the CDD had been moved forward it could not be moved back again. If there was a supported in life challenge against a DC, or if a JC made a mistake when changing the CDD, or if an ECD⁴¹⁶ was completed earlier than expected, the CDD could not be brought forward.

“When there was a need to bring the CDD date forward, the JC could only change the TCD and, talking to the JCs, it was common practice at the Controls visited to inform the CP to make a claim at the end of the job. If there was a later delay in the progress, a JC could progress the TCD forward until it matched the CDD, and any further needs for a DC would be managed as normal with the CDD would [sic] moving forward.

“When a job was closed with a CDD date in advance of the actual CDD, this could not be automatically picked up by the SLG.

“During this visit it was not possible to identify any function, which was able to change the CDD on COSMOSS to reflect the Actual CDD when a CDD was brought forward.”⁴¹⁷

- 6.11 We consider that the Audit Report shows that where there was a successful Deemed Consent appeal, the CDD could not be revised accordingly. Furthermore, upon closure of an order which had been the subject of a successful appeal, the SLG Payments Team was not able to automatically detect this and make accurate SLG

⁴¹¹ The TCD is a date given to indicate when BT expects to complete work.

⁴¹² BT’s response to Question 2 (part A)(iv) of the 4th Notice, 7 April 2016, page 18, 0434.

⁴¹³ Ethernet New Recruit Training Part 3, see for example Issue 3, November 2013, slide 19, 0004.

⁴¹⁴ The external auditor was [X]. See BT’s response to the 7th Notice, 6 July 2016, page3, 0438. We note that the document itself is marked “internal”.

⁴¹⁵ Internal Audit Report Final, 31 August 2015, page 13, 0419. Provided in BT’s Response to the 7th Notice, 20 July 2016, 0434.

⁴¹⁶ ECD stands for “Expected Completion Date”.

⁴¹⁷ Internal Audit Report Final, 31 August 2015, page 13, 0419. Provided in BT’s Response to the 7th Notice, 20 July 2016, 0434.

payments accordingly. Finally, it was known by job controllers that a Deemed Consent appeal would not result in automatic compensation payments

- 6.12 This demonstrates that BT failed to implement a system which would ensure that it was able to automatically account for successful Deemed Consent appeals in SLG payments. As we set out later, it also indicates that Openreach was aware of this failure prior to the opening of this investigation.

Failure to make SLG payments following successful Deemed Consent appeals

- 6.13 During the course of the investigation, following receipt of information requests from Ofcom seeking information relating to Deemed Consent appeals, BT confirmed that:
- a) where there had been a successful Deemed Consent appeal that should have resulted in an SLG payment, this did not automatically result in an SLG payment to the CP;⁴¹⁸
 - b) it could only confirm that payments in relation to appeals were made for the 15% of orders where the CP made a subsequent request for SLGs to the Finance team responsible for SLG payments;⁴¹⁹
 - c) in the remaining 85% of orders where there had been a successful appeal, it was not able to confirm that the appeal had been taken into account in the SLG payments for those orders;⁴²⁰
 - d) it had reviewed all Deemed Consent appeals that were recorded on the Deemed Consent appeals log to identify where an additional payment was due;⁴²¹
 - e) the first order where it failed to account for a successful Deemed Consent appeal was completed on 26 September 2013 (although BT has reported that it had recorded the date of the relevant Deemed Consent appeal as 24 October 2013, i.e. after the order had completed);⁴²²
 - f) the last order for which BT made a remedial payment was completed on 26 August 2016;⁴²³
 - g) BT had made compensatory payments in respect of some of the orders affected as recently as November 2016, including two to [§<] amounting to over £[§<]; and⁴²⁴
 - h) BT had paid £719,000 in total in relation to a failure to account for Deemed Consent appeals in 161 orders, as well as additional interest payments.
- 6.14 Table 6.1 shows the breakdown by CP of all payments and interest for all orders where BT did not take account of a successful Deemed Consent appeal.

⁴¹⁸ Letter from [Senior Manager 4] (BT) to [Principal 1] (Ofcom), 6 May 2016, page 2, 0626.

⁴¹⁹ Letter from [Senior Manager 4] (BT) to [Principal 1] (Ofcom), 6 May 2016, page 2 0626.

⁴²⁰ Letter from [Senior Manager 4] (BT) to [Principal 1] (Ofcom), 6 May 2016, page 2 0626.

⁴²¹ Email from [Senior Manager 4] (BT) to [Principal 2] (Ofcom), 24 October 2016, 0627.

⁴²² Deemed Consent Challenges and SLG Payments – FINAL, 4 November 2016, 0611.

⁴²³ Deemed Consent Challenges and SLG Payments – FINAL, 4 November 2016, 0611.

⁴²⁴ Deemed Consent Challenges and SLG Payments – FINAL, 4 November 2016, 0611.

Table 6.1: Breakdown by CP of payments and interest for orders where BT failed to take account of successful Deemed Consent appeals

Communications Provider	Payment	Interest Payment	Total payment	Orders affected
[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]

Table 6.1, source: Ofcom analysis of Deemed Consent Challenges and SLG payments – FINAL, 4 November 2016. 0611

Openreach's knowledge of the failure to make SLG payments following a successful Deemed Consent appeal

6.15 Ofcom considers that, based on the evidence before it, BT was aware of its failure to properly account for successful Deemed Consent appeals:

- a) First, the job controller training slides issued in November 2013 reveal that there was operational knowledge of the underlying issue – the inability to move the CDD back. This meant that, following a successful Deemed Consent appeal, BT could not account for the appeal by simply revising the CDD back to its original date.
- b) Second, the 2015 Audit Report provides evidence that job controllers were advising CPs to lodge subsequent claims for SLG payments where they had successfully appealed Deemed Consent.⁴²⁵ On this basis, Ofcom considers there was operational knowledge within Openreach that BT was not automatically making accurate SLG payments in cases where there were successful Deemed Consent appeals.
- c) In relation to senior management knowledge, the recipients of the Audit Report included: [Executive 1]; [Senior Manager 2]; [Senior Manager 4] and [Senior Manager 16].⁴²⁶ We therefore conclude that there was senior knowledge within Openreach that BT was at risk of not making accurate SLG payments in cases where there were successful Deemed Consent appeals.
- d) Last, we note that BT has informed Ofcom that it had in place a process to ensure that those with the authority to sign off on SLG payments had the opportunity to “review the orders and ask questions to ensure that all parties had confirmed that the values proposed were correct, insofar as they could be verified and checked. Those reviewing the Ethernet SLG payments could request the payment details by circuit and review a sample to ensure that these payments were in line with any comments provided on relevant systems.”⁴²⁷ We note that this review process failed to identify the fact that BT was underpaying SLGs on orders where there had been a successful Deemed Consent appeal.

⁴²⁵ See paragraph 6.10 above.

⁴²⁶ Internal Audit Report Final, 31 August 2015, page 1, 0419. Provided in BT's Response to the 7th Notice, 20 July 2016, 0434

⁴²⁷ BT's response to Question 2(a) (iii) and (v) the 4th Notice, 7 April 2016, page 18, 0434.

Ofcom's finding that BT failed to provide network access on fair and reasonable terms

- 6.16 Based on the evidence set out in this section, we find that BT has failed to make accurate SLG payments following successful Deemed Consent appeals in relation to orders which completed between 24 October 2013 and 26 August 2016. We find that this failure amounts to conduct in contravention of BT's SMP obligation under conditions HH1.2/1.2/1.3, to provide network access on fair and reasonable terms.
- 6.17 BT has described the Deemed Consent Appeals Process which was in place during the Investigation Period as a mechanism *"to ensure that CPs can appeal within five days of the notification of DC by the job controller and ensure that BT pro-actively makes SLG payments in cases foreseen under the CSA"*.⁴²⁸ It has also said that the process is *"straightforward to use and typically lead[s] to swift resolution of the matters raised"*.⁴²⁹
- 6.18 The evidence set out in this section shows that, contrary to these assertions, BT did not make correct SLG payments in relation to 161 orders as required under the CSA, following a successful Deemed Consent appeal. This failure gave rise to an underpayment of £719,000 in respect of these orders and this sum was not repaid to the affected CPs until June to November 2016. Given that the orders in question completed during the period 24 October 2013 to 26 August 2016, BT's processes in relation to making SLG payments following a successful Deemed Consent appeal cannot be said to have enabled *"a swift resolution"* of the matters raised.
- 6.19 The evidence shows that the reason why BT failed to make the appropriate SLG payment in these cases was due, in part, to the fact that its systems did not enable job controllers to move the CDD back following a successful Deemed Consent appeal.
- 6.20 Given the evidence of the number of orders affected and the duration of the failure, we find that there was a failure by BT to put in place the right mechanisms and processes to enable proper account to be taken of successful Deemed Consent appeals in order to correctly calculate SLG payments, in accordance with the terms of the CSA. Accordingly, given the nature of the conduct we have identified, we find that BT failed to provide Ethernet services on fair and reasonable terms from 24 October 2013⁴³⁰ to 26 August 2016.
- 6.21 We also have evidence of operational and senior management knowledge during the course of this period. The evidence shows that there was operational knowledge about this issue in November 2013 and senior management knowledge possibly as early as October 2014 and certainly by August 2015. Despite this, no action was taken to address the issue until 2016 and this does not appear to have been effective until almost the last quarter of 2016 – the last order where BT failed to take account of a successful Deemed Consent appeal, and so underpaid the SLG payment due to the CP, completed on 26 August 2016.

⁴²⁸ BT's response to the Deemed Consent Dispute Provisional Conclusions, 23 November 2015, paragraph 17, 0628.

⁴²⁹ BT's response to the Deemed Consent Dispute Provisional Conclusions, 23 November 2015, paragraph 17, 0628.

⁴³⁰ Deemed Consent Challenges and SLG Payments – FINAL, 4 November 2016. 0611, provided as part of BT's response to the 9th Notice, sets out that this was the date of the earliest known Deemed Consent Appeal for which it failed to make account in the SLG payment for the relevant order.

Ofcom's finding that BT failed to comply with its obligations under the SLG Direction

- 6.22 We also find that this practice gives rise to a contravention of the SLG Direction.
- 6.23 The SLG Direction required BT to modify the SLA in the CSA with a view to providing an effective financial incentive for BT to deliver Ethernet services in accordance with a pre-defined level of performance.⁴³¹ The modifications to the CSA required by the SLG Direction included the incorporation of a provision requiring BT to make SLG payments to the CP if it delivers an Ethernet service after the CDD.⁴³² This modification was implemented in paragraph 4.1 of Schedules 4C(i) and 4C(ii) of the CSA.⁴³³
- 6.24 Further, the CSA provides that SLG payments will be made “*by deduction from the [CP's] next invoice, unless not practicable*” and says “*For the avoidance of doubt, compensation [SLG payments] shall be payable without the need for the [CP] to make a claim.*”⁴³⁴ Accordingly, under the express terms of the CSA, CPs would not expect to make a claim in order to secure an SLG payment to which they are entitled as a result of a successful Deemed Consent appeal.
- 6.25 This contractual position is underlined by the Deemed Consent Guide for CPs which describes the processes it sets out, which include the Deemed Consent Appeals Process, as establishing “*a business model where there can be reasonable predictability around likely delivery dates for customers with automatic payment of SLGs and no overheads a claim system would drive.*”⁴³⁵
- 6.26 However, the evidence set out in this section shows that BT's systems did not enable it to identify accurately all SLG payments due on an order where there had been a successful Deemed Consent appeal in order to discharge its obligations under the CSA. As a result, there were 161 Ethernet orders where the correct deductions for SLG payments were not made and CPs were overcharged as a result. The affected CPs appear to have been unaware of this, most likely because the obligation to calculate the SLG payment and make a deduction from the invoice fell on BT under the terms of the CSA.
- 6.27 Accordingly, taking account of the number of orders where this occurred, the amount of the underpayment to CPs and the duration of BT's failure to take account of successful Deemed Consent appeals when calculating invoices, we find that:
- there was a systemic failure in BT's processes from 24 October 2013 to 26 August 2016 which prevented BT paying the correct amount of SLG payments to CPs under the terms of the CSA;
 - the failure resulted in a consistent and frequent conduct over a sustained period and prevented BT complying with the terms of the CSA required under the SLG Direction, namely the payment of compensation where BT fails to deliver an Ethernet service by the CDD;

⁴³¹ See paragraphs 2.27 – 2.31 above.

⁴³² See paragraphs 2.27 - 2.31 above.

⁴³³ Contract for Connectivity Services, Schedule 4 – Service Level Agreement, 0056.

⁴³⁴ See paragraph 6.1 of Schedules 4C(i) and 4 C(ii) to the CSA, pages 11 and 16, CSA, 0056.

⁴³⁵ See paragraph 3.46 above

- accordingly, BT has failed to give effect to the requirements of the SLG Direction and therefore is in breach of its obligations under that Direction.

Ofcom's finding that BT failed to provide network access in accordance with the terms and conditions in BT's Reference Offer

- 6.28 We also find that BT's failure to make accurate SLG payments following successful Deemed Consent appeals in respect of each order listed in the spreadsheet provided by BT, in response to the 9th Notice, amounts to a contravention of conditions HH5.9/6.9/5.10.
- 6.29 Paragraph 4.1 of Schedule 4C to the CSA requires BT to pay compensation to the CP in the event that it fails to deliver the Ethernet service by the CDD. As set out in paragraph 2.39 above, the CSA provides that such compensation will be made by deduction from the CP's invoice and without the need for the CP to make a claim.
- 6.30 The evidence set out in this section shows that BT failed to make the correct deduction for SLG payments when calculating invoices issued in respect of 161 orders for Ethernet services, which completed between 24 October 2013 and 26 August 2016. In respect of each such order, that failure is a breach of BT's obligations under the CSA. Accordingly, we find that each failure is a contravention of HH5.9/6.9/5.10.

Remedial steps taken by BT to date

- 6.31 Ofcom notes that, as a result of Ofcom's investigation, BT has taken a number of remedial steps to ensure that SLG payments would accurately reflect the outcome of a successful appeal:
- a) First, BT has to date paid a total of £725,000, including interest, in relation to those orders. These payments were made in June, July and November 2016.⁴³⁶
 - b) Second, BT has informed us that it has made changes to its internal processes (including the Ethernet Job Control Handbook) to ensure that all future SLG payments will accurately reflect the outcome of a Deemed Consent Appeal where relevant.⁴³⁷

⁴³⁶ Deemed Consent Challenges and SLG Payments – FINAL, 4 November 2016, 0611.

⁴³⁷ Email from [Senior Manager 4] (BT) to [Principal 1] (Ofcom), 21 September 2016, 0622.

Section 7

Remedy

Introduction

- 7.1 In this section we set out the steps that must be taken by BT to remedy the consequences of the contraventions we have identified in sections 4 and 5 of this Confirmation Decision. We set out the primary objective of the remedial steps and how this is to be achieved by BT. We also discuss the proportionality of the remedy.
- 7.2 We consider that BT has taken sufficient steps to remedy the contraventions we have found in section 6, relating to the underpayment of SLG payments by BT in respect of 161 orders because it failed to take account of successful Deemed Consent appeals.

Remedial steps

- 7.3 The primary objective of the remedial steps that BT must take is to secure that BT, using its best endeavours and acting promptly and in good faith, pays compensation to CPs in relation to Ethernet orders which were affected by the contraventions identified in sections 4 and 5 of this Confirmation Decision.
- 7.4 Specifically, BT must:
- 7.4.1 fully compensate each CP where it has underpaid the CP in respect of amounts due under the CSA as a result of the contravening conduct identified in sections 4 and 5 of this Confirmation Decision;
 - 7.4.2 pay such compensation as soon as reasonably practicable and in any event no later than 12 months from the date on which Ofcom gives BT its confirmation decision under section 96C of the Act.
- 7.5 For the purposes of fulfilling the primary objective set out in paragraphs 7.3 – 7.4, BT must either:
- 7.5.1 agree the amount of compensation to be paid with the CP in question; or, in the absence of agreement,
 - 7.5.2 determine the amount of compensation due by means of a compensation scheme meeting the requirements specified in paragraph 7.6 below.
- 7.6 BT must agree with Ofcom a compensation scheme which meets the following requirements:
- 7.6.1 the scheme must provide a mechanism for the calculation of compensation in respect of all Ethernet orders placed by the CP which were affected by the contravening conduct identified in sections 4 and 5 of this Confirmation Decision;
 - 7.6.2 the scheme must enable the CP to obtain, at no cost, an audit of the assessment under the compensation scheme of Ethernet orders placed by the CP and any compensation due to the CP;

- 7.6.3 the compensation paid by BT to the CP must be in accordance with the findings of any audit obtained by the CP under the compensation scheme;
- 7.6.4 such audits to be conducted by a person:
 - (a) with the necessary qualifications to carry out this function;
 - (b) who is an employee or partner of a business with an established reputation in the UK or another Member State (such as a law firm, accountancy firm, consultancy or bank); and
 - (c) who is independent of BT.
- 7.7 BT must make available to Ofcom information in relation to the operation of the compensation scheme as Ofcom considers necessary to enable Ofcom to monitor its effectiveness in securing the primary objective set out in paragraphs 7.3 – 7.4 and BT's compliance with the steps it is required to take to remedy the consequences of its contraventions.
- 7.8 BT must comply with any direction given by Ofcom for the purpose of securing the fulfilment of the primary objective set out in paragraphs 7.3 – 7.4 above, and/or monitoring or securing BT's compliance with the steps it is required to take to remedy the consequences of its contraventions.

Proportionality of the remedy

- 7.9 Ofcom considers that the steps we have set out above in relation to remedy, are necessary to remedy the consequences of the contraventions identified in sections 4 and 5 of this Confirmation Decision and therefore proportionate.
- 7.10 We also consider that the steps we have set out above are consistent with Ofcom's general duties as set out in sections 3 and 4 of the Act, in particular its duties to:
 - 7.10.1 further the interests of consumers in relevant markets;
 - 7.10.2 promote competition in relation to the provision of electronic communications services; and
 - 7.10.3 have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.
- 7.11 The harm to CPs, their customers, and ultimately to consumers, which results from the contraventions we have identified forms part of our consideration of the appropriate penalty in the next section. In that section we also consider the proportionality of the overall package of remedy and penalty in terms of its cost and likely impact on BT.

Section 8

Penalty

Introduction and summary

- 8.1 We have found that BT breached its regulatory obligations which applied to the provision of Ethernet services, as a result of the way it used Deemed Consent to extend the delivery timeframes for Ethernet services and failings in its processes for paying compensation in the event of the late delivery of those services.
- 8.2 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.
- 8.3 In line with Ofcom's duties under the Act and in light of the critical importance of leased lines generally, and of Ethernet services in particular, we carry out periodically a detailed review of competition in the provision of leased lines in the UK. The review is known as the Business Connectivity Market Review (BCMR). Our analysis of competition in the BCMR identifies any business which has Significant Market Power (SMP), that is in a position of economic strength which enables it to behave independently of competitors, customers and, ultimately, consumers. Where a business has this degree of market power, it can act in a manner to distort competition.
- 8.4 We impose regulatory obligations on any business which we find to have SMP, to facilitate effective competition and to further the interests of consumers and businesses in relation to communications matters. The obligations that we impose are subject to a public consultation and take account of the comments that we receive in response to that consultation.
- 8.5 In the BCMRs which we completed in 2008, 2013 and 2016 we found BT to have SMP in the provision of certain leased line services, including Ethernet services, in the UK. We therefore imposed regulatory obligations on BT.
- 8.6 The level of investment required to build fixed networks which match the coverage of BT's ubiquitous network in the UK is very large. The coverage of other CPs' networks is more limited and they need to use BT's Ethernet and other leased line services to serve sites which are beyond the reach of their own networks. Absent our regulatory obligations, BT would have both the incentive and ability to distort competition in the provision of Ethernet and other leased lines services, ultimately against end-users' interests. The obligations we imposed on BT in each of the BCMRs are therefore fundamental to promoting competition in communications services used by consumers and businesses.
- 8.7 The regulatory obligations we have imposed on BT include the SMP Conditions and the SLG Direction to which this Confirmation Decision relates.⁴³⁸ These are designed

⁴³⁸ The Relevant Regulatory Obligations, namely SMP Conditions HH5.9/6.9/5.10, HH1.2/1.2/1.3 and the SLG Direction set in the 2008, 2013 and 2016 BCMR Statements.

to ensure that CPs are able to access Ethernet services on a wholesale basis and on regulated terms, so as to promote competition in downstream markets and incentivise BT to maintain an appropriate level of performance.

- 8.8 BT's failure to comply with these obligations is a serious matter. Unless BT complies with its regulatory obligations, its market power is capable of harming competition in downstream markets, making it more likely that CPs, and, ultimately, consumers, businesses and Government bodies, pay more or have less choice or quality in their communications services.
- 8.9 Accordingly, we find that it is appropriate to impose a penalty for the contraventions of BT's SMP obligations in this case.
- 8.10 Any penalty has to be proportionate in its amount. In setting the penalty we have had regard to the Penalty Guidelines.⁴³⁹ In line with the Penalty Guidelines, having considered all the circumstances of this case in the round, we have imposed a penalty of £42 million. We consider that this figure is appropriate and proportionate for the reasons set out below.
- 8.11 Ofcom has not previously imposed a financial penalty for the contravention of an SMP obligation and therefore we do not consider that there are directly relevant precedents to which we should have regard in setting the penalty in this case.

Penalty amount

- 8.12 In the following paragraphs, we set out our assessment of the factors which appear to us to be relevant to determining an appropriate penalty that is proportionate to the contraventions we have found.

Deterrence

- 8.13 Ofcom's Penalty Guidelines explain that in determining the appropriate and proportionate level of any penalty the central objective 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.⁴⁴⁰
- 8.14 BT is subject to a range of SMP obligations across a number of markets. We 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 with not just the Relevant Regulatory Obligations, but all of BT's SMP obligations.
- 8.15 Any penalty we set should therefore be sufficiently high to discourage bad conduct, incentivise BT's management to encourage good practices and a culture of compliance across BT, and ensure that BT's senior management recognises that it is not more profitable for the business to break the law and pay the consequences, than it is to comply with the law in the first instance.

⁴³⁹ https://www.ofcom.org.uk/_data/assets/pdf_file/0017/96101/Penalty-guidelines-2015-Section-392-of-the-Communications-Act-2003.pdf. Under section 96B (2) of the Act, Ofcom has discretion to impose a separate penalty in respect of each contravention. In the present case, Ofcom considers it appropriate to impose a single penalty on BT for all of the contraventions in view of the fact that the contraventions were all related, involving the management and application of Deemed Consent.

⁴⁴⁰ 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

- 8.16 Under section 97 of the Act, there is a statutory maximum penalty which Ofcom may impose on BT in relation to the findings in this document. This statutory maximum is ten per cent of BT's turnover in its relevant business,⁴⁴¹ for the period 1 April 2015 to 31 March 2016.⁴⁴²
- 8.17 Since the contraventions we have found relate to the provision of Ethernet services, we have considered BT's revenues from the provision of these services, in determining the appropriate and proportionate level of penalty to provide an effective deterrent.
- 8.18 BT's Regulatory Financial Statement for 2015/16 records total revenues of £813m for Alternative Interface leased lines, which largely comprise Ethernet services.⁴⁴³ 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 £[<] million provided by BT in the course of this investigation about Openreach's external revenues for Ethernet for the year ending 31 March 2016.⁴⁴⁴
- 8.19 We have also had regard to evidence about BT's liabilities to make SLG payments in respect of Ethernet provision in 2013 and 2014, given that some of the contraventions we have identified relate to conduct which BT carried out with a view to minimising these liabilities.
- 8.20 In May 2013, a paper addressed to the Openreach Executive: "Network Investment - Top 10 Issues"⁴⁴⁵ highlighted that SLG payments on Ethernet were at c£[<]k per week. The SLG Update slide pack in May 2013, which was provided to members of the Openreach Executive, projected that on performance levels at that time, SLG spending would hit £[<]million at the end of the 2013/14 financial year – well over the forecast of £[<]million.⁴⁴⁶ In May 2014, a briefing to the Openreach Executive reported that "*Weekly SLG spend has remained at elevated levels noting the trailing 4 week average has been just under £[<]k per week.*"⁴⁴⁷
- 8.21 In the light of this evidence and assuming a relatively constant level of SLG payments throughout 2013 and 2014, the total amount of SLG payments for which BT may have been liable in the period in which the contraventions occurred could have been in the range of £[<] to £[<] million.
- 8.22 We consider that the penalty which we have imposed is sufficiently large to promote the central objective of setting a penalty, namely deterrence, having considered this information about BT's revenues and its potential SLG liabilities in the round.

⁴⁴¹ For these purposes, BT's turnover in the relevant business is calculated in accordance with the Schedule to The Electronic Communications (Networks and Services) (Penalties) (Rules for Calculation of Turnover) Order 2003 SI 2003/2712. BT's response to the 9th Notice, 4 November 2016, 0610, set out that BT Plc's turnover for the relevant business in this period was £17.698 billion.

⁴⁴² This is the relevant period for the purposes of calculating the maximum penalty, as defined in section 97(5) of the Act.

⁴⁴³ 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>

⁴⁴⁴ BT's response to the 9th Notice, 4 November 2016, 0610.

⁴⁴⁵ Network Investment – Top 10 Issues, May 2013, 0412.

⁴⁴⁶ Attachment – SLG recovery plan update PowerPoint presentation, 20 June 2013, page 11, 0228.

⁴⁴⁷ Network Investment Executive Briefing slides, May 2014, slide 4, 0272.

Seriousness of the contravention

- 8.23 A breach of an SMP condition is inherently serious. SMP conditions are imposed on a business identified as having SMP, following a detailed market review by Ofcom, including a public consultation. These regulatory obligations are designed to facilitate effective competition, that the business with SMP might otherwise be able to impede or distort, and thereby further the interests of consumers and businesses in relation to communications matters.
- 8.24 Ethernet services are essential components of business ICT services and play a key role in the delivery by CPs of fixed and mobile broadband services to consumers. We have found in successive BCMRs that, absent its SMP obligations, BT would have both the incentive and ability to distort competition in the provision of Ethernet and other leased lines services, ultimately against end-users' interests. Accordingly, the SMP obligations we have imposed on BT are designed to ensure that CPs are able to access Ethernet services on a wholesale basis and on regulated terms, so as to promote competition in downstream markets and incentivise BT to maintain an appropriate level of performance. These obligations, which include the Relevant Regulatory Obligations, are therefore fundamental to promoting competition in communications services used by consumers and businesses.
- 8.25 Accordingly, in breaching the Relevant Regulatory Obligations, BT's conduct risked harming competition in downstream markets, making it more likely that CPs, and, ultimately, consumers, businesses and Government bodies, pay more or have less choice or quality in their communications services.
- 8.26 This breach is particularly serious when we consider the importance of Ethernet services to consumers. As noted, Ethernet services play a significant role in allowing CPs to deliver broadband services to consumers.
- 8.27 Accordingly, Ofcom takes a very serious view of these contraventions of BT's regulatory obligations since they were capable of harming competition in downstream markets, and, as a consequence, of harming consumers.

Duration

- 8.28 The duration of the contraventions was significant: Practice 1 was carried out systematically in relation to open and closed orders for a period of almost 2 years; we have reason to believe that Practice 2 lasted for a similar duration; Practice 3 lasted for almost for 3 years, with the evidence showing that it continued for 4 months after BT identified the failing to Ofcom.⁴⁴⁸

Harm

- 8.29 The contraventions we have identified frustrated the important goals that the Relevant Regulatory Obligations were designed to secure, namely effective competition in downstream markets in the interests of consumers and businesses and incentives for BT to maintain an appropriate level of performance. Accordingly, the contraventions necessarily caused harm to CPs buying Ethernet services from BT and ultimately to consumers and businesses, who benefit from increased competition.

⁴⁴⁸ See sections 4, 5 and 6.

- 8.30 There is also evidence that Practice 1 caused significant direct financial harm to CPs, although we are unable to quantify this fully. It is clear also that BT made a gain out of its contravening conduct:
- 8.30.1 in the period April 2013 to September 2014, the SLG Triage Team saved SLG payments on 258 orders, a saving of at least £1,380,791, of which (accounting for successful appeals in the interim) £1,206,040 was repaid in May to July 2016⁴⁴⁹ together with interest payments of £25,301;⁴⁵⁰
 - 8.30.2 BT had already made an earlier payment to [redacted] in relation to the SLG Triage Team of £[redacted] that is not accounted for in these payments.⁴⁵¹ Furthermore, several of the orders manipulated by the SLG Triage Team were subject to successful appeals which resulted in SLG payments;⁴⁵²
 - 8.30.3 the Validation Team is reported to have made savings of £761,000.⁴⁵³
- 8.31 It is also clear that Practice 3 caused significant direct financial harm to CPs, as demonstrated by BT's report that it underpaid SLG payments by £719,031.60 following successful appeals.
- 8.32 We consider it likely that the level of direct harm was significantly higher than the sum of the amounts in paragraphs 8.30 and 8.31. As we have noted, in relation to Practice 1, the evidence shows that BT engaged in sustained and systematic conduct to apply Deemed Consent retrospectively by means of a number of specialist teams, (the National Backlog Team and Failed Completions Team in addition to the SLG Triage Team and the Validation Team), as well as by job controllers, over a two-year period.
- 8.33 Evidence about BT's budget and actual annual spending on SLG payments in 2013 and 2014 and its targets for reducing this tends to confirm that the potential financial harm that could have resulted from BT's conduct was materially higher than the sum of the underpayments BT has identified. There is evidence that weekly SLG spend in 2013 and 2014 was as much as £[redacted];⁴⁵⁴ one of the success metrics identified in a paper for the Openreach Executive about the 2014 Ethernet Recovery Plan was reducing this to £[redacted] per week.⁴⁵⁵ As noted at paragraph 8.20, the SLG Update slide pack in May 2013 projected that, on performance levels at that time, SLG spending would hit £[redacted] million at the end of the 2013/14 financial year – well over the forecast of £[redacted] million.⁴⁵⁶ On the assumption that the SLG payments held constant

⁴⁴⁹ Ethernet Provision Review orders - SLG refund payments (excluding interest) xls, 06 June 2016, 0446. See the number of entries that list SLG savings in column N. For orders where SLG savings were made in April and May, the spreadsheet notes these savings as having been made "Pre Triage Team". However, BT told us that the Triage Team was established in April 2013. Accordingly, we consider that the activities saving SLG payments during April and May 2013 represent the early work of the SLG Triage Team, before it was more fully staffed.

⁴⁵⁰ See the total in column T of 0446.

⁴⁵¹ See the total in column S of 0446 and response to Q8i which indicates payment was made in November 2015.

⁴⁵² See the total in column N of 0446.

⁴⁵³ Email regarding Validation, 24 July 2014, 0071.

⁴⁵⁴ Network Investment – Top 10 Issues, May 2013, 0412; Network Investment Executive Briefing slides, May 2014, slide 4, 0272.

⁴⁵⁵ Openreach Executive Monthly Update – Executive Session on Service, March 2014, slide 11, 0258.

⁴⁵⁶ Attachment – SLG recovery plan update PowerPoint presentation, 20 June 2013, page 11, 0228.

throughout 2013 and 2014, the total amount of SLG payments for which BT may have been liable in the period in which the contraventions occurred could have been in the range of £[X] to £[X] million.

8.34 There is evidence that Practices 1 and 2 also adversely affected CPs by creating uncertainty about when their circuits would be delivered and exacerbating the effects of the delay:

8.34.1 in the Vodafone Dispute, Vodafone describes Openreach's provisioning as having *"had a very detrimental impact on service performance and the provisioning of new circuits in particular, with customers waiting over a year for circuits delivery"*.⁴⁵⁷

8.34.2 there are internal BT documents reporting [X]'s concern about the late date management of its orders. For example, a slide in the May 2014 Ethernet Steering Group slide pack records that "[X] are actually less worried about the CDD performance but more concerned at the late Date Management of orders".⁴⁵⁸

8.34.3 another document notes more generally that customers were not happy about the late notification of CDD changes.⁴⁵⁹

8.35 Practices 1 and 2 therefore likely caused harm to CPs by creating uncertainty and exacerbating the effect of the delay, which in turn harmed their ability to manage their relationship with their customers.

8.36 We note that Practices 1 and 2 also had the potential to harm customers who rely on Ethernet circuits as part of their business ICT systems and in order to access efficient and effective telecommunications services. This is because uncertainty and delay in provision would also adversely impact the customers of the affected CPs.

The deliberate nature of Practice 1 and the involvement of the Openreach Executive

8.37 In relation to whether the contravention occurred deliberately or recklessly, we have identified that BT deliberately engaged in the conduct of retrospectively applying Deemed Consent, and it did so in a systematic and sustained way. The purpose of this conduct was to reduce the level of compensation that BT was required to pay CPs. We note, however, that we have not seen evidence that BT knowingly breached the Relevant Regulatory Obligations in carrying out this conduct.

8.38 In relation to the extent to which senior managers were aware that the contraventions were occurring, we have reason to believe that the Openreach Executive was aware of the strategy of retrospectively applying Deemed Consent and that there is evidence to show that individual members of the Executive were involved in devising and implementing the strategy and/or exercising oversight. We have not seen evidence that senior management at BT were aware that this strategy breached the Relevant Regulatory Obligations.

⁴⁵⁷ Vodafone's response to the 2015 Consultation on the 2016 BCMR, page 2.

https://www.ofcom.org.uk/data/assets/pdf_file/0033/38499/vodafone.pdf

⁴⁵⁸ Ethernet Steering Group Meeting 21.05.14, 21 May 2014, page 15, 9953.

⁴⁵⁹ Ethernet Job Control Briefing 46, 13 March 2014, 0038.

- 8.39 The full description of the evidence on this issue is set out in the detail of Section 4. By way of summary example only, we reference evidence of the deliberate nature of Practice 1 at paragraph 8.40, and the involvement of the Openreach Executive in Practice 1 at paragraphs 8.41 to 8.42 below.

The deliberate nature of Practice 1

- 8.40 The deliberate nature of this conduct is evident in particular from:

- 8.40.1 the establishment and operation of a number of dedicated teams engaged in retrospectively using Deemed Consent to reduce compensation payments:
- a) the SLG Triage Team, a dedicated team engaged in retrospectively using Deemed Consent to reduce compensation payments on closed orders from April 2013 to December 2014;⁴⁶⁰
 - b) the SLG Weekly Review which originated the conduct of retrospectively applying Deemed Consent to closed orders in early 2013 and continued to exercise oversight of the activity on a weekly basis until December 2014, with data about the savings made by the SLG Triage Team being compiled for a weekly slide pack produced for the SLG Weekly Review;⁴⁶¹
 - c) the Failed Completions Team, National Backlog Team and Validation Team, specialist teams engaged in retrospectively applying Deemed Consent to open orders, to reduce compensation payments;
- 8.40.2 briefings from senior managers to job controllers instructing them to look for opportunities to retrospectively apply Deemed Consent;⁴⁶²
- 8.40.3 the Ethernet Recovery Plan in 2013, which included 'date management' of Ethernet circuits by the SLG Triage Team as an element of its strategy;⁴⁶³
- 8.40.4 KIL calls that were held in 2013 to monitor the achievement of the targets set out in the 2013 Ethernet Recovery Plan;⁴⁶⁴
- 8.40.5 the Ethernet Recovery Plan in 2014, which worked on reducing the number of Ethernet circuits where the CDD had been passed and compensation payments were accruing, including through overseeing the work of the National Backlog Team and Validation Team;⁴⁶⁵ and
- 8.40.6 the Ethernet Steering Group: a group of senior managers from the NI and Finance business units of Openreach which was provided with information about the levels of compensation payments and BT's performance in

⁴⁶⁰ The savings identified by the SLG Triage Team were not actioned after September 2014 – see paragraph 4.49.

⁴⁶¹ See paragraphs 4.30 to 4.45.

⁴⁶² See paragraphs 4.54 to 4.69.

⁴⁶³ See paragraphs 4.130 to 4.144.

⁴⁶⁴ See paragraphs 4.142 to 4.149.

⁴⁶⁵ See paragraphs 4.145 to 4.152.

providing Ethernet. The Ethernet Steering Group was provided with information about the work of the SLG Triage Team.⁴⁶⁶

The involvement of the Openreach Executive

- 8.41 As set out in Section 4 at paragraphs 4.160 to 4.201, we also have found that the Openreach Executive was aware of the strategy of retrospectively applying Deemed Consent and that there is evidence to show that some members of the Executive were involved in devising and implementing the strategy and/or exercising oversight. For example:
- 8.41.1 the SLG Weekly Reviews were set up and conducted by a member of the Openreach Executive and at least one slide pack relating to the SLG Weekly Review was copied to another member of the Openreach Executive;⁴⁶⁷
 - 8.41.2 a member of the Openreach Executive was the author of a slide pack dated 20 June 2013 that described the 2013 Ethernet Recovery Plan explaining that “*Priority #1*” was to “*Close or ‘date manage’ SLG CCTs to <200 in 5 weeks.*”. The slide pack was provided to senior managers for discussion, including key members of the Openreach Executive.
 - 8.41.3 there is evidence that members of the Openreach Executive knew about the work of the SLG Triage Team. Updates on the work of this team were included in the minutes of the Ethernet KIL calls that were sent to them. For example, minutes of the KIL call of 29 July 2013, that went to a number of members of the Openreach Executive by email on 30 July 2013, report on the activity of the SLG Triage Team;⁴⁶⁸
 - 8.41.4 the Openreach Executive were briefed on the Ethernet Recovery Plan in March 2014. One of the workstreams noted for Q1 under the heading “*On-time Delivery & Reduced Lead-Times*” was “*War Room removes backlog*” and in Q2 “*Job Control & Jeopardy Management improvements reduce CDD fails.*”⁴⁶⁹ In May 2014 the Network Investment Executive Briefing to the Openreach Executive⁴⁷⁰ described the problem of elevated levels of weekly SLG spend, and the solution of a “*Comprehensive recovery plan built to reduce backlog to below 200 orders and our On Time Delivery to above 95% by 31 July.*”⁴⁷¹
- 8.42 The involvement of the Openreach Executive in this way, and as set out in Section 4, supports our finding that BT’s retrospective use of Deemed Consent to reduce its SLG liabilities was deliberate conduct.
- 8.43 By deliberately engaging in the conduct of retrospectively applying Deemed Consent, BT sought to avoid payment of compensation by maximising the use of Deemed Consent, rather than by improving its quality of service. In doing so, BT undermined

⁴⁶⁶ See paragraphs 4.156 to 4.157.

⁴⁶⁷ See paragraph 4.166.

⁴⁶⁸ See paragraphs 4.167 to 4.171.

⁴⁶⁹ Openreach Executive Monthly Update – Executive Session on Service, March 2014, slide 11, 0258

⁴⁷⁰ Network Investment Executive Briefing slides, May 2014, slide 4, 0272.

⁴⁷¹ See paragraphs 4.197 to 4.199.

the objective of the SLG Direction, which was to incentivise BT to improve its quality of service in the provision of Ethernet services.⁴⁷²

BT either knew or should have known that the failings in its systems would give rise to Practice 3

8.44 BT made available to CPs a Deemed Consent Guide which included a provision for CPs to challenge the application of Deemed Consent by BT under a Deemed Consent Appeals Process. We have set out in section 6, paragraphs 6.15 and 6.16, that we consider that based on the evidence, BT was, or should have been, aware that it was failing to properly account for successful Deemed Consent Appeals in its compensation payments to CPs.

8.45 The evidence we rely on includes:

8.45.1 job controller training slides issued in November 2013 revealing that if the CDD was moved too far forward by mistake, it could not be moved back. This meant that, following a successful Deemed Consent appeal, BT could not account for the appeal by simply revising the CDD back to its original date. Accordingly, this evidence reveals that there was operational knowledge of the underlying issue, the inability to move the CDD back, as early as November 2013;⁴⁷³

8.45.2 the 2015 Audit Report disclosed in August 2015 that job controllers were advising CPs to lodge subsequent claims for SLGs where they had successfully appealed Deemed Consent.⁴⁷⁴ This provides evidence that there was existing operational knowledge within Openreach that BT was not automatically making accurate SLG payments in cases where there were successful Deemed Consent appeals;⁴⁷⁵

8.45.3 in relation to senior management knowledge, the recipients of the 2015 Audit Report (issued on 31 August 2015) included [Executive 1]; [Senior Manager 2]; [Senior Manager 4] and [Senior Manager 16].⁴⁷⁶

8.46 On the basis of this evidence we consider that BT either knew that its systems were insufficient to take account of successful Deemed Consent appeals when SLG payments were calculated, or that it should have known.

Co-operation with Ofcom's investigation and timeliness of remedial action

8.47 We are of the view that BT's co-operation with the investigation has, at times, not been adequate. This is evidenced by failures to respond on time to statutory information requests.

⁴⁷² The objective of the SLG Direction was to incentivise BT to improve its quality of service for the provision of Ethernet, particularly in relation to the length of time taken to provide Ethernet. The SLG Direction sought to achieve this by requiring BT to pay compensation to CPs in the event that it did not provide service by the required delivery date. See Paragraphs 1.7, 2.6 and 3.59 of the 2008 SLG Direction Statement.

⁴⁷³ See paragraphs 6.15(a) above.

⁴⁷⁴ See paragraph 6.15(b) above.

⁴⁷⁵ See paragraphs 6.15(b) above.

⁴⁷⁶ See paragraphs 6.15(c) above.

- 8.48 In the course of the investigation, we have sent nine formal information requests to BT, some of which included staggered response deadlines. In responding to these information requests, BT provided the required information in full by the original required deadline on only four occasions.⁴⁷⁷
- 8.49 The completeness of BT's response to one of the information requests sent in the investigation is the subject of a separate enforcement investigation and we have not taken it into account in setting the penalty in this Confirmation Decision.
- 8.50 During the course of the investigation, BT made reports in relation to two of our findings:
- BT informed Ofcom of the existence and conduct of the SLG Triage Team.⁴⁷⁸
 - BT informed Ofcom that it had failed to pay correct SLG payments in certain orders where there had been a successful Deemed Consent appeal.⁴⁷⁹
- 8.51 In relation to BT's report concerning Deemed Consent appeals, we are of the view that this report made a positive contribution to the investigation. While the 4th Notice sought information in relation to Deemed Consent appeals, it is not clear that the evidence alone would have shown that BT had failed to account for Deemed Consent appeals in SLG payments. Nonetheless, in its 1st response to the 4th Notice BT informed Ofcom that it was reviewing whether Deemed Consent appeals had resulted in SLG payments and, shortly after, confirmed that there had been a failure to pay SLG payments following successful Deemed Consent appeals.
- 8.52 Had BT not made this report, further work would have been required of Ofcom to uncover this conduct, which would have been potentially resource intensive and complex.
- 8.53 That said, for the reasons set out at paragraphs 8.45 to 8.46 and in more detail in Section 6, we have reason to believe that BT was aware, or should have been aware given the information before it, of the risk that it was failing to make accurate SLG payments following successful Deemed Consent appeals by the end of August 2015, when the 2015 Audit Report was issued. We therefore consider that BT's report could have been made at an earlier stage of Ofcom's investigation.
- 8.54 In relation to the report of the activity of the SLG Triage Team, we are of the view that the evidence that BT was required to provide under the 4th Notice would have been sufficient for Ofcom to identify the existence and work of the SLG Triage Team, even without BT's report.⁴⁸⁰ We therefore consider that this report was made on the basis that the breach was evident from the information BT was required to provide under the 4th Notice. Given this, we are of the view that this report did not have a material impact in terms of simplifying the progress of the investigation.
- 8.55 In its response to the 4th Notice, BT wrote on 7 April 2016:

⁴⁷⁷ Specifically, the first deadline for response to the 1st Notice, the deadline for response to the 5th Notice, the deadline for response to the 7th Notice, and the deadline for response to the 9th Notice.

⁴⁷⁸ See BT's response to the 4th Notice, 0434 and Email from BT to Ofcom, 21 April 2016, 0612.

⁴⁷⁹ See BT's response to the 4th Notice, 0434 and Letter from BT to Ofcom, 6 May 2016, 0626

⁴⁸⁰ See BT's response to Q1B (ii) and (iv) and Q4B of the 4th Notice for documents which make clear the work and existence of the SLG Triage Team, pages 8-9, 0434.

“We have evidence that the SLG Triage team reviewed closed circuits for situations where Deemed Consent was not applied, where it could have been applied during the circuit provision process, and then implemented reductions in the SLGs paid to customers as if that deemed consent had been applied. We are urgently investigating this and will take any corrective action necessary, including making any additional SLG payments due.”⁴⁸¹

8.56 On 21 April 2016 BT wrote to Ofcom as follows⁴⁸²

“When we met last week, I updated you that we had found evidence, for about an 18 month period from Spring 2013 – Autumn 2014, of the existence of a team with Openreach Finance, the SLG Triage Team, reviewing closed circuits for situations where it would have been appropriate to apply DC during the circuit provision process but where this did not happen. As we understand it, as well as feeding back these examples to the Job Control team as part of learning, they reduced the SLG paid to the CP as if DC had been applied. CPs were not informed – they simply received the lower SLG.”

- 8.57 However, as set out in detail in Section 4 and summarised at paragraph 8.41 above, there is evidence to show that the existence and activities of the SLG Triage Team were part of the deliberate strategy pursued by Openreach in 2013 and 2014 to reduce its SLG liabilities, with the knowledge and oversight of the Openreach Executive.
- 8.58 Further, we note that there is evidence to indicate that BT was aware of the compliance issues relating to the SLG Triage Team well before Ofcom opened its investigation in November 2015 and BT’s reports in April 2016.
- 8.59 Specifically, as set out in paragraph 4.50, there is evidence that the activities of the SLG Triage Team were concluded in December 2014 after concerns were raised by the regulatory team about the activity of the team.⁴⁸³ Moreover, the evidence set out at paragraph 4.229 indicates that [S<] received a compensation payment in relation to the work of the SLG Triage Team in November 2015. However, as BT’s response of 7 April 2016 reveals, BT did not take action to carry out further investigations or repay other CPs in relation to the activities of the SLG Triage Team until after receipt of the 4th Notice.
- 8.60 Accordingly, we do not consider that BT’s reports in relation to the SLG Triage Team were timely or that they made a material contribution to simplifying Ofcom’s investigation.
- 8.61 BT has taken steps to remedy the work of the SLG Triage Team and the failure properly to account for Deemed Consent appeals in SLG payments. BT has paid

⁴⁸¹ See BT’s response to Question 4, part B of the 4th Notice, page 26, 0434.

⁴⁸² Email from BT to Ofcom, 21 April 2016, 0612.

⁴⁸³ A slide pack of 21 November 2014 reports a decision by “Regulatory” to pay the full amount of SLG payments without deducting savings identified by the SLG Triage Team following a “letter of complaint from CPs”. See 034 SLG Weekly Review call 21 Nov 2014, 21 November 2014, page 3, 0339 (see also, 035 Weekly Review call 28 Nov 2014, 28 November 2014, 0341; 036 Weekly Review call 05 Dec 2014, 05 December 2014, 0343).

£1,206,040 to CPs in relation to the work of the SLG Triage team⁴⁸⁴ and £719,000 in relation to Deemed Consent appeals,⁴⁸⁵ as well as additional interest payments.⁴⁸⁶

- 8.62 As set out above, in relation to the SLG Triage Team, the report of the existence and work of this team was made only as a result of the investigation. Further, the evidence indicates that BT was aware of this conduct in 2014 and could have taken earlier steps to investigate and fully remedy the consequences of this misconduct, but did not do so.
- 8.63 We consider repayments made in relation to the SLG Triage Team do not represent the full amount of the SLG 'savings' achieved through Practice 1. Practice 1 went beyond the activities in relation to closed orders of the SLG Triage Team, in respect of which BT has made remedial payments, and extended to action on open orders undertaken by the Failed Completions Team, the National Backlog Team, and the Validation Team, as well as job controllers in their day-to-day work.
- 8.64 In relation to Deemed Consent appeals, as set out at paragraph 6.31, in addition to the repayments it has made, BT has introduced operational and systems changes to ensure that SLG payments properly reflect the outcome of Deemed Consent appeals, as well as paying historic SLG payments.
- 8.65 As set out at paragraph 6.15, we believe the evidence indicates that Openreach was made aware of the risk that successful Deemed Consent appeals were not being accounted for in SLG payments as early as August 2015. While BT has now taken steps to remedy this issue, we are of the view that it did not do so in a timely fashion.
- 8.66 We also note that there were 38 orders completed after April 2016 for which BT later made a corrective payment in relation to Deemed Consent appeals.⁴⁸⁷ BT made its report to Ofcom in April 2016 and began a review of historic orders which had been subject to Deemed Consent appeals. However, it did not ensure that the original SLG payment for orders closing after that date properly accounted for Deemed Consent appeals, and as a result there were orders that closed as late as August 2016 for which BT had to make a later corrective payment.⁴⁸⁸ Therefore, BT did not implement remedial steps in a timely fashion after making its report to Ofcom.
- 8.67 We note that BT provided Ofcom with updates on the processing of Deemed Consent appeals on 6 May 2016, 19 May 2016, 3 June 2016, 10 June 2016, 6 July 2016, 14 July 2016 and 24 October 2016. BT told us that the process of reviewing historic orders was manual-only and required significant time.

Ofcom's findings on the penalty amount

- 8.68 We have imposed a penalty of £42 million on BT. The calculation of this figure includes a 30% discount applied to the provisional penalty figure of £60 million proposed in the section 96A notification as a result of BT's accepting liability and entering into a voluntary settlement with Ofcom.

⁴⁸⁴ See the total in column T of 0446.

⁴⁸⁵ Ofcom analysis of Deemed Consent Challenges and SLG Payments – FINAL, 4 November 2016, 0611.

⁴⁸⁶ See the total in column G of 0445.

⁴⁸⁷ BT's response to the 9th Notice, 0610.

⁴⁸⁸ The last corrective repayment was made in November 2016.

- 8.69 In determining the amount of the penalty, we have taken account of the likely cost to BT of implementing a remedy for the consequences of its contraventions. Taking account of this and all the factors set out above in the round, we consider the penalty is both appropriate and proportionate.

Annex 1

List of annexes

This section sets out the of annexes included in addition to those that are part of this document:

Annex Number	Description
9	Not included in non-confidential version
10	Not included in non-confidential version
11	Not included in non-confidential version
12	Not included in non-confidential version
13	Not included in non-confidential version

Annex 2

Confirmation Decision under Section 96C of the Communications Act 2003 relating to a contravention of SMP Conditions HH5.9, 6.9 and 5.10, HH1.2, 1.2 and 1.3

Section 96C of the Communications Act 2003

A2.1 Section 96C of the Communications Act 2003 (the “Act”) allows the Office of Communications (“Ofcom”) to issue a decision (a “Confirmation Decision”) confirming the imposition of requirements on a person where that person has been given a notification under section 96A of the Act, Ofcom has allowed that person an opportunity to make representations about the matters notified, and the period allowed for the making of representations has expired. Ofcom may not give a Confirmation Decision to a person unless, having considered any representations, we are satisfied that the person has, in one or more of the respects notified, been in contravention of a condition specified in the notification under section 96A.

A2.2 A Confirmation Decision:

- a) must be given to the person without delay;
- b) must include the reasons for the decisions;
- c) may require immediate action by the person to comply with the requirements of a kind mentioned in section 96A(2)(d) of the Act,⁴⁸⁹ or may specify a period within which the person must comply with those requirements; and
- d) may require the person to pay:
 - i) the penalty specified in the notification issued under section 96A of the Act, or
 - ii) such lesser penalty as Ofcom consider appropriate in light of the person’s representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, andmay specify the period within which the penalty is to be paid.

SMP Conditions

A2.3 Section 45(1) of the Act gives Ofcom the power to set conditions, including SMP services conditions, binding on the person to whom they are applied.

⁴⁸⁹ Such requirements include those steps that Ofcom thinks should be taken by the person in order to remedy the consequences of a contravention of a condition.

- A2.4 Ofcom imposed SMP conditions on BT pursuant to Ofcom's Notifications of 8 December 2008, 28 March 2013 and 28 April 2016, issued under sections 48(1) and 79(4) of the Act.

SMP Conditions HH5.9, 6.9 and 5.10

Condition HH5.9/Condition 6.9/Condition 5.10: provision of network access in accordance with the Reference Offer

- A2.5 In the December 2008 BCMR Statement, Condition HH5.9 was imposed pursuant to a Notification under sections 48(1) and 79(4) of the Act on 8 December 2008 and came into force on the same date.⁴⁹⁰
- A2.6 In the 2008 BCMR Statement, Condition HH5.9 stated that:
- “The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.”*
- A2.7 In the March 2013 BCMR Statement, Condition HH5.9 was revoked on 28 March 2013 and Condition 6.9 was imposed in the same terms pursuant to a Notification of 28 March 2013 under sections 48(1) and 79(4) of the Act and came into force on the same date.⁴⁹¹
- A2.8 In the April 2016 BCMR Statement, Condition 6.9 was revoked on 28 April 2016 and Condition 5.10 was imposed to the same substantive effect pursuant to a Notification of 28 April 2016 under sections 48(1) and 79(4) of the Act and came into force on the same date.⁴⁹²

SMP Condition HH1.2, 1.2 and 1.3 and the SLG Direction

Condition HH1.2/Condition 1.2/ Condition 1.3: provision of network access on fair and reasonable terms

- A2.9 In the December 2008 BCMR Statement, Condition HH1.2 was imposed pursuant to a Notification of 8 December 2008 under sections 48(1) and 79(4) of the Act and came into force on the same date.⁴⁹³
- A2.10 Condition HH1.2 was set in the following terms:
- “The provision of Network Access in accordance with paragraph HH1.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms and conditions (excluding*

⁴⁹⁰ See the 2008 BCMR Statement Annex 8: Notification under sections 48(1) and 79(4) of the Act, Schedule 4, page 406.

⁴⁹¹ See the 2013 BCMR Statement, Annex 7: Notification under sections 48(1) and 79(4) of the Act, Schedule 2, Part 3.

⁴⁹² See the 2016 BCMR Statement, Annex 35, Notification under sections 48(1) and 79(4) of the Act, Schedule 1, Part 3.

⁴⁹³ See the 2008 BCMR Statement, Annex 8: Notification under sections 48(1) and 79(4) of the Act, Schedule 4, page 404.

charges) and on such terms and conditions (excluding charges) as Ofcom may from time to time direct”.

A2.11 In the March 2013 BCMR Statement, Condition HH1.2 was revoked on 28 March 2013 and Condition 1.2 was imposed pursuant to a Notification of 28 March 2013 under sections 48(1) and 79(4) of the Act and came into force on the same date.⁴⁹⁴

A2.12 Condition 1.2 was imposed with the same substantive requirement to provide network access on fair and reasonable terms and conditions:

“the provision of network access by the Dominant Provider in accordance with this Condition must—

(a) take place as soon as reasonably practicable after receiving the request from a Third Party;

(b) be on fair and reasonable terms, conditions and charges; and

(c) be on such terms, conditions and charges as Ofcom may from time to time direct.”

A2.13 In the April 2016 BCMR Statement, Condition 1.2 was revoked on 28 April 2016 and Condition 1.3 was imposed pursuant to a Notification of 28 April 2016 under sections 48(1) and 79(4) of the Act, and came into force on the same date.⁴⁹⁵

A2.14 Condition 1.3 was imposed with a similar effect:

“Where Condition 10 applies to the provision of network access by the Dominant Provider, the provision of that network access in accordance with this Condition must:

(a) take place as soon as reasonably practicable after receiving the request from a Third Party (and, in any event, in accordance with Condition 7);

(b) be on:

(i) fair and reasonable terms and conditions (excluding charges); and

(ii) such terms, conditions and charges as Ofcom may from time to time direct.”

SLG Direction

A2.15 Section 49 of the Act gives Ofcom the power to make Directions for the purposes of a Section 45 Condition.

⁴⁹⁴ See the 2013 BCMR Statement, Annex 7: Notification under sections 48(1) and 79(4) of the Act, Schedule 2, Part 3, page 123.

⁴⁹⁵ See the 2016 BCMR Statement, Annex 35, Notification under sections 48(1) and 79(4) of the Act, Schedule 1, Part 3, page 19.

- A2.16 On 20 March 2008, pursuant to section 49 of the Act and Condition HH1.2⁴⁹⁶, OFCOM gave the following Direction requiring the modification of the Service Level Agreements (“SLAs”) governing the supply of certain Ethernet services.⁴⁹⁷

“The Dominant Provider shall modify the service level agreements which govern the supply of backhaul extension services (‘BES’), wholesale extension services (‘WES’) and wholesale end to end Ethernet services (‘WEES’). In particular, the following contracts will require modification to reflect the proposals set out in the accompanying Annex to this Direction: (i) the Conditions for Backhaul Extensions Services; and (ii) the Conditions for Wholesale Extension Services.”

- A2.17 The SLG Direction required the following modifications of BT’s contracts for the provision of the specified Ethernet services:
- to require BT to provide reasons to justify a contractual delivery date (CDD) later than the 57th day;
 - to require an extension of the CDD beyond the 57th day to be subject to the CP’s consent; and
 - to require BT to pay compensation (“SLG payment”) set at 100% of one month’s line rental for every day or part day of delay beyond the CDD, up to a maximum of 60 days.
- A2.18 In the December 2008, March 2013 and April 2016 BCMR Statements, Ofcom decided to re-impose the SLG Direction in substantively the same terms, applying to BT’s Ethernet services in the relevant wholesale markets where BT had been found to have a position of significant market power.⁴⁹⁸

Subject of this Confirmation Decision

- A2.19 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 96A

- A2.20 On 22 March 2017, Ofcom gave a notification under section 96A of the Act (“the section 96A Notification”) to BT.
- A2.21 Ofcom determined that there were reasonable grounds for believing that BT contravened SMP Conditions HH5.9, 6.9, and 5.10 and HH1.2, 1.2 and 1.3 and the SLG Direction by:

⁴⁹⁶ This SMP condition was set by Ofcom on 24 June 2004 under section 48(1) and 79 of the Act.

⁴⁹⁷ *Service level guarantees: incentivising performance, Statement and Directions*, 20 March 2008 (“SLG Direction Statement”), Annex 3.

<http://stakeholders.ofcom.org.uk/binaries/consultations/slq/statement/statement.pdf>. The Ethernet services covered by the SLG Direction were WES, BES and WEES.

⁴⁹⁸ See the December 2008 BCMR Statement, paragraph 8.292 and Schedule 15; March 2013 BCMR Statement, paragraph 12.236 and Annex 8, Schedule 2; April 2016 BCMR Statement, paragraphs 13.750 – 13.765, Annex 35, Schedule 4.

- 2.21.1 applying Deemed Consent retrospectively in relation to open and closed orders from January 2013 to 17 December 2014, in breach of the terms and conditions of the relevant Reference Offer;
 - 2.21.2 failing to ensure that CPs were adequately notified of applications of Deemed Consent between January 2013 and 17 December 2014. Each instance where BT failed to provide adequate notification of an application of Deemed Consent it breached the terms and conditions of the relevant Reference Offer;
 - 2.21.3 failing to make the correct deduction for SLG payments when calculating invoices issued in respect of 161 orders for Ethernet services, which completed between 24 October 2013 and 26 August 2016. In respect of each such order, that failure is a breach of the terms and conditions of the relevant Reference Offer.
- A2.22 The section 96A Notification also specified that Ofcom was minded to impose a penalty of £60 million on BT in respect of the contravention of SMP Conditions HH5.9, HH6.9 and 5.10, and HH1.2, 1.2 and 1.3 and the SLG Direction.
- A2.23 The section 96A Notification allowed BT the opportunity to make representations to Ofcom about the matters set out.

Confirmation Decision

- A2.24 The period allowed for making representations has now expired. BT did not make any representations about the matters notified and has accepted liability for the contraventions in a letter to Ofcom dated 26 March 2017.
- A2.25 Accordingly, Ofcom is satisfied that BT has, in the respects notified in the section 96A Notification, contravened SMP Conditions HH5.9, 6.9 and 5.10 and HH1.2, 1.2 and 1.3 and the SLG Direction. Ofcom has decided to give BT a Confirmation Decision, and to impose a financial penalty, in accordance with section 96C of the Act. The reasons are set out in the explanatory statement to which this Confirmation Decision is annexed.

Requirements

- A2.26 The requirements imposed on BT by this Confirmation Decision are for steps BT to comply with the following steps to remedy the consequences of the contraventions of SMP Conditions HH5.9, 6.9, and 5.10 and HH1.2, 1.2 and 1.3 and the SLG Direction:
- 2.26.1 BT, using its best endeavours and acting promptly and in good faith, to fully compensate each CP where it has underpaid the CP in respect of amounts due under the CSA as a result of the contravening conduct identified in sections 4 and 5 of the explanatory statement to which this Confirmation Decision is annexed;
 - 2.26.2 to pay such compensation as soon as reasonably practicable and in any event no later than 27 March 2018.
 - 2.26.3 In fulfilling the specified remedial steps BT to either:

- agree the amount of compensation to be paid with the CP in question; or, in the absence of agreement,
 - determine the amount of compensation due by means of a compensation scheme, which is approved by Ofcom, provides for an independent audit and meets the other requirements specified in paragraph 7.6 in the explanatory statement annexed to this Confirmation Decision
- 2.26.4 BT to make available to Ofcom information in relation to the operation of the compensation scheme as Ofcom considers necessary to enable Ofcom to monitor its effectiveness and BT's compliance with the requirements imposed by this Confirmation Decision.
- 2.26.5 BT to comply with any direction given by Ofcom for the purpose of securing the fulfilment of the requirements imposed by this Confirmation Decision and/or monitoring or securing BT's compliance with these requirements.

Penalty

- A2.27 Ofcom has determined that BT must pay a penalty of £42 million in respect of its contraventions of SMP Conditions HH5.9, HH6.9 and 5.10, and HH1.2, 1.2 and 1.3 and the SLG Direction. The calculation of this figure takes account of a 30% discount applied to the provisional penalty figure of £60 million proposed in the section 96A Notification, as a result of BT accepting liability and entering into a voluntary settlement with Ofcom.
- A2.28 BT has until 5.00pm on 26 April 2017 to pay Ofcom the penalty.

Interpretation

- A2.29 Words or expressions used in this Confirmation Decision have the same meaning as in the SMP Conditions or the Act except as otherwise stated in this Confirmation Decision

Gaucha Rasmussen, decision maker for Ofcom

27 March 2017

Annex 3

Chronology of actions taken by Openreach during the Investigation Period in relation to Practice 1

November 2012	[redacted]Consultant[redacted] report on Ethernet delivery.
January 2013	Failed Completions team established.
February 2013	Weekly SLG review meetings begin (chaired by [Executive 1]/[Senior Manager 5] RCA of orders which have failed their CDD
April 2013	SLG Triage team is set up
May 2013	Loop Extra message from [Executive 1] to job controllers about setting the CDD and deemed consent
June 2013	Openreach predicts SLG liabilities of £[redacted] million for 2013/14 Ethernet Recovery Plan 2013 begins Daily KIL calls begin with action log Evidence of National Backlog team's involvement in retrospective applications of Deemed Consent.
July 2013	SLG Triage team increases in size (including recruiting offshore members) Daily KIL calls end
November 2013	Failed Completions team disbanded
January 2014	National Backlog Team is established
February 2014	War room established
March 2014	Ethernet Recovery Plan 2014 begins Ethernet Steering Group is established War room oversees reduction of backlog under Ethernet Recovery Plan. Daily calls begin
April 2014	SLG liabilities reported to Openreach Executive as c£[redacted]K per week
June 2014	National Backlog Team disbanded Validation Team starts

July 2014	Last month in which Ethernet Steering Group meets
August 2014	Backlog target of >200 orders under Ethernet Recovery Plan reported as being achieved
September 2014	Last month in which savings from SLG Triage Team were processed War room disbanded
November 2014	Ethernet Recovery Plan ends – SLG payments reported to Openreach Executive as at their lowest for 2 years. Openreach receives complaint about retrospective application of Deemed Consent/ Openreach Regulatory suspend retention of SLG savings identified by SLG Triage Team
December 2014/January 2015	Last month in which SLG Weekly Review is held SLG Triage Team disbanded Validation team disbanded

Annex 4

National Backlog Team

- A4.1 During our review of the Sample, as set out in section 5, it became apparent from looking at the wider circumstances of particular applications of Deemed Consent that there were a number of orders where either the National Backlog Team or the [redacted] Team had intervened.
- A4.2 We explain at paragraphs 4.85-4.90 that the National Backlog Team was created as part of the conduct of retrospectively applying Deemed Consent to open orders so as to reduce BT's SLG exposure. We note that [redacted] is the location of one of the job control offices, and that the National Backlog Team was coordinated out of [redacted].⁴⁹⁹ Based on the examples set out below, it appears that this office was involved in the retrospective application of Deemed Consent in open orders.
- A4.3 In this section, we set out some further examples of the work of these teams which were identified in our review of the Sample. In reading these examples, it is important to remember that SLG payments are calculated by working out the number of working days between the final CDD that is confirmed to the CP and the date on which the circuit was provided (the service completion date or SCD). If the SCD is after the final CDD, BT must make SLG payments for the difference in working days between the two dates. It is also important to note that there is usually a period of delay between the SCD and the sending of a handover email to the customer. The handover email confirms the SCD and the final CDD for the order.
- A4.4 We note that the timing and circumstances of the retrospective applications made by the National Backlog Team and the [redacted] Team varied, but that there were a number of instances in which these teams Deemed Consent at a point between the SCD of an order and the date on which the customer was sent a handover email.⁵⁰⁰
- A4.5 This intervention occurred in orders where the SCD was a date that was after the last CDD, meaning that BT was liable for SLG payments for that order. The purpose of this intervention was to retrospectively apply Deemed Consent to move the CDD forward, reducing the number of days by which the circuit failed the CDD and thereby lowering the SLG payments for that order.
- A4.6 In one example, an order completed on 22 July 2014, and this was recorded as the SCD.⁵⁰¹ At that time, the CDD was 1 July 2014 (15 working days before the SCD), meaning that SLG payments of 15 days would be payable on the order. On 24 July 2014, before the handover email was sent to the CP, the National Backlog Team applied Deemed Consent in order to move the CDD from 1 July 2014 to 22 July 2014, thereby moving the CDD forward 15 working days so that it matched the SCD. It justified this application of Deemed Consent in COSMOSS with reference to a delay that occurred between November and December 2013.⁵⁰² The handover email was then sent to the CP later on 24 July 2014. Before this intervention, BT

⁴⁹⁹ BT's 1st Response to the 4th Notice, 7 April 2014, page 10, 0434.

⁵⁰⁰ See paragraphs 3.8 to 3.18 for an explanation of the Ethernet provisioning process.

⁵⁰¹ Order no. [redacted]. This is the example which we discuss at paragraph 4.88.

⁵⁰² The relevant note in COSMOSS attributes this application of Deemed Consent to the National Backlog Team and reads: "High level description: DC7A, CDD moved by 15 days from 26/11/13 – 17/12/13 waiting customer to advise when the cabinet had been provided."

would have had to pay 15 days of SLG payments, meaning that the effect of this retrospective application of Deemed Consent was to reduce the number of days of SLG payments to zero.

- A4.7 In another example,⁵⁰³ an order completed on 26 June 2014, making that the SCD. The [X] Team deemed consent on 27 June 2014 in order to revise the CDD from 13 June 2014 to 20 June 2014. This was justified by an access issue that had occurred on 10 June 2014. The result of this application of Deemed Consent was that the final CDD was moved to 20 June 2014, reducing the number of days of SLG payments to be made to four days, rather than the nine days of SLG payments that would have been paid if the CDD had remained at 13 June 2014.
- A4.8 In a further example,⁵⁰⁴ the order was completed on 6 June 2014, making this the SCD. COSMOSS shows that the National Backlog Team intervened on 9 June 2014 to extend the CDD from 26 May 2014 to 6 June 2014. It justified this with reference to a delay in gaining access for the survey three months earlier, in March 2014, i.e. it retrospectively applied Deemed Consent. COSMOSS records that the delay should have been recorded as a total of 21 days but that only 15 days were added at the time the delay was ongoing. The result of this application of Deemed Consent was that the CDD was moved from 29 May to 6 June and so no SLG payments were paid. The handover email was then sent to the CP later on 9 June 2014.⁵⁰⁵
- A4.9 Each of these examples demonstrates that the National Backlog/[X] teams intervened, at times, between the SCD and the sending of a handover email to the CP, in order to reduce the difference between the last CDD and the SCD and, in doing so, reduce the SLG payments for those orders.
- A4.10 In some cases, we found retrospective applications of Deemed Consent purporting to account for a whole series of missed days from across a number of previous applications.
- A4.11 For example, in one order the SCD was recorded as 7 July 2014. On 12 July 2014,⁵⁰⁶ the Backlog Team applied three separate DC codes to add 30 days of delay at the end of the order, including for a period between 16 January and 14 March 2014 for which 20 days were added. The corresponding COSMOSS note recorded this as follows: *“National Backlog Team...CDD move deemed consent... High Level Description: DC22/DC7M/DC7F...Low Level Description: CDD moved for days not accounted for during ongoing TRT DLY from 20/6 to 26/6 (4 days), AXS DLY for fibre work 27/6 to 2/7 (3 days), F&T DLY from 3/7 to 7/7 (3 days) and 20 days for TRT DLY not accounted for DLY from 16/1 to 14/3 where TRT delayed WTGPTD to be signed for blockage work...”* This indicates that the National Backlog Team engaged in the conduct of reviewing orders to identify historic delays for which it could retrospectively deem consent.
- A4.12 In another example,⁵⁰⁷ where the SCD was 30 July 2014, the handover email of 5 August 2014 included notification of Deemed Consent, the CP was informed: *“Please be advised CDD has been date managed by 4 days on DC7J for customer access delay from 22/04/14 to 28/04/14 and by 4 days on DC7M for internal cable*

⁵⁰³ Order no. [X].

⁵⁰⁴ Order no. [X].

⁵⁰⁵ We note that the handover email in this case did notify the CP of the application of Deemed Consent.

⁵⁰⁶ Order no. [X].

⁵⁰⁷ Order no. [X].

work access delay from 10/06/14 to 16/06/14 and by 3 days on DC22 for last part of delay for night work required from 08/07/14 to 11/07/14 and by 3 days on DC7M for access delay from 22/07/14 to 25/07/14.” COSMOSS notes on 31 July showed that the date management for the delay in April was executed by the Backlog Team, whilst the additional notes made on 3 August showed that it was the [§] Team who had intervened to make the further additions in respect of the subsequent periods of delay. Both of these applications of Deemed Consent took place after the SCD and before the handover email was sent to the CP.

- A4.13 We believe that these examples demonstrate that the National Backlog Team, as well as a team located in [§], were engaged in the conduct of retrospectively applying Deemed Consent to open orders. Further, the examples we set out above demonstrate that this intervention often occurred at the very end of a process, with the clear purpose of reducing the degree of CDD failure of an order and, therefore, reducing the SLG payments.

Annex 5

Ofcom's approach to creating a representative sample

Objective

- A5.1 In response to the 1st Notice, BT provided information relating to all orders completed during the period 1 May 2014 to 31 July 2014 (the "Sample Period") in which Deemed Consent was applied.⁵⁰⁸ In all, BT provided information relating to 8,628 orders where Deemed Consent was applied.
- A5.2 In order to assess whether BT's use of Deemed Consent complied with its SMP obligations, we considered it necessary to review the evidence relating to these orders. Given the large number of orders in which Deemed Consent was applied during the Sample Period, we did not consider that it would be necessary, or a reasonable use of time and resources, to review each and every order. We therefore decided to review a representative sample of these orders, and the following section sets out how we constructed this sample.
- A5.3 In constructing our sample, we sought to ensure that it was representative of the following key characteristics, which we believed could influence the rate of inadequate notification in orders for Ethernet services:
- i) Length of time taken to complete an order;
 - ii) The number of instances each code was applied;
 - iii) As a subset of (ii), the number of orders in which each code was applied;
 - iv) The number of times the CDD was extended per order using Deemed Consent;
 - v) The split of orders across different product groups (most of the products being provided are Ethernet Access Direct) and order types (most orders being "Provide" orders).
- A5.4 On 30 March 2016, following queries from Ofcom about orders for which eCo scripts had not been provided, BT said that 122 of the orders that it identified in response to the 1st Notice were placed using BT's EMP/Flow platform, rather than the eCo platform.⁵⁰⁹ On 30 March 2016, BT provided us with all information relating to these orders, which were all for Ethernet Backhaul Direct services. When determining the original population from which to draw our sample, we concluded that the information available from BT's EMP/Flow records was not sufficient for us to make robust conclusions on those 122 orders. BT also identified that an additional two orders were internal LLU fibre only orders whereby an external CP

⁵⁰⁸ This includes orders that were placed and validated before the start of the Sample Period. In relation to these orders, BT included in its response information relating to applications of deemed consent from before the start of the Sample Period, in addition to information relating to applications of deemed consent during the Sample Period.

⁵⁰⁹ BT's supplementary response to Question 3 (i) of the 1st Notice, 30 March 2016, page 4, 0429.

was not involved and therefore these orders were raised on COSMOSS only.⁵¹⁰ Given that they represented only a small proportion of the orders in our population, we decided to exclude these 124 orders from the population from which we constructed our sample.

- A5.5 Added to this, in the course of reviewing our sample, we identified one order that was incorrectly recorded as having completed during the Sample Period. We therefore excluded this order from our population.⁵¹¹
- A5.6 When constructing our sample, we therefore drew from a population of 8,503 orders, comprising 40,197 applications of Deemed Consent.⁵¹²

Sample methodology

- A5.7 In determining the appropriate population of data from which to construct our sample, our first decision was to sample the population by orders, rather than by individual applications of Deemed Consent. This decision was informed by the following factors:
- i) When assessing applications of Deemed Consent to consider whether they were applied in accordance with relevant SMP conditions, we consider that it can be necessary to consider the full context of an order or other applications of Deemed Consent in that order. Because of this, assessing one application of Deemed Consent will frequently result in a need to assess other, if not all, applications of Deemed Consent within an order. Therefore, we considered that it was a more proportionate use of resources for Ofcom to assess all applications within an order.
 - ii) The information provided to us by BT was organised according to either circuit ID or Job Number. Individual eCo notes, eCo emails and COSMOSS notes could not be distinguished by individual applications of Deemed Consent without a manual review of the data. We considered that it would be disproportionate for Ofcom to undertake an exercise of separating out the evidence for each individual application of Deemed Consent within an order, and then only assessing certain applications within that order.
- A5.8 Sampling orders therefore offered organisational, analytical and resource benefits not offered by sampling individual applications of Deemed Consent.
- A5.9 The following section sets out the individual stages involved in constructing the sample using the data from our Sample Period (the “Population”).

Stage 1

- A5.10 The purpose of this section is to give a high-level overview of the process used to identify a relevant and robust sample of this population

⁵¹⁰ BT’s supplementary response to Question 3 (i) of the 1st Notice, 30 March 2016, page 4, 0429.

⁵¹¹ This order was [§<]. Upon reviewing this order, it appeared that this order had incorrectly been recorded as having completed during the period May to July 2013.

⁵¹² We noted that BT included 58 orders in this response which appeared to have been subject to no extensions to the CDD using deemed consent. However, as they were listed in response to Q2 of the 1st Notice, we decided to include these orders as part of the population from which we drew the sample.

A5.11 Given that the objective of our sample was to allow for robust analysis of orders and applications of Deemed Consent as a whole, it was necessary to balance the following three factors when determining the size of the sample:

- Ensuring the sub-groups are sufficiently large to allow for robust analysis;
- Minimising the potential for over-represented groups to have an undue influence on the total sample;
- Ensuring adequate but not unnecessarily high levels of the Ethernet Access Direct (EAD) Provide order type in the sample.

A5.12 The Population comprises three product types, shown in Table 1.1. The first stage of constructing our sample was to decide whether a proportionate sample of each order type should be drawn, i.e. whether a sample should be drawn by selecting circa 5% of each order type.

Table A5.1

Product type	Percentage of orders in full population
Backhaul Extension Services	[<]
Ethernet Access Direct	[<]
Wholesale Extension Services	[<]

A5.13 As Table A5.1 shows, there was a low incidence of Backhaul Extension Services (BES) and Wholesale Extension Services (WES). A proportional sample would not allow sufficient number of respondents to be analysed to allow reporting at an order type level. Therefore, these two order types (BES and WES) were sampled in full (13 and 28 orders respectively). We set out below how we sampled EAD.

Stage 2

A5.14 The next stage was to look at the breakdown of order type within the category of Ethernet Access Direct in the Population. While the 2008 SLG Direction applies solely to the provisioning of an order (the “Provide” category), we considered it necessary to review all order types, as SMP conditions HH1.2/1.2 and HH5.9/6.9 apply to all product types.

A5.15 Table A5.2 shows the breakdown in order types within the Ethernet Access Direct category in the Population.

Table A5.2

EAD Order type	Number of orders in full population
Provide	[X]
Rearrange	[X]
Regrade	[X]
Remove/Re-site	[X]
Shift	[X]

A5.16 Due to the small number of remove/re-site orders in the population, we decided to sample this order type for Ethernet Access Direct in full. We now set out how we sampled the remaining types of EAD order.

Stage 3

A5.17 The third stage was to examine the profile of the Population in terms of total duration of the order and the number of times the CDD was extended using Deemed Consent.⁵¹³ This analysis showed that the profiles of the order types within Ethernet Access Direct differed widely. For example, an Ethernet Access Direct Provide order took on average [X] days and [X] extensions to complete compared to [X] days and [X] extensions to complete an Ethernet Access Direct Shift order. This showed that it was more appropriate to stratify the Ethernet Access Direct sample by order type than to treat Ethernet Access Direct as a homogenous sample.

A5.18 Table A5.3 sets out the differences in the profiles of the four order types for Ethernet Access Direct that are to be sampled.

Table A5.3

	EAD Provide	EAD Rearrange	EAD Regrade	EAD Shift	Total
Duration of order (days)					
Mean	[X]	[X]	[X]	[X]	[X]
Standard Error	[X]	[X]	[X]	[X]	[X]
Number of times an order was extended using Deemed Consent					
Mean	[X]	[X]	[X]	[X]	[X]
Standard Error	[X]	[X]	[X]	[X]	[X]

⁵¹³ This was calculated as total number of applications –1 to account for the original raising of the order hence why some extensions appear as 0 or -1.

Stage 4

- A5.19 To ensure a representative sample in terms of duration of order, number of extensions and spread across the three relevant months, the population was ordered in turn by number of days taken to complete the order, number of extensions and months in which the order was completed. Due to the larger sample, the population of Ethernet Access Direct provision orders was split into five duration bands and three bands according to the number of extensions. All other order types were split in three duration bands and two number of extensions bands.
- A5.20 Table A5.4 sets out the bands that were used for Ethernet Access Direct Provide, Rearrange, Regrade and Shift by duration and number of extensions – these were set to generate roughly the same number of orders in each band.

Table A5.4

	EAD Provide	EAD Rearrange	EAD Regrade	EAD Shift
Bands – duration (days)	<i>5 bands</i>	<i>3 bands</i>	<i>3 bands</i>	<i>3 bands</i>
1	0 to 38	0 to 39	0 to 35	0 to 38
2	38 to 46	40 to 56	36 to 65	39 to 41
3	47 to 64	57+	66+	42+
4	65 to 107			
5	107+			
Bands – number of extensions	<i>3 bands</i>	<i>2 bands</i>	<i>2 bands</i>	<i>2 bands</i>
1	0 to 2	1	1	1
2	3 to 5	2+	2+	2+
3	6+			

Stage 5

- A5.21 This stage considered the size of the sample required for each of the four order types remaining. It is rare for a sample to give exactly the same results as would be achieved by analysing every case in a population – it is usual to say the population mean will fall within a confidence interval around the sample mean. Two elements determine how narrow or wide this confidence interval is. These are the size of the sample and how consistent the variable under analysis is. The larger the sample, the more precise the confidence interval. The more consistent the variable, the smaller the interval. We decided that a confidence of plus or minus 5% offered sufficient robustness.
- A5.22 Ideally the sample size for each sub-group should preferably be pro rata to the full population, which allows us to minimise the need to apply weightings⁵¹⁴ to the

⁵¹⁴ Weighting is a means to correct for an over or under-representation of certain groups in a sample, and in doing so ensure a sample better represents a population. Each category is assigned a weight adjustment to each category in a sample depending on whether they are over or under-represented

greatest extent possible. In order to enable each sub-group to have the same confidence interval, the sample size should be the same for each sub-group. In order to balance between these two approaches, the geometric mean⁵¹⁵ of our estimates of a pro rata sample and a fixed sample was taken. Very simply, the geometric mean provides a best fit sample size as it reflects both the varying sizes of the population and the need to sample all sub-groups robustly.

A5.23 Table 1.5 below shows what these sample sizes would be under these conflicting demands. The starting sample was set to 1095

Table A5.5

Order Type	Population	Pro rata sample	Fixed sample	Geo mean scaled	Final recommendation
EAD – Regrade	[X]	[X]	[X]	[X]	[X]
EAD – Rearrange	[X]	[X]	[X]	[X]	[X]
EAD – Shift	[X]	[X]	[X]	[X]	[X]
EAD – Provide	[X]	[X]	[X]	[X]	[X]

A5.24 The final sample size is in the bold “Final Recommendation” in Table A5.5 above.

Stage 6

A5.25 Having identified a sample plan and the sample size, we then created a sample frame.⁵¹⁶ In order to do this, we tagged the full population for each Ethernet Access Direct order type by month, duration of order bands and the number of extensions bands determined under stage 4.

Stage 7

A5.26 Having created the sample frame, we then selected our sample. This was done by stratifying⁵¹⁷ the sample and using a random sample selector to randomly choose the specific orders for analysis.

A5.27 Once this was done, we reviewed the sample selected and we are content that as well as representing the pattern of orders, it also adequately represents the number of instances each DC code was applied, and the number of orders in which each code was applied.

A5.28 In summary, our sample is as follows:

and to gross up the sample to reflect the population characteristics. Typically, over-represented factors are assigned a value 1, while under-represented factors are assigned a value of more than 1.

⁵¹⁵ The geometric mean is the nth root of the product of n numbers.

⁵¹⁶ The sample frame is the source material from which the sample is drawn.

⁵¹⁷ Stratification is the process of dividing members of the population into homogeneous subgroups before sampling.

- [X] Backhaul Extension orders (entire sample)
- [X] Wholesale Extension orders (entire sample)
- [X] Ethernet Access Direct orders – Remove/Re-site (entire sample)
- [X] Ethernet Access Direct orders – Regrade
- [X] Ethernet Access Direct orders – Rearrange
- [X] Ethernet Access Direct orders – Shift
- [X] Ethernet Access Direct orders – Provide

Weighting

- A5.29 In order to analyse the sample as a whole (i.e. determine from our sample whether BT's use of Deemed Consent during the three month period breached relevant SMP conditions), it is necessary to apply weights to sub-groups within the sample.
- A5.30 Because some product and order types are over-represented and others under-represented in the sample plan, we must use weighting to account for this.⁵¹⁸ It is necessary to weight the influence of orders when considering BT's performance across the sample as a whole.
- A5.31 Three subgroups were selected in their entirety and the weighting applied to these is 1.00. For the other four groups, samples of orders were taken in line with the process described here and then all applications within those orders were sampled.
- A5.32 Each application was allocated to a cell based upon order type, duration of application and month. Counts of the sample and the population were generated for each of these cells, as shown in Table A5.6 below. On the right are the products sampled in their entirety, on the left those sampled in accordance with the sampling process outlined here.
- A5.33 Within each product, the range of weights is quite modest and most of the weighting is to correct the deliberate over sampling of the low incidence products.

Table A5.6

[X]TABLE REDACTED IN FULL [X]

Checking the profile of Deemed Consent codes

- A5.34 Each application has a DC code, signifying the nature of the issues that led to the application of Deemed Consent. Table A5.7 below compares the profile of these DC

⁵¹⁸ Weighting is a means to correct for an over or under-representation of certain groups in a sample, and in doing so ensure a sample better represents a population. Each category is assigned a weight adjustment to each category in a sample depending on whether they are over or under-represented and to gross up the sample to reflect the population characteristics. Over-represented factors are assigned a value 1, while under-represented factors are assigned a value of more than 1.

codes from the sample, using the weights shown above, with the population profile. There are no codes where the % is significantly different from the population.

Table A5.7

DCC	Population	Weighted sample
BT01	[X]	[X]
CU01	[X]	[X]
CU02	[X]	[X]
DC21	[X]	[X]
DC22	[X]	[X]
DC23	[X]	[X]
DC24	[X]	[X]
DC25	[X]	[X]
DC26	[X]	[X]
DC27	[X]	[X]
DC28	[X]	[X]
DC29	[X]	[X]
DC7A	[X]	[X]
DC7C	[X]	[X]
DC7D	[X]	[X]
DC7E	[X]	[X]
DC7F	[X]	[X]
DC7G	[X]	[X]
DC7I	[X]	[X]
DC7J	[X]	[X]
DC7K	[X]	[X]
DC7L	[X]	[X]
DC7M	[X]	[X]
DC7N	[X]	[X]
DC7O	[X]	[X]
DC7P	[X]	[X]
DC7Q	[X]	[X]
DC7R	[X]	[X]
DC7S	[X]	[X]

- A5.35 When the % of applications of Deemed Consent which were not adequately notified is weighted by the sample profile, the result is 18.98%; when it is weighted by the population profile it is 18.99%.
- A5.36 Use of the weights derived therefore generates an application profile which is not significantly different from the population profile and applying these weights gives the same % of applications of Deemed Consent which were not adequately notified as using the population profile.

- A5.37 As a result, we are happy that the weights can be applied to the sample to provide robust estimates of the % of applications of Deemed Consent which were not adequately notified which will reflect those of the underlying population.

Annex 6

Findings from the Sample

A6.1 Here we set out two tables showing the findings of our Sample according to product and order type. These two tables show the percentage of applications in the Sample which were not adequately notified, and the range of inadequate notifications which can be identified in the population.

Table A6.1: Percentage of applications of Deemed Consent which were not adequately notified by order type

Order type	% of applications of deemed consent reviewed in sample which were not adequately notified	Confidence interval
PROVIDE	18.92%	18.52-19.31%
REARRANGE	11.95%	8.49–15.42%
REGRADE	25.47%	21.89-29.05%
REMOVE/RES ITE	16.10%	(sampled in full)
SHIFT	20.24%	17.76-22.72%
Grand Total	18.98%	18.59-19.36%

Table A6.2: Percentage of applications of Deemed Consent which were not adequately notified by product type

Product type	% of applications of deemed consent reviewed in sample which were no adequately notified.	Confidence interval
BES	7.35%	(sampled in full)
EAD	19.00%	18.63-19.40%
WES	18.93%	(sampled in full)
Grand Total	18.98%	18.59-19.36%

Source: Ofcom's analysis

Annex 7

Openreach Executive members

In its response to the 8th Notice, BT provided the following information about the members of the Openreach Executive during the Original Relevant Period:⁵¹⁹

[illegible]

⁵¹⁹ BT's response to Question 4 of the 8th Notice, 17 October 2016, pages 8 – 9, 0596.

Annex 8

Information gathering

- A8.1 In this Annex we set out the steps we have taken to gather relevant evidence from BT.
- A8.2 During the course of our investigation, we sent BT 9 Notices under section 135 of the Act, requiring BT to provide specified information. An outline of the information requested is set out in the following paragraphs.
- A8.3 On 6 November 2015, we sent BT a notice under section 135 of the Act, requiring BT to provide specified information in relation to the investigation (the “1st Notice”).⁵²⁰
- A8.4 The 1st Notice required BT to provide information in relation to Ethernet orders where a CDD was set 30 or more working days after the date on which the order was processed, either having obtained explicit consent from the CP or in reliance on Deemed Consent. It asked for information provided by BT to the CP via eCo or held by BT on COSMOSS, as well as communications to or from the job controller regarding each order’s CDD. In order to ensure we carried out the investigation within a reasonable timeframe, we did not consider that it was reasonable or proportionate to gather and analyse information concerning all orders provided over the entire period. We therefore decided to request order information for all orders completed in a three-month period between 1 May 2014 and 31 July 2014 (the “Sample Period”), during which the number of applications of Deemed Consent appears to be particularly high.
- A8.5 The 1st Notice also asked for internal documents relevant to Openreach’s approach to applying Deemed Consent and making of SLG payments.
- A8.6 On 4 March 2016, we sent BT a second information request (the “2nd Notice”),⁵²¹ requiring BT to provide, in relation to each order identified by BT in response to the 1st Notice where it had relied on Deemed Consent, information as to:
- i) whether the extension to the CDD relying on Deemed Consent was appealed by the CP, under the Deemed Consent Appeals Process; and
 - ii) where the CP made an appeal under the Deemed Consent Appeals Process, whether that appeal was successful.
- A8.7 On 8 March 2016, we sent BT a third information request (the “3rd Notice”),⁵²² requiring BT to provide, in relation to each order identified by BT in response to the 1st Notice where it had relied on Deemed Consent, information regarding any disputes raised by CPs in respect of the order.
- A8.8 On 11 March 2016, we sent BT a fourth information request (the “4th Notice”),⁵²³ requiring it to provide information including a description of Openreach’s decision-making processes in applying Deemed Consent, making SLG payments and

⁵²⁰ Ofcom’s 1st Notice request, 6 November 2015

⁵²¹ Ofcom’s 2nd Notice, 4 March 2016.

⁵²² Ofcom’s 3rd Notice, 8 March 2016.

⁵²³ Ofcom’s 4th Notice, 11 March 2016.

resolving disputes during the Original Relevant Period. It also asked for information concerning certain job control and finance teams that were in place during the Original Relevant Period, as well as a list of factors which were relevant to determining the duration of any extension period.

- A8.9 Following discussions with BT regarding the scope of Question 4 of the 1st Notice, which requested certain internal BT documents concerning Openreach's approach to the use of Deemed Consent and the payment by Openreach of SLG payments, we proposed to narrow the scope of the 1st Notice.⁵²⁴ On 24 March 2016, Ofcom sent BT a fifth information request (the "5th Notice"),⁵²⁵ requiring BT to provide this information.
- A8.10 On 21 June 2016, Ofcom sent BT a sixth information request (the "6th Notice"),⁵²⁶ requiring BT to provide information relating to the SLG Triage Team and its work. It also required BT to provide information in relation to repayments it had made to CPs following an internal investigation which identified SLG payments which it should have made but had not done so. It additionally required BT to provide information in relation to challenges made by CPs to applications of Deemed Consent by BT.
- A8.11 On 13 July 2016, we sent BT a seventh information request (the "7th Notice").⁵²⁷ The 7th Notice required BT to provide certain documents that were referred to in information previously provided by BT.
- A8.12 On 6 October 2016 we sent an eighth information request (the "8th Notice")⁵²⁸ to BT. The 8th Notice sought to clarify issues raised by previous Notices, and gathered information intended to ascertain the extent of senior management knowledge of the matters under investigation.
- A8.13 On 31 October 2016 we sent a ninth information request (the "9th Notice")⁵²⁹ to BT. The 9th Notice required BT to provide details of payments made to CPs to compensate for its failure to account for successful appeals of Deemed Consent, as well as details of BT's turnover for the purposes of establishing the upper limit of the penalty imposed in this Confirmation Decision under section 96C of the Act.
- A8.14 In addition to the information gathered during the course of this investigation, we have relied on information provided by BT during the course of the 2016 BCMR.⁵³⁰ We have also relied on information provided by BT, Vodafone during the course of the Vodafone Dispute.

⁵²⁴ Email from [Principal 1] (Ofcom) to [Senior Manager 16] (Openreach), 14 March 2016, 0617.

⁵²⁵ Ofcom's 5th Notice, 24 March 2016.

⁵²⁶ Ofcom's 6th Notice, 21 June 2016.

⁵²⁷ Ofcom's 7th Notice, 13 July 2016.

⁵²⁸ Ofcom's 8th Notice, 6 October 2016.

⁵²⁹ Ofcom's 9th Notice, 31 October 2016.

⁵³⁰ Specifically, information gathered under the 5th and 8th 2016 BCMR Notices.