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20 November 2015

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Dispute between Vodafone and BT regarding Deemed Consent (CW/01165/08/15)

We welcome the opportunity to provide feedback on the provisional conclusions of 6 November 2015 in relation to the dispute above.¹ Our full submission on the provisional conclusions is **attached**. In summary:

1. Vodafone is largely supportive of the provisional conclusions and Ofcom's legal and factual reasoning. We warmly welcome the provisional decision to declare:
 - a. that BT's practices in inappropriately deeming consent would be in breach of its SMP conditions; and
 - b. that BT would be in breach of the CSA by "deeming" a CP's consent to have been given in the circumstances as set out in the provisional conclusions.
2. We believe that Ofcom's proposed approach not only represents a significant step forward in addressing BT's liability for SLG payments for the circuits in dispute, but should also substantially reduce the application of deemed consent – and provide better transparency when deemed consent is used – going forward. This would give CPs greater confidence in BT's provisioning timeframes and a much better ability to manage expectations with their end customers.
3. Our two overarching concerns are that:
 - a. Despite our general support for Ofcom's approach, Ofcom should revisit its approach to interpreting the CSA, to better reflect the regulatory context; and
 - b. Contrary to Ofcom's findings, we consider that the CSA – properly interpreted – requires BT to provide the same level of information to CPs when deeming consent as the SMP conditions require.
4. While we would have preferred Ofcom to examine specific circuits, in order to facilitate the efficient resolution of this dispute, we acknowledge that Ofcom's approach is a pragmatic one which is intended to

¹ In this response, we adopt the defined terms and acronyms as set out in Vodafone's original dispute referral and Ofcom's provisional conclusions.

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provide a clear baseline on which the parties can resolve this factual dispute. However, given Ofcom is not providing determinations on individual circuits, it is important that Ofcom's declaration eliminates the possibility for ambiguity on matters of principle. Accordingly, in certain cases set out below, we think Ofcom's detailed reasons could be augmented to better reflect its overarching principles or Ofcom could provide greater clarity about the treatment of particular categories of orders. Specifically, we request that Ofcom clarify or amend its proposed approach by:

- a. making clear that providing only a DC code (such as DC27) will never comprise sufficient "reasons to justify" the use of deemed consent. Such a DC code may provide transparency about the cause of the delay. But it provides no information about the likely impact on timescales and therefore cannot by itself comply with what Ofcom has determined that the SMP conditions require;
 - b. providing guidance on a number of the specific issues in dispute for categories 3 and 4, including whether BT can use deemed consent to correct its own errors in setting the initial CDD, or to manage wayleaves where this is BT's responsibility;
 - c. making a declaration in relation to all categories in dispute (including category 5) – so that there is a clear baseline against which the parties can apply the facts;
 - d. in relation to category 6 – confirming that, to comply with its SMP conditions, BT has to notify of its intention to apply deemed consent and the new CDD as soon as reasonably practicable (regardless of whether this is before or after the existing CDD); and
 - e. making a declaration that the onus is on BT to prove that the individual facts for each circuit in dispute complied with the CSA and the SMP conditions – so that there is clear guidance about how the parties should proceed in establishing the facts for individual circuits.
5. If Ofcom makes a final decision reasonably consistent with its provisional conclusions, we expect that this would undercut the basis on which BT has resisted making SLG payments for many of the circuits in dispute. However, given the history of obfuscation and delays by BT to date, it is important Ofcom's declarations are appropriately worded to minimise the risk of this dispute being referred back to Ofcom down the track. We are very keen to ensure that the form of any declaration minimises the risk that either party will need to refer the matter back to Ofcom: accordingly, the Annex to our submission proposes wording of the declarations which we believe will help achieve this, including clarifying that (i) it is for BT to provide evidence that consent has been validly deemed; and (ii) Vodafone is entitled to have BT's liability for SLG payments over the Relevant Period apportioned from averaging the months Vodafone has actively investigated. Our proposed declaration assumes that Ofcom proceeds on the basis of dealing with categories of orders in principle (rather than looking at the individual facts of each order in dispute) but otherwise incorporates the specific suggestions we set out in this submission.

Yours sincerely

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Vodafone

20 November 2015

Dispute between Vodafone and BT concerning Deemed Consent in relation to the provision of
Ethernet Services

CW/01165/08/15

Vodafone's response to Ofcom's Provisional Conclusions

Non-Confidential Version



Ofcom's general approach

1. In general, Vodafone supports the approach taken by Ofcom. However, we set out in this section two areas where Vodafone believes Ofcom's approach could be made more robust, or more effective in achieving an efficient resolution of the dispute.

The decision not to examine individual circuits

2. We welcome Ofcom's decision to make declarations about the broad categories of cases in dispute. We believe that this offers the opportunity to set out a clear basis on which BT should identify past misapplications of deemed consent, and clearly indicates the way in which deemed consent should be applied going forward.
3. We would welcome a decision by Ofcom to make specific findings in relation to each circuit although we acknowledge that Ofcom's approach is a pragmatic one which should provide a clear baseline on which the parties can resolve factual disputes. We note that, even without examining individual circuits, Ofcom should still be in a position to declare the manner in which the Appropriate Proportion Dispute should be resolved. We set out in the Annex below a proposed declaration that would set out the principles by which the parties should resolve that dispute (that is, by "smearing" based on a sample unless the parties agree otherwise). In relation to the September 2012 Dispute and the Specific Orders Dispute, whilst we recognise the scope of Ofcom's provisional findings reflect the limitations of time available to Ofcom to resolve the dispute, we believe that findings in relation to each circuit would have offered an efficient resolution of the dispute, minimising the need for further negotiation and/or potentially the need to refer this dispute back to Ofcom if negotiation is unsuccessful for some circuits.
4. Given Ofcom is not providing determinations on individual circuits, we believe it is important that Ofcom's declaration eliminates the possibility for ambiguity on matters of principle. In our view, the behaviour of BT to date makes a referral back to Ofcom in the future a real risk. Its behaviour has been characterised by recalcitrance; a willingness to drag the dispute out as long as possible; and a willingness to offer major concessions or concede significant concede facts only when faced with the threat of regulatory intervention. For example, in addition to the tortured history of negotiations outlined in Vodafone's dispute referral, Ofcom will be aware that BT has continued its practice of making concessions only at the last minute:
 - a. $\frac{1}{2}$
 - b. $\frac{1}{2}^1$
5. Accordingly, many of our suggestions in this submission are aimed at ensuring Ofcom's detailed reasons better reflect its overarching principles and that Ofcom provides the greatest possible clarity about the treatment of particular categories of orders so that there is a clear path for resolution of the dispute in respect of individual cases. . We are very keen to ensure that the form

¹ $\frac{1}{2}$.



of any declaration minimises the risk that either party will need to refer the matter back to Ofcom and so we have set out in the Annex to this submission proposed directions that we believe would best assist in resolving the dispute promptly and efficiently. In particular, we believe it would be helpful for Ofcom to make a declaration:

- a. in relation to all categories of circuits (including category 5); and
- b. in terms that are sufficiently broad to minimise the risk of future disputes about the principles that apply in assessing the validity of applications of deemed consent.

Ofcom's analytical framework for assessing compliance

6. We agree with the analytical framework as set out by Ofcom in paragraphs 3.22 and 3.28-3.34 of the provisional conclusions. Specifically, we agree that it is appropriate for Ofcom to consider compliance with both the CSA and the SMP Conditions. We deal with each in turn:

- a. Compliance with the CSA

In this respect, BT has questioned whether a breach of contractual obligations is automatically and necessarily a breach of regulatory obligations (see paragraph 2.37.6 of the provisional conclusions). We agree with Ofcom's view that assessing compliance with an SMP condition which requires BT to provide its services "on the terms and conditions in its reference offer" and/or on terms that are "fair and reasonable" may require Ofcom to determine whether or not BT has complied with the terms of its reference offer.

In this respect, we note that BT has referred to the BT v Telefonica (2014) Supreme Court judgment (the "Ladder Pricing Judgment") in support of its view that "there is no reason under Article 8 of the Framework Directive why the parties to a Reference Offer contract would need to seek additional and speedy remedies from Ofcom in the form of administrative declarations in relation to past breaches of Contract".

However, the Ladder Pricing Judgment is of no relevance to this dispute. That judgment concerned a decision of the Competition Appeal Tribunal (the "CAT"). The CAT decision expressly concerned Ofcom's ability to act where a person had contractual power to vary charges, and the CAT found it was "inappropriate for Ofcom to use its dispute resolution powers as a way of controlling the charges of a CP like BT which did not have significant market power in a relevant market".² That decision was reinstated, with the Supreme Court quashing the Court of Appeal judgment which had set it aside.

In that case, BT had not been found to have SMP: this was a central premise on which the judgment proceeded, and a key reason why the Supreme Court decided that BT's contractual arrangements should be given precedence over Ofcom's attempt to apply what was referred to as an "extreme form of the precautionary principle to a dynamic and competitive market".³ There is no basis to apply any findings in that judgment to business connectivity markets where BT has been found to have SMP and is already subject to SMP conditions – and therefore the market is not competitive. That is especially true where the

² See para 25.

³ See para 43.



very basis of the agreement between the parties is BT's SMP condition requiring it to contract on the terms of a reference offer. Instead, Vodafone fully agrees with Ofcom that this is a case where a party is entitled to seek remedies from Ofcom in relation to both contractual compliance and breach of SMP conditions.

b. Compliance with the SMP conditions

We do not oppose Ofcom's approach of assessing BT's compliance with the SMP conditions regardless of whether or not there is compliance with the CSA. However, to avoid doubt, we continue to consider that there is merit in Ofcom adopting the approach to assessing compliance with SMP condition 1.2/HH1.2 set out in Vodafone's dispute submission.

7. We also generally agree with the provisional conclusions Ofcom reached in interpreting the CSA in relation to each category (except in relation to the detailed reasons BT must provide – see our comments on this below). However, while Ofcom has (with that exception) reached the correct conclusion, we believe Ofcom should reconsider its general approach to interpreting the CSA.
8. Ofcom has in large part interpreted the CSA having regard to its words alone. It has then examined policy issues – like the impact of deemed consent on the industry and the impact of various regulatory obligations – only in the context of interpreting BT's regulatory obligations. However, we believe that policy issues are highly relevant to interpreting the CSA. In our view, the CSA should be interpreted in light of all the circumstances with a view to ascertain the parties' intentions.
9. Where a contract is entered into to comply with regulatory obligations, it is particularly important that the contract not be interpreted in a vacuum. The overriding policy objectives, as set out in the SMP conditions, include that BT must provide services on fair and reasonable terms and as soon as reasonably practicable. The CSA is simply the reference offer setting out the terms and conditions on which BT offers services in compliance with the SMP conditions. Therefore, the specific provisions in the CSA must be read in light of the SMP conditions. Specifically, the CSA should be (as far as reasonably possible) interpreted in a way that reflects an intention by BT to implement and be consistent with BT's regulatory obligations.
10. The introduction of a new suite of evidence considered relevant only to the SMP conditions (and not to interpreting the CSA) may lead to the unfortunate result where there is a "mismatch" between BT's contractual and its regulatory obligations. Indeed, that is exactly what occurs in Ofcom's findings about the detail BT must provide to comply with the CSA obligation to give "reasons to justify" changes to delivery timeframes. We think the potential for these "mismatches" could create significant uncertainty about the scope of BT's obligations. We do not consider that this is in the interests of BT or any other CP.
11. As we set out below, we believe that adopting such an approach would lead to the finding that BT is in breach of the CSA where the level of reasoning provided by BT is not fair and reasonable. We believe adopting such an approach would also impact Ofcom's reasoning (although not impact the outcome) in relation to the other categories of order in dispute.



Categories in dispute

12. Vodafone generally supports Ofcom's provisional findings in relation to each category in dispute, except:
- a. in relation to the sufficiency of reasons required to be provided. Vodafone's view is that Ofcom has misinterpreted the CSA, and the CSA requires BT to provide a level of detail in its reasoning that is fair and reasonable (i.e., the same level of detail required by the SMP conditions); and
 - b. in relation to the requirement for notification in writing. In this case, we accept Ofcom's views about what the CSA and the SMP conditions require, but there is a lack of clarity regarding the specific facts relevant to particular categories or orders and we continue to believe there are cases where notification has not been provided as required. We set out below how we believe Ofcom should address this issue.

Category 1: No notice given of intent to deem consent

13. We fully agree with Ofcom's finding that BT will have breached the CSA in any instance where it did not provide notice of its intention to deem consent at all.⁴ We agree that paragraph 2.3 of Schedule 4C(i) of the CSA ("Paragraph 2.3") could not be clearer that BT must always notify a CP as soon as reasonably practicable of its intention to deem consent. BT's failure to do so at all is a clear breach of that requirement.
14. We agree with the factors listed by Ofcom as suggesting that a failure to notify does not comply with the SMP conditions, namely:
- a. the deemed consent mechanism has been explained by BT as a mechanism to "minimise the additional time" required by obtaining explicit consent;
 - b. the SLG Direction requires BT to provide reasons and obtain consent for changes to delivery timeframes – indeed, it does not contemplate "deeming" of consent at all;
 - c. failure to notify the CP compromises its ability to manage the provision of services to its end users; and
 - d. failure to notify the CP removes transparency about how services are being delivered and how consent is being deemed.
15. We believe all of these factors are relevant to the interpretation of the CSA (although in this case we believe Paragraph 2.3 is already clear and therefore although Ofcom should consider these factors, they should not change the outcome Ofcom has provisionally reached).

Category 2: Insufficient reasoning provided

16. We request that Ofcom reconsider its provisional conclusion that BT can comply with the CSA requirement to provide reasons, by providing a "deemed consent code" or some other indication of

⁴See para 4.6 of the provisional conclusions.



the particular circumstance in Paragraph 2.3 which is applicable. Specifically, Ofcom has provisionally found that:

in providing a DC Code as part of the notification of an intention to deem consent, BT was acting in accordance with [the] requirement [of the CSA to provide reasons]:⁵

17. First, we do not consider that the reasons Ofcom has provided to support this provisional conclusion are robust. The only reasoning provided is that “*under a proper reading of the provision, the requirement under (i) of Paragraph 2.3 (to “provide reasons to justify”) applies whether BT obtains or deems consent*”.⁶ Vodafone fully agrees that this is a proper reading of the CSA, but this in fact supports Vodafone’s view because:
- a. It must be correct that, when BT is seeking to obtain express consent, sufficient detail must be provided for the CP to make an informed decision about whether to grant consent. It cannot sensibly be suggested that a CP must make a decision about whether to grant consent based only on a generalised reference to a clause of the CSA, without any explanation of the specific reason why consent is being sought or why it relates to the length of the extension being sought; and
 - b. There is no basis on which the level of reasoning to be provided when consent is being deemed should be any less than when express consent is being sought.
18. Second, we believe Ofcom should revisit the express terms of the CSA. The requirement is that BT provide “reasons to justify ... to extend the CDD”. The reasons that must be provided are not reasons to justify the application of the deemed consent provision, but reasons to justify the need to extend the CDD. It follows that a reference to the particular clause that permits deeming of consent (i.e. a reference to an item in the list of reasons at the end of Paragraph 2.3 for which consent can be deemed) clearly cannot comprise “reasons to justify ... to extend the CDD”:
- a. these reasons have no relevance to (or, at least, are wholly inadequate reasons for) seeking express consent. This is consistent with Ofcom’s view (as referred to above) that the requirement to provide reasons applies and is independent of whether consent is being deemed or obtained expressly; and
 - b. the mere existence of a relevant reason in Paragraph 2.3 cannot automatically justify the extension of the CDD. For example, the mere fact that new infrastructure build is required does not always and in every instance justify a CDD extension. A CP could reasonably withhold consent, for example, if the degree of work required could reasonably be performed without extending the CDD, or where a reasonable CP supplying the service would have anticipated and properly resourced to avoid the new infrastructure build causing delays. It follows that “reasons to justify” must (at the very least) explain why the particular reason in Paragraph 2.3 justifies – in the specific case – an extension of the CDD.
19. For example, over the course of 2015, Vodafone has been subject to thousands of instances of deemed consent under DC code DC22, with the CDD extension ranging from 3x to 3x days. There is a similarly high level of variance across many of the DC codes. The effect is Vodafone can have no confidence whatsoever that the length of the delay is reasonable based on the DC code alone.

⁵Para 4.18 of the provisional conclusions.

⁶Para 4.18 of the provisional conclusions.



Merely providing a DC code and a date gives a CP no ability to understand whether the CDD extension is reasonable or should be challenged.

20. Third, we don't think Ofcom's reliance on a textual reading of the CSA is the right approach, and we would ask Ofcom to have greater regard to the policy factors and the broader regulatory context which are relevant to interpreting this contract, which have been previously set out by Vodafone. Many of these factors have in fact been considered by Ofcom in the context of interpreting BT's SMP conditions. In that context, Ofcom notes that:
- a. merely providing a DC code would (in most instances), "not provide sufficient transparency for the CP to understand the specific circumstances that cause the delay and the likely impact on timescales";⁷ and
 - b. "more detailed information was readily available to BT and that this could have been communicated to CPs at a relatively low cost".⁸
21. These factors are (for the reasons set out in paragraphs 7–11 above) highly relevant to interpreting the CSA. Other policy and regulatory factors that Ofcom should equally have regard to include that:
- a. deemed consent has been explained by BT as a mechanism to "minimise the additional time" required by obtaining explicit consent. In other words, BT has not claimed that the mechanism was introduced to minimise the amount of information it provided to CPs or the resources required to provide such information;
 - b. the SLG Direction requires BT to provide reasons and obtain consent for changes to delivery timeframes – indeed, it does not contemplate "deeming" of consent at all. This again suggests that BT cannot provide reasons that are so imprecise that no reasonable CP would grant express consent on that basis; and
 - c. there is a significant adverse impact of providing such little information to CPs, including the impact on their own resources; the adverse impact on their ability to manage the provision of services to their end users; and the general destruction of confidence by the industry that is felt from this removal of transparency about how services are being delivered.
22. We would emphasise that Vodafone is not seeking for BT to draft detailed notes explaining the exact cause of delays, every step taken to address the delay and the reasons why BT has decided on the new CDD in a minute level of detail. However, the level of detail being provided to date is often so cursory that it could not form a reasonable basis for the CP to properly plan or communicate the reason for the delay to its customer (where applicable). We would stress that we believe this information is readily available to BT, being captured within existing order notes.⁹
23. In this case, Ofcom's approach of treating interpretation of the CSA and interpretation of the SMP conditions as entirely separate exercises leads to the undesirable result where – in the same circumstances – BT has been found to comply with the CSA but not to have complied with the SMP conditions. We believe the CSA should be interpreted to avoid such an inconsistency wherever

⁷Para 4.24 of the provisional conclusions.

⁸Para 4.25 of the provisional conclusions.

⁹For example the recent OTA-facilitated discussions over the future quantum of SLGs have involved the discussion of an Openreach produced spreadsheet which we understand provides a brief explanation of the reasons why deemed consent has been applied in every case, for every CP, not just details of the DC code used.



possible. In this case, the CSA can clearly be interpreted such that the “reasons to justify” must “offer sufficient transparency for the CP to understand the specific circumstances that cause the delay and the likely impact on timescales”.¹⁰ Indeed, we consider this to be the only viable interpretation of the CSA.

24. We generally agree with the conclusions Ofcom has reached in relation to the SMP conditions and the reasoning leading to that conclusion. However, we note that Ofcom has indicated that certain DC codes may in some circumstances provide “sufficiently specific information for the CP to understand the circumstances that cause the stated delay, as is the case with DC27, which concerns asbestos contamination” and in the case where CP action or inaction is the cause of delay.¹¹ We do not agree:
- a. Merely providing such a DC code may – in some instances – provide sufficient transparency for the CP to understand the cause of the delay, but only in the very broadest sense. In particular, we consider it unreasonable for BT not to provide a reasonable level of detail about the specific cause. For example, in relation to delay caused by CP action or inaction, it is particularly important that BT advises exactly what the CP is required to do to progress the order. A mere statement that “CP action is required” provides no assistance at all in understanding the cause of the delay.
 - b. In any event, a DC code provides no information about the likely impact on timescales, and therefore cannot by itself comply with the standard Ofcom sets out in paragraph 4.24 of its provisional conclusions (except in limited circumstances where the delay is caused by CP action or inaction). We request that Ofcom clarify this potential contradiction in its final decision, and confirm that “reasons to justify” must always provide sufficient information to understand the likely impact on timescales.

Category 3: Reliance on reasoning not listed in the CSA and Category 4: New CDD incorporates delays that would not have themselves permitted DC

25. We support Ofcom’s finding that Paragraph 2.3 sets out an exhaustive list of the circumstances under which consent may be deemed (and we believe the policy and regulatory reasons why this list must be treated as exhaustive are relevant to interpreting both the CSA and the SMP conditions). We agree that:
- a. Ofcom’s interpretation is “consistent with this mechanism being set out in the CSA as an exception to the general obligation of BT to obtain consent prior to extending a CDD”; and
 - b. any departure from the list, either by BT relying on reasons not listed in Paragraph 2.3 or incorporating additional delays that do not amount to circumstances permitted under Paragraph 2.3, falls outside the scope of that paragraph and puts BT clearly in breach of the CSA and its SMP conditions.
26. As Ofcom acknowledges, the parties remain in dispute in relation to the facts for certain circuits in these categories. While Ofcom has declined to comment on specific circuits, it would be helpful if Ofcom could (at a minimum) provide guidance to the parties (and minimise the scope for further

¹⁰ Para 4.24 of the provisional conclusions.

¹¹ Para 4.23.2 of the provisional conclusions.



negotiations, with a potential subsequent referral back to Ofcom) by expressing its views as to whether deeming consent for the following categories cases fall within the scope of the CSA and/or is compliant with the SMP conditions:

- a. revisions to the CDD to reflect correction of errors made by BT when setting the initial CDD; and
- b. management of wayleaves that lies within BT's responsibility.

Category 5: Notice not provided in writing

27. We agree with Ofcom's finding that "notice must be given in writing" and that "any orders for which BT provided notice to Vodafone in any form other than by hand, fax, e-mail or first class post would not be in accordance with the CSA".¹² In other words, we accept Ofcom's provisional view that if emails were sent to a designated Vodafone email address, then this would satisfy the requirements of the CSA.
28. It has become apparent that there is a disagreement between BT and Vodafone as to how the eCo notification system works. Vodafone re-iterates its position that the eCo system updates complained of did not result in an email being sent to Vodafone. BT's position is apparently that its "policy and practice require job controllers to provide an email to the CP" when deeming consent.¹³
29. We understand that Ofcom wishes to resolve this dispute by making declarations on broad principles rather than engaging in factual analysis. On this basis, we think it would still be appropriate for Ofcom to make a declaration on this issue. We consider that the parties will be able to more efficiently and easily resolve this dispute if Ofcom provides:
 - a. a clear baseline against which the parties can agree the facts – by declaring that notice must be given in writing and by hand, fax, e-mail or first class post; and
 - b. a declaration that the burden of proof lies on BT to establish that, as a matter of fact, it has complied with this requirement (rather than a bald assertion that its policies, procedures and systems provide for such a requirement to be complied with). We believe that such an approach is necessary to protect the intention of the obligation that BT make proactive SLG payments. That obligation is intended to avoid CPs having to incur the costs of proactively investigating failure to comply with a valid CDD, and is the only sensible approach in the context where deemed consent (i) is not a concept ever contemplated in the SMP conditions or BT's other regulatory obligations, and (ii) was – even on BT's own explanation – introduced for time management purposes, not to reduce transparency for CPs.
30. In relation to BT's compliance with SMP conditions, we don't think Ofcom's view that "BT's intent to deem consent by means other than the ones provided for in the CSA would not have been in breach of BT's SMP conditions" has been properly reasoned.¹⁴ The basis for this conclusion is not self-evident and we would appreciate clarification from Ofcom if this part of the provisional conclusions contains a typographical error. In our view, the only conclusion consistent with Ofcom's approach

¹²Para 4.54 of the provisional conclusions.

¹³Para 4.50 of the provisional conclusions.

¹⁴Para 4.58 of the provisional conclusions.



to interpreting the SMP conditions elsewhere in the provisional conclusions, is that if BT has failed to comply with the CSA, then it must also have failed to comply with the relevant SMP conditions (including failing to provide the service on the terms of the reference offer).

Category 6: Retrospective application of deemed consent

31. We broadly support Ofcom's findings in relation to retrospective application of deemed consent. In our view, Ofcom correctly distinguishes between:
 - a. BT's obligation to notify the CP "as soon as reasonably practicable" of its intention to deem consent – which can never be done retrospectively (that is, well after BT has become aware of the delay) although it might (in exceptional circumstances, when a cause of delay is evident to BT only on the intended handover date) be done on the existing CDD. In other words, we agree with Ofcom that notification by BT of its intent to deem consent cannot happen on a day after the original CDD. In addition, Vodafone suggests that to comply with this requirement, BT must advise a CP immediately after encountering a delay; and
 - b. BT's obligation to notify the CP of the new CDD, which may in certain exceptional circumstances reasonably be delayed until after the pre-existing CDD has passed. However, in addition, Vodafone expects that Ofcom's reasoning leads to the view that BT must, in any event, notify the CP of the new CDD as soon as reasonably practicable.
32. However, we note that Ofcom's reasoning in this part of the provisional conclusions focuses largely on whether the application of deemed consent is notified on or after the CDD. While this is a significant concern, Vodafone is also concerned about instances where BT notifies Vodafone of the application of deemed consent *before* the existing CDD, but *well after* the cause of the delay was apparent to BT. Vodafone considers that this would also be in breach of the CSA, because it would not comply with the obligation that "once BT is aware that it intends to extend the CDD, it should notify the CP of this fact as soon as practicable". It would be helpful in resolving this dispute (and more broadly) if Ofcom clarified BT's obligations in this respect – that is, that the obligation to notify the CP as soon as reasonably practicable applies even if the notification is given before the existing CDD.
33. We believe the principles set out above are supported not only by the wording of the CSA and the SMP conditions, but are indeed necessary given the underlying regulatory context, including that deemed consent is a mechanism that is not contemplated by any of BT's regulatory instruments, and it runs the risk of undermining the policy intention of the SLG regime if it operates in a manner that unreasonably deprives CPs of the ability to understand the timeframes in which services are provided or to manage their relationship with their end customers.
34. We also support Ofcom's findings in relation to BT's compliance with its SMP conditions. However, we note that paragraph 4.73 of the provisional conclusions does not include any provisional finding that, to comply with its SMP conditions, BT has to notify the new CDD as soon as reasonably practicable. In order to clarify the parties' rights and obligations, and to set a baseline for BT's conduct going forward, we request that Ofcom make a declaration to this effect.

Category 7: Extension of CDD following un-suspending of orders

35. We support Ofcom's provisional conclusion that, when processing un-suspend orders, BT:
 - a. may only extend the CDD for a reason permitted under the terms of the CSA; and



- b. must provide the new CDD as soon as reasonably practicable.
36. We also agree with Ofcom's view that un-suspended orders should be subject to the same requirements as ordinary orders under the CSA and that BT must provide "reasons to justify" any delay and set any subsequent CDD for as soon as reasonably practicable.
37. In Vodafone's view, these provisional conclusions are simply the logical outcome of a review of the terms of the CSA and Ofcom's provisional conclusions in relation to the other categories of circuits under dispute. There is no contractual basis to treat un-suspend and new orders differently. We note that BT has in no cases under dispute, provided proper "reasons to justify" the additional days added to the CDD when a circuit is un-suspended. In relation to all the circuits surveyed under this category, BT failed to provide sufficient reasons justifying the delay and therefore BT breached both its contractual requirements under Paragraph 2.3 and its obligation to provide access on fair and reasonable terms.
38. We also agree with Ofcom's findings that, in the circumstances above where BT would have breached the CSA, it would also have breached the SMP conditions.



Resolution of the dispute

39. As described in paragraph 5 above, we believe it is important that Ofcom prepare its proposed declaration having regard to the difficulties Vodafone has experienced in negotiating a resolution of this dispute with BT – especially in a context where Ofcom has determined parameters for the use of deemed consent in the abstract rather than applied to individual cases. We consider that a declaration be both broad and specific so it provides clear guidance and minimises the scope for further delays in promptly resolving the dispute. We set out in the Annex to this submission a proposed declaration that we believe would achieve these purposes.
40. We note that BT is subject to an obligation under the SLG Direction to “monitor its performance” and “compensate [CPs] proactively should it fail to satisfy the service guarantees ... without the need for a [CP] to make a claim”. As will be clear from the history of correspondence, BT has breached this obligation – first, by failing to make the SLG payments at all, and, secondly, by failing to agree a reasonable basis on which to agree the quantum of SLG payments it is liable to pay – and in particular by (until 4 September 2015) insisting on Vodafone producing evidence to dispute the application of deemed consent on an order-by-order basis.
41. It is important that – to protect the integrity of the SLA regime – Ofcom make a declaration about how BT is to comply with the obligation to make proactive payments, so that the process of deeming consent (and BT’s requirement that CPs actively appeal any such deeming) does not wholly undermine that obligation. It is also important that Ofcom make a declaration that – at least at the level of principle – addresses how the Appropriate Proportion Dispute is to be determined. To achieve that, and given the deemed consent construct is one that is not anticipated in (and is in tension with) the relevant regulatory instruments, Vodafone suggests that Ofcom declare that:
 - a. BT is required to provide all evidence reasonably required by Vodafone to demonstrate that the requirements for deeming consent have been satisfied in each instance. We understand that BT records this information in its systems in any event (as has been demonstrated by its negotiations with Vodafone) and there is no reason why such information should not be available to the CP whose consent is being deemed, particularly since deemed consent is a contractual mechanism that otherwise threatens to undermine the efficacy of BT’s regulatory obligations; and
 - b. Vodafone is entitled to have its SLG payments determined on the basis of a “smeared approach” unless the parties agree otherwise.
42. As a final point, we consider that it is important Ofcom’s final decision sends a clear message about the consequences of Ofcom’s conclusions and the broader steps that Ofcom would expect BT to take in relation to its process of deeming consent. While we understand Ofcom will likely consider these issues in the context of its own initiative investigation, we would expect that these next steps would include BT:
 - a. addressing its deemed consent processes going forward;
 - b. conducting a review of past uses of DC and making proactive payments to Vodafone for SLG payments owed outside the Relevant Period; and
 - c. reimbursing Vodafone the costs it has incurred in investigating and appealing where that appeal should have been successful.



Annex

Suggested scope of declaration wording to minimise the likelihood of any future referrals:

1. During the Relevant Period, BT has failed to comply with:
 - (a) the terms of the Connectivity Services Agreement (“CSA”) between itself and Vodafone; and
 - (b) Condition HH5.9 (imposed pursuant to a notification of 8 December 2008), Condition 6.9 (imposed pursuant to a notification of 28 March 2013), Condition HH1.2 (imposed pursuant to a notification of 8 December 2008) and Condition 1.2 (imposed pursuant to a notification of 28 March 2013), as applicable,

where BT purported to extend the Customer Delivery Date by deeming Vodafone to have consented to such change pursuant to paragraph 2.3 of Schedule 4C(i) of the CSA (“Paragraph 2.3”), provided one of the following circumstances apply:

| Category | Circumstances |
|----------|--|
| 1 | BT did not notify Vodafone of its intention to deem consent. |
| 2 | BT did not provide “reasons to justify” pursuant to Paragraph 2.3 that provided sufficient information for Vodafone to: <ul style="list-style-type: none"> • understand with reasonable specificity the reasons for the delay; • understand with reasonable specificity the relationship between the reasons and the extent of the delay; • where applicable, manage the extension of the CDD with its customer; and • challenge BT’s attempt to deem consent, including (without limitation) where BT’s “reasons to justify” solely comprised a reference to a clause in Paragraph 2.3. |
| 3 | BT relied on a “reason to justify” which was not listed in Paragraph 2.3, including (without limitation) where BT: <ul style="list-style-type: none"> • sought to correct an error in setting the initial CDD; or • sought to manage a delay which was its responsibility under the CSA and was not otherwise expressly referred to in Paragraph 2.3. |
| 4 | BT set the new Customer Delivery Date by incorporating the effect of delays that were not themselves notified, or for which reasons to justify were not themselves provided, in accordance with the CSA. |
| 5 | BT did not notify Vodafone of its intention to deem consent, or of the new Customer Delivery Date, in writing, by fax, email, hand or first class post or cannot provide all evidence reasonably required by Vodafone that the notification was provided in such a way. |
| 6 | BT: <ul style="list-style-type: none"> • did not notify Vodafone of its intention to deem consent as soon as reasonably practicable after becoming aware of the reason to justify deeming consent |



| Category | Circumstances |
|----------|---|
| | (including (without limitation) in all cases where such notification was provided after the pre-existing Customer Delivery Date); or <ul style="list-style-type: none">• did not notify Vodafone of the new Customer Delivery Date as soon as reasonably practicable. |
| 7 | The reliance on Paragraph 2.3 relates to an unsuspended order, and BT extended the Customer Delivery Date (in whole in part) for a reason for which it would not otherwise have been permitted to deem consent under the CSA. |

2. In the circumstances set out in paragraph 1:
 - (a) any purported reliance by BT on the deeming of consent pursuant to Paragraph 2.3 is invalid and of no effect (except in relation to Category 4, where the purported reliance by BT is invalid to the extent it relates to the reason for which deeming consent would not otherwise have been permitted under the CSA);
 - (b) BT is liable to pay SLG payments pursuant to the CSA for any order provisioned after the valid Customer Delivery Date (being the Customer Delivery Date that would have applied if the invalid reliance on Paragraph 2.3 was disregarded); and
 - (c) BT has failed to comply with the CSA to extent it has failed to make such SLG payments to Vodafone proactively.
3. In relation to the Relevant Period, to comply with the SLG Directions, BT must: provide
 - (a) SLG payments for the whole Relevant Period on the basis of the agreed proportion of orders subject to an invalid reliance on Paragraph 2.3 in September 2012, March 2013 and September 2013, unless BT and Vodafone agree a different basis for determining the SLG payments; and
 - (b) all evidence reasonably required by Vodafone to demonstrate that the requirements for deeming consent have been satisfied in each instance that BT has purported to rely on the deeming of consent pursuant to Paragraph 2.3.