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23 November 2015

Dear Gala,

**Dispute relating to BT's use of Deemed Consent and non-payment of SLG payments for Ethernet Services**

**BT's comments on Ofcom's provisional conclusions**

**Introduction and summary**

1. This document sets out British Telecommunications plc ("BT")'s comments on Ofcom's Provisional Conclusions ("PCs") in relation to the dispute brought by Vodafone Limited ("Vodafone") regarding the use by BT of Deemed Consent ("DC") and non-payment of Service Level Guarantees ("SLGs") for Ethernet services.
2. In its PCs, Ofcom relies on the different categories of behaviour Vodafone alleges have been undertaken by BT, although with some modifications, ("the alleged categories of behaviour")<sup>1</sup> to assess whether each of these categories could amount

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<sup>1</sup> Ofcom, PCs, Table 1

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to a breach of contract and / or a breach of the Significant Market Power (“SMP”) obligations to provide service on fair and reasonable terms and on the basis of the terms and conditions of the Reference Offer. Ofcom provisionally concludes that:

- i) some of the alleged behaviours are always in breach of contract and also of regulation (categories 1, 3 and 4), and Ofcom proposes to declare that if BT had undertaken such a conduct, BT would be in breach of its SMP obligations and the parties rights and obligations under the Connectivity Services Agreement (“CSA”);
- ii) some of the alleged behaviours are compliant with the terms of the contract but can be in breach of regulation in certain circumstances (category 2), and Ofcom proposes to declare that if BT had undertaken such a conduct, BT would be in breach of its SMP obligations in certain circumstances;
- iii) some of the alleged behaviours would breach the contract and SMP obligations depending on specific circumstances (categories 6 and 7). Ofcom proposes to declare that if BT had undertaken such a conduct, BT would be in breach of its SMP obligations in certain circumstances; and
- iv) some of the alleged behaviours could breach the contract whilst being compliant with the regulation (category 5).

3. BT’s main concerns relate to Ofcom’s analysis and assessment of where a SMP breach would occur. In BT’s view, the finding of an SMP infringement requires an analysis that goes beyond the finding of contractual breach. An adequate and proportionate assessment by Ofcom of the alleged conducts would result in a clearly different outcome than what is currently set out in the PCs. BT requests that Ofcom reconsiders its findings in its PCs and reach final conclusions which are the opposite of those in the PCs, namely, that the alleged behaviours are not, in the circumstances of this case, in breach of regulation. We have set out below in **Section 1** the arguments as to why it would be appropriate for Ofcom to depart from the PCs in this case.
4. With regard to Ofcom’s contract law analysis and conclusions, BT has set out its comments in **Section 2** in relation to those parts of the PCs where BT believes Ofcom’s analysis needs refinements or where BT disagrees.

5. On 6 November, Ofcom opened an own-initiative investigation on BT's use of DC in relation to the provision of Ethernet services. BT has set out further comments about the procedures adopted by Ofcom in this case in **Section 3**.
6. In addition to the specific comments set out below, BT refers Ofcom generally to the detailed submissions which BT has made in relation to the matter in its 26 August 2015 and 25 September 2015 letters to Ofcom. To the extent that Ofcom has not already accepted them, BT reiterates and relies upon those submissions, which reinforce and/or supplement the points made below.

### **Section 1. The alleged categories of behaviour are not cases which trigger finding of SMP breach**

7. In the PCs, Ofcom disagrees with BT that the SMP obligation only requires BT to ensure that the terms of its Reference Offer are in the contract and that the implementation of these obligations falls outside of the scope of SMP Condition HH5.9 and Condition 6.9. Ofcom justifies that position by stating that: "*If it was permissible for BT only to contract on the terms of its Reference Offer to then depart materially from it when providing its services in practice, the effectiveness of Condition HH5.9 or Condition 6.9 would be undermined*".<sup>2</sup>
8. Ofcom indicates that for the purpose of the PCs, it will review each of the alleged categories of behaviour to assess whether these constitute regulatory breaches having in mind the objectives that the SMP conditions aim to achieve:
  - The objective of the requirement to publish a Reference Offer and provide services on its terms is 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 competition 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 (...)*".<sup>3</sup>

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<sup>2</sup> Ofcom, PCs, paragraph 3.13

<sup>3</sup> Ofcom, PCs, paragraph 3.16

- The objective of the requirement to provide services on fair and reasonable terms is *“to prevent supply on 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”*.<sup>4</sup>
9. Relying on a brief and superficial analysis, Ofcom goes on to set out its view on whether each of the alleged categories of behaviour would or would not amount to a SMP breach<sup>5</sup>.
10. BT disagrees with Ofcom’s provisional findings in relation to whether the alleged categories of behaviour 1, 2, 3, 4, 6 and 7 would constitute a breach of Conditions HH5.9 or 6.9 and/or Conditions HH1.2 and 1.2. In particular, BT fundamentally disagrees with Ofcom’s analysis and conclusions in relation to the finding that breaches of contract amount in this case to SMP breach. BT refers to the comments made in its letter to Ofcom of 25 September 2015 to this effect. BT further sets out below why Ofcom’s analysis as set out in the PCs is inadequate in view of:
- (a)** the lack of regard for the fact that there are contractual mechanisms to remedy any deviations from the contract;
  - (b)** the superficial reasoning and the lack of proper assessment of any of the alleged deviations from the terms of the Reference Offer that would take into account all the circumstances of a case and its materiality;
  - (c)** the inadequate reasoning supporting the allegation of breach of the Conditions HH1.2 and 1.2, and
  - (d)** the unreasoned suggestion that BT could be in breach of the SLG Direction.
11. Consequently, BT considers that Ofcom has not complied with its statutory duties which require it to *“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”*<sup>6</sup> and that Ofcom has not carried out its

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<sup>4</sup> Ofcom, PCs, paragraph 3.17

<sup>5</sup> Ofcom, PCs, paragraphs 4.8-4.10; 4.20-4.27; 4.33-4.34; 4.43-4.445; 4.58; 4.72-4.73; 4.82

<sup>6</sup> Communications Act, Article 3(3)

functions in accordance with the six Community requirements including in particular the requirements set out in Article 8 of the Framework Directive.<sup>7</sup>

12. **(a)** Ofcom appears to have had little or no regard to the fact that failures to comply with a contract carry contractual consequences. Not only does BT contract on the terms of the CSA, it is also subject to contractual remedies for non-compliance.

In particular Ofcom has not referred to any previous cases where a breach of contract, for which there are existing contractual remedies, amounted to a failure to provide services on the terms of the Reference Offer. Treating breaches of contract as regulatory breaches undermines parties' certainty and relegates the importance of the contract, and industry discussions to determine what the contract should provide for. Such an action by Ofcom goes beyond what is necessary and proportionate.

13. **(b)** Ofcom's main justification for the finding of the SMP breaches relies on the supposed lack of transparency in the service delivery associated with a number of categories of alleged behaviour. Yet transparency is an issue of fact and Ofcom's analysis does not contain any analysis of the facts and circumstances surrounding the alleged behaviours. In BT's view, when assessing whether a conduct may be in breach of regulation, Ofcom has to take into account all the circumstances surrounding an alleged behaviour, the materiality of any deviation from the terms of the Reference Offer and of its impact (as referred to by Ofcom in the PCs at paragraph 3.13). It is not possible to conclude a behaviour amounts to a SMP breach *in principle* without having conducted such an analysis, in particular with regard to the delivery of Ethernet services which is inherently complex and which involves a number of permutations that can and do occur at an order level, based on the specific circumstances encountered.

14. In particular, in the specific circumstances of the dispute, were any of the alleged conducts to be considered susceptible to breaching regulation (which BT has argued is not the case<sup>8</sup>), BT considers that the materiality threshold required to conclude that BT has breached its SMP obligations is not reached. BT's view relies on a number of factors which include:

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<sup>7</sup> Communications Act, Article 4(2)

<sup>8</sup> BT's letter to Ofcom of 25 September 2015

- when reviewing the three months Vodafone had analysed, BT found it had breached the DC provisions in a small proportion of the orders to which DC was applied;
- when it did not apply DC in line with the terms of the CSA, this was likely to be due to manual errors and this was not based on any systematic behaviour;
- given the complexity associated with delivering Ethernet services, human error will occasionally occur. BT is very concerned that Ofcom, although acknowledging the complexity of the process in its PCs<sup>9</sup>, has in fact given this important consideration no apparent weight in reaching its PCs; and
- where BT found it has made errors, it has remedied these errors by making SLG payments to Vodafone.

15. **(c)** BT does not believe that Conditions HH1.2 and 1.2 aim to address the lack of transparency Ofcom suggests in relation to a number of categories of alleged behaviour. Ofcom itself indicates that the aim of the requirement for BT to provide its services on fair and reasonable terms is to ensure competition in the relevant markets and in the related downstream markets<sup>10</sup>. In its dispute submission Vodafone has not demonstrated that the alleged conducts had any impact on downstream competition (in particular where DC is applied for customer related reasons or where there are good reasons that justify the application of DC). Likewise, in the PCs, Ofcom has not properly established how the seven categories of conduct would undermine competition in the manner that the SMP obligations fundamentally aim to address.

16. **(d)** Ofcom indicates that some of the categories of behaviour would involve a breach of the SLG Direction<sup>11</sup>. Ofcom states that where BT would have applied the DC as per categories 1, 2, 3 and 4 of alleged behaviour and delivered its service after the 57<sup>th</sup> day, BT would be in breach of the SLG direction. In BT's view, this extensive application of the SLG Direction is not appropriate or reasonable. The SLG Direction aimed at setting a timeframe for the standard time for delivery (of 57 working days) that BT subsequently aimed to improve by setting the CDD at 30 working days.

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<sup>9</sup> Ofcom, PCs, paragraph 4.25

<sup>10</sup> Ofcom, PCs, paragraph 3.17

<sup>11</sup> For instance: Ofcom, PCs, paragraphs 4.10, 4.27, 4.34 and 4.45

17. We also note that, at paragraph 4.95 of the PCs, Ofcom seems to suggest that BT could be in breach of its obligations under Condition HH1.2 when not complying with its obligations under the SLG Direction. We understand, in view of the reference made at paragraph 2.5 of the PCs, that Ofcom may also be referring to BT's obligations to monitor its performance against the service guarantees and compensate pro-actively CPs. As set out in BT's letter to Ofcom dated 25 September, BT has mechanisms in place 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<sup>12</sup>. In addition to being able to challenge DC applications, CPs are also able to question / challenge SLG payment levels directly with BT. Both the DC and SLG challenge processes are straightforward to use and typically lead to swift resolution of the matters raised. Requiring anything beyond what is already in place would be disproportionate. We reserve our position to make any further comments on the application of the SLG Direction to the present case if Ofcom were to consider BT has infringed Section (H) of the relevant annex of the SLG Direction.

18. We have made below some additional comments as to why we disagree with Ofcom's very short analysis for each of the alleged categories of behaviour 1, 2, 3, 4, 6 and 7.

***Category 1: No notice given of BT's intent to deem consent for a change of CDD.***

19. In the PCs, Ofcom provisionally concludes that failure by BT to give any notice of its intention to deem consent for a change of the CDD would be a breach of the SMP Conditions HH5 or 6.9 and/or HH1.2 and 1.2. Ofcom's provisional findings rely on the following considerations:

- failure to notify the CP of its intent to deem consent risks reducing the effectiveness of BT's obligations in relation to the provision of its services;
- notifying a CP of the delay allows that CP to manage the provision of its services to its end-users;
- notifying CPs allows them to appeal the use of DC of length of the CDD extension; and
- departing from the CSA undermines the certainty that publication of the Reference Offer seeks to achieve<sup>13</sup>.

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<sup>12</sup> BT's letter to Ofcom of 25 September 2015 (paragraphs 19-21).

<sup>13</sup> Ofcom, PCs, paragraph 4.9

20. In BT's view, Ofcom's analysis does not provide any evidence or justification as to why in the circumstances of the present case, BT's failure to give notice amounts to a breach of regulation. The reasons Ofcom provides are general assertions which set out the rationale for notice to be given, and BT has agreed to adhere to these notice requirements under the terms of the contract. Whilst we agree failure to notify is a breach of contract which triggers the payment of SLG, it should not also qualify as an SMP breach.
21. Firstly, where BT has given no notice of its intention to deem consent, SLGs may be payable under the contract. In other words, the payment of SLGs remedies the breach. Yet, by making a direct link between the breach of contract (due to lack of notification) and the SMP breach, Ofcom seems to imply that every time BT would recognise it has to pay SLG, BT would also acknowledge it has breached the SMP obligations. Such an interpretation cannot be correct. CPs already enjoy certainty under the CSA and regarding the use of the DC mechanism, and this should be sufficient for the parties to assert their rights.
22. Secondly, BT notes that, in many circumstances, the CP is perfectly aware of the delay and of the fact that BT had to apply the DC provisions because of the constant dialogues between BT and the CP before and after BT's engineer customer visit. Moreover, in many instances, the reason why BT had to rely on the DC provisions was due to the CP and related to items that were the CP's responsibility to manage. Going through the schedule of negotiations with regards the 96 orders in dispute for September 2012, March 2013 and September 2013: [REDACTED] orders, the application of DC was customer related<sup>14</sup>. In such instances, the end customer and the CP must logically know that BT could not complete the order on time and that an additional delay was required because it was their own failure to complete an activity they were responsible for that led to the delay (e.g. providing access to a site where installation work was required). The question of "managing the

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<sup>14</sup> [REDACTED]

customer expectation” or “allowing CPs to appeal the use of DC” is not a concern in such instances since the customer triggered the requirement for the CDD extension and the CP evidently knew what the delay related to.

23. Therefore, even if there were an SMP obligation to provide transparency as opposed to a contractual obligation, which BT disputes in relation to the notification to the CP, BT believes that that objective has not been undermined to an extent that the SMP obligation has been breached.

***Category 2: Insufficient level of reasoning given by BT***

24. Ofcom’s analysis of category 2 results in Ofcom’s finding that any actions by BT which are in accordance with BT’s contractual obligations are nevertheless capable of being a breach of the SMP obligations<sup>15</sup>.
25. Notwithstanding BT’s comments on the relevance of transparency to Conditions HH1.2 and 1.2, BT has the following comments with respect to paragraphs 4.20-4.27 of the PCs. At paragraph 4.24, Ofcom distinguishes between the types of DC codes and provisionally concluded that some would appear to be unlikely to offer the transparency for the CP to understand the specific circumstances that cause the delay and the likely impact on timescales (particularly in cases where the delay is due to reasons which are outside the CP’s control) without additional explanation, whereas others would be sufficient.
26. Unfortunately, BT had not sent Ofcom the most clear list of DC codes shared and discussed with CPs (including Vodafone) on a regular basis in its Section 191 response for which it apologises. BT has now supplied the relevant document to Ofcom under cover of separate correspondence and this is also included in **Annex 1** to this response. Ofcom’s conclusions rely on the fact that in some cases the DC code list which was provided by BT to Ofcom in the Section 191 response does not contain a detailed description of a number of the DC codes, namely those where Ofcom has provisionally concluded that provision of those DC codes only would not meet the requirements of the CSA. As can be seen from the annexed DC list, all DC codes come with a clear, discrete description that provide reasons to justify date movement, thereby offering sufficient transparency to the CP. For example, there is more than

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<sup>15</sup> Ofcom, PCs, paragraph 3.11

one code for “access” (e.g., DC7J-DC7L) because access can take more than one form, so BT has developed additional codes to help CPs better understand the nature of the access issue that affects a particular order. For the same reason there is more than one code where BT is seeking information or concurrence from the CP or where the CP requests BT to carry out an activity.

27. We trust that this additional information will lead Ofcom to review its provisional conclusions for the DC codes DC7C, DC7J-DC7S, DC21 and DC22, and confirm that BT would not be in breach of the relevant obligations in circumstances where a DC code only (for any DC code) was provided to justify date movement.

28. In BT’s view, it would be consistent and appropriate if Ofcom were to confirm that BT would not be in breach of any of the SMP obligations which Ofcom considers applies in circumstances where a DC code or circuit type was not provided, but where a description of the delay reason was provided to the CP. Such a scenario would provide sufficient transparency to the CP.

***Categories 3 & 4: Reliance on reasons not listed in the CSA for the application of Deemed Consent & New CDD date set under Deemed Consent incorporating additional delays that did not amount to circumstances permitting the application of Deemed Consent***

29. In the PCs, Ofcom finds that relying on reasons not listed in the CSA (i.e. the alleged behaviour described in category 3) is a breach of regulation because DC should only be invoked in “exceptional”<sup>16</sup> and “limited” circumstances, and compliance with the CSA and the Reference Offer also ensures that there is sufficient transparency on the terms under which BT provides its services<sup>17</sup>. For the same reasons, Ofcom states that the alleged behaviour described in category 4 amounts to a breach of the SMP condition<sup>18</sup>.

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<sup>16</sup> Ofcom, PCs, paragraph 4.33

<sup>17</sup> Ofcom, PCs, paragraphs 4.33-4.34

<sup>18</sup> Ofcom, PCs, paragraph 4.44

30. BT notes that although DC is used frequently, that is a consequence of the complexity involved in the installation<sup>19</sup> and, as acknowledged by Ofcom, in a high proportion of cases, delay has been caused by the customers<sup>20</sup>. The fact that Ofcom considers that the DC mechanism should only be used in “exceptional circumstances” has to be reconsidered having these elements of fact in mind and cannot be used as a parameter to assess compliance with the SMP conditions.
31. More specifically, when looking at the circumstances surrounding the application of DC, BT believes that the categories of behaviour 3 and 4 do not necessarily affect transparency, and in any event, should not be considered as SMP breaches. In many instances there are constant dialogues between BT and the CP before and after BT’s engineer customer visit, and therefore, in these instances, the CP is well aware of the circumstances surrounding the application of DC. As such the CP would generally know why DC is applied and be in a position to spot any human error in the way in which DC has been notified to it at the time of the notification. As mentioned in BT’s letter of 15 September 2015, the current system of DC requires human intervention and occasionally errors occur. Whilst such errors can trigger the payment of SLGs, they do not mean that BT has infringed regulation.
32. As stated in BT’s overarching comments (above, paragraphs 10 to 17), Ofcom should not make any finding of SMP breach without assessing the materiality of the impact of the behaviour in light of the specific circumstances surrounding each order and whether the objectives of the relevant SMP conditions are affected. Such an analysis is absent from the PCs.

***Category 6: Retrospective application of Deemed Consent to change the CDD***

33. Ofcom considers that any application of DC after the CDD day would be constitutive of a breach of the SMP condition as this would, in effect, amount to a situation where BT does not provide any notification at all<sup>21</sup>. BT submits that such an analysis is not

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<sup>19</sup> The complexity is partly due to the highly bespoke nature for a large number of Ethernet deliveries. Unlike copper based services, Ethernet is not delivered over a pre-built national network, and so a large proportion of Ethernet circuits require new network infrastructure to be built as part of their delivery. Furthermore, Ethernet delivery is subject to activities being taken by multiple parties (BT, CPs, third parties) and their agents, and delay is attributable to reasons that are the responsibility of all of those parties.

<sup>20</sup> Ofcom, Business Connectivity Market Review, Consultation, Annexes, 15 May 2015, Paragraph A17.135.

<sup>21</sup> Ofcom, PCs, paragraphs 4.72 and 4.73

appropriate. BT refers to the overarching comments made above at paragraphs 10 to 17.

34. In particular, BT also notes that in cases where there is a delay on the day of installation due to reasons that are the responsibility for the CP to manage (e.g., because activities that are the responsibility of the CP have not been dealt with in advance of the installation date, or because CP / end customer requirements changed on the day when installation was due to occur), the CP should be reasonably expected to already know that service could not be delivered. Therefore, transparency in such circumstances would not be undermined in cases where BT had not immediately formally gone back to the CP to set out reasons for delay that the CP should already be aware of.
35. BT notes that this will be the case in the many cases which include (but are not limited to) the following scenarios:
- When there is no power is available at site. This would require a separate visit to take place when the power had been provided.
  - When the CP (or in some cases end customer representative) advises the engineer on the day when installation is due, of the need for Site Specific Risk Assessment and Method Statement (SSRAMS). This would involve BT needing to organise a new visit to survey the end customer site in order to develop the SSRAMs, and then for a re-appointment to complete the installation work.
  - When, after the survey stage the BT engineer visits the site again to carry out installation work and finds that since survey the end-customer still has not provided the asbestos register at site. In such circumstances the appointment would need to be re-scheduled for health and safety reasons.
  - When the access requirements (often related to security) at the end customer site (that had not been previously advised to BT) change on the day of installation. For example, this could be the end customer representative insisting on specific requirements such as drug and alcohol tests, eye tests, and engineers carrying specific forms of identification such as passports and birth certificates.
  - When the installation details change on the day of the installation, rendering the previous installation details that BT had been provided incorrect. This would include, for example, the end customer advising on the day of the installation that the circuit needed to be provided to a different location in the end customer site

(which may have totally different engineering delivery requirements from those that had been previously assessed).

36. Moreover, it is unreasonable to assume that all updates associated with delays encountered on the day of the CDD will be provided on the same day (see below paragraph 46).

***Category 7: Extension of the CDD of un-suspended orders for a longer period than the initial suspension period***

37. In the PCs, Ofcom refers to the same reasoning as for the categories 3 and 4 of alleged practice to consider that BT would be in breach of the SMP conditions HH1.2 and 1.2, HH5.9 or 6.9 if it were to extend the CDD for a period longer than “justified”.<sup>22</sup> BT refers to the overarching comments made above at paragraphs 10 to 17. In this regard, BT believes that it is very important to understand the circumstances surrounding the suspension and un-suspension of the order.
38. Typically, the CP suspends the order for an open-ended period i.e. when the suspension request is made, there is no date provided at that stage as to when the CP wants to un-suspend the circuit. In many cases, therefore, BT is reliant on receiving the un-suspend request from the CP (typically without notice) that it needs to process. When the customer un-suspends the order, BT needs to reassess the time required to deliver the order in light of new factors that may have arisen during the course of circuit suspension. Conditions may have changed and this will lead to a longer delay. For example: BT fibres that were spare prior to the circuit going into suspension, and that were needed for circuit delivery may no longer be spare at the point when the order is un-suspended; the suspended circuit may still be reliant on a driver circuit when it is un-suspended; duct may have become blocked or damaged during the period of suspension. In such circumstances where factors that will affect circuit delivery have changed (or remain) at the point of the circuit un-suspension it is reasonable that such delays are accounted for by BT, and further work may need to be done to assess the degree of further delay which may mean that the following DC is not provided on the day of the un-suspension request being made by the CP. It is also appropriate that BT is allowed a reasonable time to deal with the administrative tasks associated with processing an un-suspend request. For example, in situations

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<sup>22</sup> Ofcom, PCs, paragraph 4.82.

where the job control teams are dealing with high levels of work on behalf of CPs, it may not be possible to deal with the un-suspend request instantaneously.

## **Section 2. BT's comments on Ofcom's analysis of BT's compliance with the terms of the Connectivity Services Agreement**

39. BT is concerned that Ofcom has failed to adequately capture the specific circumstances that are relevant to a proper assessment of the alleged categories of behaviour 2, 6 and 7. In BT's view, Ofcom has failed to adequately account for the complexity that is inherent in the delivery of Ethernet services, where circuit delivery is often bespoke at an individual circuit level, and where delivery relies on action being taken by, and detailed interaction occurring between, BT, CPs and third parties. These factors give rise to very specific circumstances at an order level that need to be properly understood and taken account of in order to assess whether DC was managed in compliance with BT's contractual obligations.

### ***Category 2: Insufficient level of reasoning given by BT***

40. BT agrees with the provisional conclusions reached by Ofcom with respect to paragraphs 4.17 to 4.19 of the PCs. In particular, BT agrees with Ofcom's findings that the provision of either a DC code only, or a circuit category only, are sufficient to meet the terms of the CSA in that such information provides the transparency for the CP to understand the specific circumstances that cause the delay. Both of these types of information are associated with a clear description that is readily available to CPs and meet the requirement for BT to provide 'reasons to justify' date movement. BT also agrees that it would be in accordance with the CSA to provide the same code more than once (as can reasonably occur with some provision jobs).

41. Although not considered by Ofcom in its PCs, BT notes that it would be appropriate and consistent for Ofcom to find that, in circumstances where BT had not provided a DC code or circuit category type, but had instead provided a clear written explanation of the reason for the change in CDD which falls within the list of the categories where DC can be applied, this would be in accordance with BT's obligations under the CSA. For the sake of completeness, BT believes that Ofcom should confirm that this scenario is in accordance with BT's contractual obligations in its final determination.

**Category 6: Retrospective application of Deemed Consent to change the CDD**

42. BT has the following comments in relation to paragraph 4.69 of the PCs. BT believes that it would be unreasonable to expect in every case that BT informs the CP on the day of the CDD. The obligation is to notify as soon as reasonably practicable, and this may be after the day of the CDD depending on the specific circumstances of the order.

43. BT frequently encounters circumstances where services cannot be provided on the day of the CDD due to DC reasons that it is the CP's responsibility to manage (e.g. relating to site access and site readiness). In some instances it will not be reasonably possible for BT to confirm the DC code back to the CP on the same day that the delay is encountered. Such circumstances include (but are not limited to)<sup>23</sup>:

- Occasions where BT has to arrange a new appointment to complete the installation because the BT engineer had been unable to gain access to the site on the day the installation was due to occur. The date of the delay required may not be known for a few days (often because it may take time to reach the CP contacts and re-arrange a visit that is acceptable to all parties).
- Occasions where the CP has changed the design or implementation of the 'driver circuit' that is needed as a pre-condition to the delivery of other circuits. Such changes late in the process affects any subsequent circuits planned off the back of the driver circuit and means that the subsequent circuits need to be re-organised to account for the changes to the driver circuit. Again, the length of the DC required will not be known for a few days.

44. Although BT accepts that such activities should always take place as soon as reasonably practicable, it will often not be possible for such activities (which can vary in terms of their complexity) to happen instantaneously.

45. For instance, what will typically happen is that the engineers on site will complete as much physical work as is possible, they will then provide an update to the engineering job control, and the engineering control will then provide an update to the job control

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<sup>23</sup> See also comments provided in paragraph 35.

team who will then update the CP<sup>24</sup>. The speed of this process can be affected by a number of considerations including, for example, the time on the day when the engineering delay is encountered, and the level of priority work taking place at both the engineering control and job control teams which may reasonably lead to a short delay in information being passed through the system and back to CP. It is quite possible, for example, in circumstances where the engineering activity is taking place towards the end of the day, and the engineering control is experiencing a high level of work in progress, that the update is not passed to the job control teams until past their normal working hours. Given this context, it is unreasonable to assume that all updates associated with delays encountered on the day of the CDD will be provided to the CP on the same day, or that a failure to provide an update on the day of the CDD automatically breaches the contractual obligation to provide services as soon as reasonably practicable.

46. Moreover, it is also reasonable to expect, in relation to delays encountered on the day of installation that are due to activities that are the CP's responsibility not being completed, that the CP will already be aware that delay will occur and be in a position to provide an interim update to their customer in advance of further updates being provided by BT. In this context, Ofcom should find that including a reasonable amount of time associated with the main delay in circumstances where the customer caused delay is encountered at the end of the provision process is compliant with BT's obligations under the CSA, even if the updated DC is not provided on the same day of the CDD.

47. With respect to paragraph 4.71 of the PCs, BT believes that bullet point 3 should be expanded to explicitly reference access and power and other circumstances where delay due to customer reasons are encountered at the end of the delivery process, and lead to re-work needing to be undertaken. The existing paragraph may have intended to cover these points, and it would be helpful for the point to be clarified.

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<sup>24</sup> Note that the engineering control and job control teams are separate functions.

***Category 7: Extension of the CDD of un-suspended orders for a longer period than the initial suspension period***

48. BT agrees it should provide reasons to justify an extension of the CDD and to set any subsequent CDD for “as soon as reasonably practicable”<sup>25</sup>.
49. We believe this analysis has to be case specific and requires an assessment of the circumstances surrounding the orders in questions. In particular, in cases where there are further complicating factors, BT should be given a reasonable time to deal with the un-suspension request. The CP is in full control of when an order is suspended in the first instance and also when an order is brought out of suspend. It is reasonable that BT is allowed a reasonable time to deal with an un-suspend request (which BT notes is not specified in the CSA), taking into account factors including the prevailing level of work ongoing within the job control handling the un-suspend request, and the level of complexity associated with the request itself.
50. These are matters that would be looked into if the dispute escalation procedure had been used and discussed in contractual negotiations or examined in any court proceedings. In BT’s submission, it would be inappropriate for Ofcom to reach conclusions concerning contractual breaches without having regard to similar considerations in relation to each case.

**Section 3. Comments on the procedures followed by Ofcom**

51. BT reserves its rights entirely concerning the fact that Ofcom has opened a compliance investigation at the same time as it is also taking steps to resolve the present dispute, and further as to any prejudice caused to BT as a result. For the reasons already referred to and developed further in its letter to Ofcom of 25 September 2015 and above in Section 1, BT contends that there has been no breach of BT’s SMP obligations in the present case. [3<]

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<sup>25</sup> Ofcom, PCs, paragraphs 4.80-4.81

52. These matters will be the subject of separate consideration by BT and, if appropriate, further representations in the compliance investigation.

I would be happy to have further discussions with Ofcom in relation to matters raised in this response.

Yours sincerely,

Matt Madden  
Head of Operational Regulation  
Openreach