

[NON-CONFIDENTIAL VERSION]

11 Evesham Street
London
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Gala Poole
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

20 November 2015

Dear Gala,

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

TalkTalk welcomes the opportunity to comment on Ofcom's provisional conclusions in the above dispute.

We believe that Ofcom has carried out a thorough assessment of BT's use of deemed consent and its compatibility with the relevant regulatory obligations (including the SLG Direction) and the relevant Connectivity Services agreement. In the main we support Ofcom's conclusions that BT has in the vast majority of scenarios failed to comply with either or both of its regulatory obligations and the Connectivity Services agreement.

As we have previously submitted to Ofcom, TalkTalk has experienced very similar issues in our own relationship with Openreach when ordering Ethernet circuits. There is a clear and discernible pattern in Openreach's Ethernet provisioning process in which it manipulates the use of deemed consent in clear violation of its obligations to provide these services on a fair and reasonable basis in order to exaggerate its apparent performance and avoid paying legitimate service level guarantees. Our own analysis shows that Openreach has indeed moved back the delivery date beyond the original CDD in a variety of unjustified circumstances such as without providing reason (or sufficient) reason and/or doing so only retrospectively after the original CDD had passed.

[REDACTED]

We believe that the circumstances of this dispute shows that Openreach has very poor incentives to comply with its regulatory obligations and will only do so once found out and vigorously pursued by its customers (which often involves having to refer the matter to Ofcom). Even with the plethora of regulatory oversight introduced by Ofcom over the years, Openreach essentially continues to behave in classic monopolistic patterns. There is a strong economic argument that Openreach's behaviour also has a discriminatory effect by which it favours BT's downstream divisions over its external customers. BT's downstream divisions do not pay for these services through an actual transfer of funds whereas external customers obviously do so. When Openreach fails to make adequate service level guarantee payments (because it has manipulated the use of deemed consent), its external customers suffer a financial detriment which is not experienced by BT's downstream divisions. Even if BT is required by Ofcom to make up the shortfall in service level guarantees (as an outcome of a dispute), this will never compensate its external customers in full because BT would not normally be required to pay interest to the amount equal to the cost of capital of the external customer. Thus its external customers are being discriminated against when compared to BT's downstream divisions.

Although we welcome Ofcom's step to initiate a separate own-initiative investigation into BT's compliance with its regulatory obligations, it remains to be seen whether this will have a real impact on BT's future behaviour and it will certainly not remedy the discriminatory effect of Openreach's behaviour.

Yours sincerely,

Rickard Granberg
Head of Regulation and Compliance