

26 August 2015

Gala Poole  
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**BY EMAIL**

Dear Gala,

**Dispute relating to BT's use of "deemed consent" and non-payment of SLG payments for Ethernet Services**

I set out below BT's initial comments on the Vodafone dispute referral (Referral) which you provided to me on 18 August 2015.

Given the early stage in the Ofcom dispute process, this response focuses on whether Ofcom should accept a dispute. BT also sets out a number of items in the Vodafone Referral which it considers are misleading, inaccurate or inconsistent.

BT reserves the right to make further comments on the substance of Vodafone's submission as appropriate.

**Summary**

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1. BT does not consider that Ofcom should accept the dispute on the basis that it is, in reality, a contractual dispute related to BT's compliance with the provisions of the Connectivity Services Agreement (CSA)<sup>1</sup>. On this basis, the dispute does not fall under section 185(1A) or (2) of the Communications Act 2003 (CA), but rather under section 185(1) CA. In the context of section 185(1) CA, BT believes that Ofcom should exercise its discretion and consider it is not appropriate for it to accept the dispute. (Part 1 of this response)
2. Should Ofcom nevertheless decide that the dispute falls under section 185(1A) or (2) CA, Ofcom should exercise its discretion and consider it not appropriate for it to accept the dispute. (Part 2 of this response)
3. Finally, and within the limited time available to BT to provide its comments on the Referral, BT has noted a number of inaccurate, inconsistent or misleading statements within the Referral which it believes affect the credibility of Vodafone's claim. (Part 3 of this response)

#### **1) The dispute falls under section 185(1) of the CA.**

4. Vodafone claims the dispute falls under section 185(1A) of the CA<sup>2</sup>. Yet, BT believes this dispute does not concern the entitlement to network access required by or under a condition imposed under section 45 CA; rather it is a dispute about whether Openreach has properly applied the terms of the CSA. Ofcom should exercise its discretion and decide not to open the dispute.

##### **1.1) The matter in dispute is fundamentally an allegation of contractual breach**

5. The heart of Vodafone's dispute is about whether the terms of the CSA have been correctly applied by BT, and about the level of money that Vodafone claims it is entitled to under the SLG provisions. In BT's view, the regulatory points raised by Vodafone in its Referral have been manufactured in order to artificially broaden the scope of a dispute which is essentially about alleged contractual breaches.

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<sup>1</sup> <https://www.openreach.co.uk/orgg/home/products/ethernet-services/contracts/contracts.do>

<sup>2</sup> Vodafone's Referral, paragraph 21. At footnote 10 of its Referral, Vodafone alleges that if the dispute does not fall within section 185(1A) of the CA, it falls under section 185(2). For the same reasons as those set out in respect of section 185(1A), BT considers that this dispute does not fall under section 185(2).

**a. The negotiations that led Vodafone to raise the present dispute relate to alleged contractual breaches**

6. The Vodafone letters that have been sent to BT in relation to this subject, plus the discussions at the two meetings held between the parties<sup>3</sup>, have focused on whether BT has applied Deemed Consent (DC) in line with its obligations as set out in the CSA, and whether money is owed to Vodafone as a result.
7. In this context, as evidenced in Vodafone's most recent letter to BT on this matter<sup>4</sup>, the discussions leading to the present dispute have focused in particular on:
  - compliance with Schedule 4C(i) of the CSA and BT's guidance in this respect; and
  - Vodafone's claim for SLG payments covering the period 1 September 2012 to 31 January 2014, based on an extrapolation of its own assessment of the 3 months where it has conducted analysis.
8. The detailed discussions between the parties were not about whether BT had in fact breached a regulatory condition. Vodafone has made passing reference in its letters to BT's alleged conduct not being compliant with its regulatory obligations, but such assertions have never been substantiated by Vodafone, and have not been discussed between the parties over the last year other than at a very superficial level.

**b. The evidence provided by Vodafone only goes to its allegations of contractual breach**

9. Throughout the negotiation process Vodafone has asserted that BT has not applied DC in line with its obligations under the CSA, and that in consequence BT owes Vodafone SLG payments for the period 1 September 2012 to 31 January 2014. Vodafone has provided information in support of these assertions which has come in the form of analysis against specific circuits. Where data has been available to conduct an evaluation, BT has assessed in detail the Vodafone information provided and has made SLG payments in relation to circuits where it considers there is evidence that a payment is due.

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<sup>3</sup> Meetings dated 18 December 2014 and 28 January 2015

<sup>4</sup> Vodafone letter dated 5 June 2015, page 7.

10. Conversely, Vodafone has not substantiated any of the claims made about BT's compliance with applicable regulatory conditions. According to Ofcom's Dispute Resolution Guidelines, it is not sufficient for the party raising a dispute to merely claim that a practice breaches regulatory conditions applying to any party to the dispute – without substantiating this allegation at all - for Ofcom to open a dispute<sup>5</sup>. In the present case, Vodafone is merely asserting that should BT's application of DC not fall foul of the contractual provisions, then it should be considered a breach of regulatory conditions applying to BT<sup>6</sup>, which clearly is not sufficient to substantiate an allegation about the breach of a regulatory condition.

**c. The principal remedies discussed by the parties to date have been contractual**

11. The discussions between the parties to date have focused on contractual remedies, with Vodafone claiming that BT has applied DC in a manner that is not compliant with its obligations under the CSA, and requesting the contractual SLG payments to which it claims it is entitled. As noted above, this focus is evident from Vodafone's most recent letter to BT, in which it 'finally' requested remedies relating only to compliance with Schedule 4C(i) of the CSA and contractual SLG payments.

12. In any event, we note that SLGs are a form of liquidated damages that fall outside the scope of section 190 CA. This was acknowledged by Ofcom in the previous disputes between TalkTalk and BT and Sky and BT, where it concluded *inter alia* that:

*“Our view is that this is essentially a question of whether the word “charge” should, on its face and within the scheme of the Act, be construed broadly enough to include sums by way of liquidated damages (where there is a contract containing SLGs) or damages more generally (where the contract did not contain SLGs). Neither Sky nor TTG has identified any authority for taking so broad a view of the power. While we consider that “charge” is broad enough to cover any overpayments and underpayments relating to services received either under a contract or pursuant to*

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<sup>5</sup> Ofcom Dispute Resolution Guidelines, paragraphs 3.14 and 6.11

<sup>6</sup> Referral, paragraph 18.b

*some other form of regulatory arrangement, our view is that its meaning cannot extend to the payment of damages”.*<sup>7</sup>

**d. Were Ofcom to find the current dispute falls under section 185(1A) of the CA, this would have unintended consequences**

13. Were Ofcom to find the current dispute falls under section 185(1A) CA, this would result in CPs increasingly seeking to use section 185(1A) CA to test the application of detailed contractual terms and conditions, with Ofcom having only limited discretion to reject such disputes. Clearly this is not what the dispute process under section 185(1A) CA was intended to achieve.

**1.2) Ofcom should exercise its discretion and find that it is not appropriate for it to open the dispute**

14. Ofcom has discretion to decide whether it is appropriate for it to handle the dispute falling under section 185(1) of the CA. In view of the factors set out in Ofcom’s Guidelines on Dispute Resolution to assess disputes against its priorities and available resources<sup>8</sup>, BT believes that Ofcom should exercise its discretion and decide it is not appropriate for it to handle the present dispute. The points actually in dispute between the parties are all contractual in nature. To the extent that any broader regulatory issues are raised, these are not in dispute between the parties and there are other alternative regulatory actions to address these issues. In particular, we note the consideration of DC in Ofcom’s ongoing Business Connectivity Market Review (BCMR) and the industry processes envisaged therein. As a result of its review, Ofcom may conclude there is a need to impose specific regulatory conditions or that matters should be dealt with via industry discussions. Moreover, there are provisions in the contract that would allow a prompt resolution of the matter in dispute.

**a. Ofcom’s current consultation on BCMR**

15. The use of DC by BT and whether further regulation is needed in this respect is being considered by Ofcom as part of its consultation on BCMR. Whilst Ofcom recognises

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<sup>7</sup> See [http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/1313949/SLA\\_Disputes\\_Final\\_Determination.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/1313949/SLA_Disputes_Final_Determination.pdf) paragraph 4.85

<sup>8</sup> Ofcom, Guidelines on Dispute Resolution, paragraph 4.19

that DC is a matter of concern for CPs, it also states in the consultation document that: *“We also considered whether we should address the issue of date certainty by specifying specific rules as to the use of deemed consent. However, we considered that this approach may also have unintended consequences or interfere with the development of the new industry process.”*<sup>9</sup>

16. Any changes to the underlying mechanism of DC would affect all CPs. Should changes be needed to the rules around the use of DC, it would be right to progress this via a process of appropriately facilitated industry-wide discussion and not via a regulatory dispute. BT considers that this is consistent with Ofcom’s position to date in the BCMR, where it has avoided direct intervention in specifying the terms of DC, but rather has preferred to let discussions that may lead to a change in the application of DC (for example, those discussions related to the Differentiated Order Journey (DOJ) and the ongoing negotiations of the Ethernet provision SLA/SLG scheme) to progress via a process of appropriately facilitated industry discussion.

**b. There is a process in the CSA to handle the matter currently in dispute**

17. As set out below in paragraph 25, clause 16 of the CSA provides a mechanism to attempt to resolve contractual disputes between parties. Given that the matters that are in dispute are essentially contractual in nature, BT submits that the escalations and dispute resolution mechanism within the CSA would be an appropriate next course of action to resolve the outstanding items.

18. Vodafone asserts in the Referral<sup>10</sup> that it has exhausted every available means of attempting to resolve the dispute itself, yet it has never attempted to avail itself of the mechanism included under clause 16 of the CSA. Moreover, Vodafone does not substantiate its allegation that commercial negotiation would not be an appropriate alternative means to resolve the dispute.

**2) If Ofcom finds that the dispute falls under section 185(1A) of the CA then BT believes that Ofcom should not open the dispute**

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<sup>9</sup> Ofcom, Business Connectivity Market Review 2015 Consultation document paragraph 13.118

<sup>10</sup> Referral, paragraph 23

19. Notwithstanding BT's view that this alleged dispute does not fall to be considered under section 185(1A) CA, should Ofcom nevertheless proceed on that basis, it may refuse to handle the alleged dispute (or any part of it) if (1) negotiations between the parties have not been exhausted in respect of all or part of the alleged dispute, and (2) there are alternative means to resolve the dispute that are likely to lead to a prompt and satisfactory resolution of the dispute<sup>11</sup>.

**2.1) Negotiation between the parties have not been exhausted in key respects**

20. In Ofcom's Guidelines on Dispute Resolution<sup>12</sup>, Ofcom says it expects the parties in dispute to have entered into good faith negotiations in order to resolve their differences themselves. It is only when Ofcom has sufficient evidence that negotiations have been exhausted that it could open the dispute. The grounds of the dispute should therefore reflect the different items which have been the object of the negotiations. Ofcom should not accept grounds which have not been the object of the negotiations between the parties that have led to the submission of a dispute before Ofcom.

21. As mentioned in paragraph 8 above, in its Referrals, Vodafone is raising allegations regarding the breach of regulatory conditions which have not been the subject of the substantive negotiations that have led to the present dispute and therefore should fall outside the scope of any dispute accepted by Ofcom.

22. In addition, with respect to the remaining contractual allegations, negotiations have not been exhausted in respect of Vodafone's September 2012 analysis. Vodafone brought up the matter of the September 2012 analysis in its first letter dated 26 August 2014. In its response to that letter dated 3 October 2014 BT set out that it had not been able to assess Vodafone's data for September 2012 due to the lack of BT records. Subsequent communications between the parties then focused on the Vodafone claims that BT had been able to assess, and on other issues in relation to the application of DC raised by Vodafone. At no point since its letter of 26 August 2014 has Vodafone subsequently raised with BT the specific issue of the September 2012 data and any alleged payments due, nor has BT stated that it is unwilling to

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<sup>11</sup> Ofcom, Guidelines on Dispute Resolution, paragraph 4.10.

<sup>12</sup> Ofcom, Guidelines on Dispute Resolution, paragraph 2.4.

enter into further discussions in relation to payments for this month; in fact the parties have merely focussed their discussions on other matters during the last year.

23. ✂

## **2.2) There are alternative means available to resolve the dispute**

24. Further to section 186 CA and Ofcom's Guidelines on Dispute Resolution, Ofcom should refuse to handle a dispute if alternative means exist to resolve the dispute, resolution of the dispute by those means would be consistent with Ofcom's Community requirements as set out under section 4 of the 2003 Act, and those means are likely to lead to a prompt and satisfactory resolution of the dispute<sup>13</sup>.

25. BT submits that Section 16 of the CSA sets out a process for escalation and dispute resolution that should be used as first resort to attempt to settle the contractual matters that are actually in dispute. Using this process would allow discussions to continue between the parties, and offers an appropriate mechanism for the items in dispute to be promptly and satisfactorily resolved. ✂

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considers that this would be a more appropriate next step than seeking to resolve the matters raised through a dispute before Ofcom and that resolution of the dispute by these means would be consistent with Ofcom's Community requirements.

## **3) A number of Vodafone's assertions are factually incorrect or misleading**

26. At this stage of our analysis, and without going into the substance of Vodafone's allegations, BT has noted a number of assertions that are misleading, inaccurate or inconsistent, thereby affecting the credibility of Vodafone's claim. These include the points set out in the table below.

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<sup>13</sup> Ofcom, Guidelines on Dispute Resolution paragraph 4.10



Table 1 – BT comments on a number of Vodafone statements in its dispute referral.

Vodafone statement / reference	BT comment
<p><i>“BT’s Equality of Access Board has referred to “process inconsistencies” in the context of Ethernet provisioning for a number of years..”</i> (Paragraph 2 in the Vodafone dispute referral).</p>	<p>This is misleading since Vodafone also fail to acknowledge that, for example, the EAO conducted a review of the DC process following an allegation of non-compliance by Vodafone, and found that the process was compliant with equivalence obligations.</p>
<p><i>“The CMA has noted the risk that in light of BT’s proposed acquisition of EE, BT will have further incentives and the ability to reduce the quality of service for Ethernet services”</i> (Paragraph 2).</p>	<p>This is misleading in that Vodafone omits important contextual details. In fact the press release that accompanies the CMA’s issues statement expressly states that <i>“The issues statement identifies clearly for all interested parties the key questions that the inquiry is examining. The issues statement does not imply that the inquiry group has yet identified any competition concerns”</i> <sup>14</sup></p>
<p><i>“The [DC] mechanism finds no basis in SMP conditions that Ofcom has imposed on BT, and it is clear that BT’s use of the mechanism has mutated over time from one which was originally intended to deal with a narrow set of circumstances..”</i> (Paragraph 4).</p> <p><i>“..the original intention was that “deemed consent” could be applied only in relation to Excess Construction Charges.”</i> (Paragraph 19).</p>	<p>These statements are misleading and inaccurate in that they fail to acknowledge that (a) DC was agreed with industry and adopted into the CSA following the 2008 SLG Direction via a transparent process involving industry, OTA2 and Ofcom and (b) the circumstances under which BT can deem consent are unchanged since 2008.</p>
<p><i>“CPs are permitted to challenge its [DC’s] application, but the process for doing so is burdensome and difficult given the information asymmetry between BT and the relevant CP.”</i> (Paragraph 4)</p>	<p>This statement is inaccurate. The DC challenge process requires the challenging CP to do no more than set out why it is challenging a DC application for a particular circuit and send the challenge to the BT Job Control team. Typically DC challenges are dealt with by BT in a matter of days. ✕</p>

<sup>14</sup> <https://www.gov.uk/government/news/cma-publishes-issues-statement-in-btee-merger>

<p><i>“On the contrary, the months for which the manual investigations and reviews were undertaken were selected at random, without any knowledge of the ultimate outcome of the review, and Vodafone does not accept that there is any inherent bias..” (Paragraph 78 a).</i></p>	<p>This statement appears to be contradicted elsewhere in the Vodafone document where Vodafone indicates in paragraph 43 that <i>“Vodafone consequently commissioned a detailed and time-consuming analysis of the application of “deemed consent” to its orders over the period from 2012 to 2013 during which BT’s performance was weakest.”</i> BT submits that this approach is not a random selection, as separately indicated by Vodafone.</p>
<p>In paragraph 18 and elsewhere in its submission, Vodafone appears to be characterising the existence of a process to challenge DC, and successful CP challenges through that process, with a failure to pay SLGs proactively.</p>	<p>This is incorrect; BT does make SLG payments for Ethernet proactively, while the DC challenge process has been set up as a facility for all CPs to raise issues about the application of DC and seek rapid resolution of issues when they arise. In this sense the DC challenge process is a mechanism giving CPs the right to query / challenge applications that will affect SLG payments, it does not represent a general failure by BT to make SLG payments proactively.</p>
<p>At paragraph 1 of its Referral, Vodafone appears to recognise BT’s right to use DC by stating in its dispute referral that <i>“BT is permitted to extend the delivery date”</i> and <i>“However, BT may deem Vodafone to have consented in certain circumstances”</i></p>	<p>This is inconsistent with Vodafone’s simultaneous argument that the use of DC is not fair and reasonable even in circumstances where it is applied in line with the requirements under the CSA.</p>

I look forward to discussing these comments further at the Enquiry Phase Meeting on 2 September 2015.

Yours sincerely,



**Alan Lazarus**

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