



**Dispute regarding the use of “deemed consent” by BT to avoid SLG payments
for Ethernet services**

**Referral by Vodafone Ltd (“Vodafone”) of a dispute with British
Telecommunications Plc (“BT”)**

14 August 2015

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Executive summary

1. This dispute relates to the provisioning timeframes in which BT has delivered Ethernet services to Vodafone and to BT's avoidance of service level guarantee ("SLG") payments for late delivery. Under the terms of the Connectivity Services Agreement ("CSA") between BT and Vodafone, BT must provide the services by the contractual delivery date or make SLG payments. BT is permitted to extend the delivery date. In most circumstances, it must seek Vodafone's consent to extend the delivery date for Ethernet services beyond the 30th day. However, BT may deem Vodafone to have consented in certain circumstances.
2. There are long-standing concerns with BT's performance in provisioning Ethernet services, which have been felt across the industry and have been recognised by Ofcom. Ofcom has found that BT has significant market power in certain markets for the supply of Ethernet services, and CPs in most instances are therefore substantially reliant on having fair and reasonable access to these services from BT. As set out in Annex C, this dispute comes amidst serious concerns from all parts of the industry about Ethernet provisioning. Ofcom acknowledged in its most recent BCMR consultation document that there were "growing concerns about the provisioning of new Ethernet lines" by BT and that it had been "monitoring the situation for some time";¹ BT's Equality of Access Board has referred to "process inconsistencies" in the context of Ethernet provisioning for a number of years; and 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.
3. The operation of the "deemed consent" mechanism has been a specific concern. Ofcom's own analysis has shown that BT applies "deemed consent" to the vast majority of Ethernet orders.² The procedure has fundamentally undermined CPs' confidence in the initial delivery dates provided by BT. Ofcom has recognised that BT's performance has caused costs for CPs and has likely impacted competition and, indeed, retail end users of such services.³
4. To date, there has been no effective independent oversight of BT's application of "deemed consent". The mechanism finds no basis in the 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, to one which now applies to the vast majority of orders⁴ and wholly undermines BT's service level standards. BT determines for itself whether circumstances permit the mechanism to be used and when it will be relied on. CPs are permitted to challenge its application, but the process for doing so is burdensome and difficult given the information asymmetry between BT and the relevant CP, and such challenges

¹ See Ofcom's 15 May 2015 consultation document entitled *Business Connectivity Market Review — Review of competition in the provision of leased lines* ("**2015 BCMR Consultation Document**") para 13.18.

² Ofcom concluded that "between 2011 and 2014, 71% of all provide and regrade orders for Ethernet products completed by Openreach, were subject to at least one deemed consent change...": 2015 BCMR Consultation Document para 13.45.

³ 2015 BCMR Consultation Document paras 13.86–13.87.

⁴ 2015 BCMR Consultation Document para 13.18.

are in any event determined by BT in the first instance, which has a vested interest in upholding its original application of deemed consent.

5. Vodafone has had long-standing concerns that the lack of effective independent oversight has permitted BT to apply “deemed consent” in circumstances in which it was never intended, in which it is not permitted by contract, and which are unfair and unreasonable, in order to avoid liability for SLG payments. These include, for example, BT’s practice of applying “deemed consent” at any point in the provisioning process – including retrospectively at handover. Such practices represent an abuse of the mechanism by BT, and make it impossible for CPs to have any confidence in the provisioning timeframes quoted by BT until the Ethernet service is actually provisioned – destroying trust in the market by CPs and retail end users alike.
6. Accordingly, Vodafone undertook an expensive and time consuming process of individually analysing the historical use of deemed consent in September 2012, March 2013 and September 2013, which were chosen as a representative sample of months at relatively even points across the period from 1 September 2012 to 31 January 2014 (from the time the service deterioration occurred to the time Vodafone began a program of proactively monitoring the use of deemed consent and challenging it as necessary on a “real time” basis).
7. Vodafone’s analysis revealed extensive evidence of the systematic misuse of “deemed consent” by BT. It showed that BT had – with consistent frequency – flouted its contractual and/or regulatory obligations by applying “deemed consent” in inappropriate circumstances. The result has been to comprehensively undermine the purpose of the service level standards imposed by Ofcom under BT’s SMP conditions.
8. Vodafone and BT have engaged in extensive negotiation about the use of “deemed consent” in the relevant months to move CDDs and avoid and/or minimise SLG payments, which has taken many forms including substantive negotiation and correspondence over a period of more than 12 months. While there has been some agreement regarding individual orders, BT has failed to acknowledge its contractual and/or regulatory breaches in certain key respects.
9. Accordingly, this dispute relates to:
 - a. issues concerning whether the actual application of “deemed consent” in relation to the specific circumstances of individual orders in March and September 2013 was permitted by the CSA, including (without limitation) (i) whether BT is permitted to deem consent solely by providing a code to Vodafone; and (ii) whether BT may deem consent on a retrospective basis;
 - b. the appropriate treatment of Vodafone’s claims in September 2012. BT has inexplicably stated that it no longer has access to its records for this month in order to challenge Vodafone’s claims. BT has therefore not engaged on these claims; and
 - c. the appropriate proportion of successful challenges to BT’s application of deemed consent that should apply to the other months within the 1 September 2012 to 31 January 2014 period, for which the same detailed and expensive analysis has not been undertaken, on the basis that the evidence from the months sampled by Vodafone shows a sustained and systematic pattern of conduct by BT throughout this period.

10. Vodafone's analysis shows that BT has engaged in sustained and systematic breaches of its contractual and regulatory requirements, which BT has refused to acknowledge. Vodafone considers that it has done everything it reasonably can to encourage BT to acknowledge the issue, pay Vodafone the SLG payments to which it is entitled, and to secure change in BT's use of "deemed consent" going forward. Accordingly, Vodafone now has no choice but to bring this dispute, in order to:

- a. obtain a direction from Ofcom that BT has breached its obligations;
- b. secure the SLG payments to which Vodafone is entitled; and
- c. most importantly, secure an outcome whereby BT will be aware that its use of "deemed consent" is subject to external scrutiny and will be corrected, in order to provide incentives for BT to ensure the mechanism is applied appropriately in future.

Section A: Preliminary Information

11. This dispute is referred by Vodafone (Corporate and External Affairs Department, Vodafone House, The Connection, Newbury, Berkshire RG14 2FN, England). The primary contacts for this dispute are:
- a. Colin Scott, Senior Regulatory Manager (colin.scott@vodafone.com; +44 7770 926843); and
 - b. Karen Wray, Regulatory Lead (karen.wray@vodafone.com; +44 7554 227569).
12. Vodafone wishes to refer to Ofcom, under section 185(3) of the Communications Act, a dispute between itself and BT.
13. Vodafone provides retail mobile and fixed-line telecommunications services to consumers. It is part of a corporate group that provides mobile services in 24 countries and fixed-line services in 17 countries around the world. In the UK, Vodafone estimates that in the quarter ending 31 March 2015, it had 18.4 million customers and a 24% market share in mobile services and a 4% market share in fixed telecommunications services.⁵
14. As necessary inputs to deliver retail telecommunications services to its customers, Vodafone has entered into contracts with BT for the provision by BT to Vodafone of a number of types of wholesale telecommunications services. Among these contracts, Vodafone and BT are party to the CSA under which BT provides Ethernet Access Direct (“EAD”) services to Vodafone. EAD services are a critical wholesale input to the retail services provided by Vodafone to its consumers, particularly retail telecommunications services to the enterprise and business sector, and are used (for example) to provide backhaul for fixed-line and mobile services. Vodafone and BT are competitors in relation to the provision of these retail telecommunications services.
15. BT is (and has been throughout the Relevant Period) designated as a dominant provider in the relevant market⁶ and is subject to conditions imposed by Ofcom under section 45 of the Communications Act (“SMP conditions”). Among other things, those SMP conditions require BT to provide the relevant services subject to dispute on request; as soon as reasonably practicable; and on reasonable terms and conditions, and such other terms as Ofcom may direct. The CSA is the reference offer pursuant to which BT purports to comply with the SMP condition requiring it to provide the services on request, on reasonable terms and conditions, and on the terms Ofcom directs.

⁵ Vodafone Annual Report 2015, p 9,

<http://www.vodafone.com/content/annualreport/annualreport15/assets/pdf/overview.pdf>.

⁶ In its 8 December 2008 statement entitled *Business Connectivity Market Review – Review of the retail leased lines, wholesale symmetric broadband origination and wholesale trunk segments* (“**2008 BCMR Statement**”), Ofcom found that BT had SMP in the market for wholesale low bandwidth AISBO services, which included certain Ethernet services relevant to this dispute. In its 28 March 2013 statement entitled *Business Connectivity Market Review – Review of retail leased lines, wholesale symmetric broadband origination and wholesale trunk segments* (“**2013 BCMR Statement**”), Ofcom again found that BT had SMP in the market for wholesale low bandwidth AISBO services.

16. The terms of supply relating to EAD services are subject to service levels, setting out the timeframe in which new EAD services should be provisioned (the “**SLAs**”), failure to comply with which may render BT liable for service level guarantee payments (the “**SLGs**”). The SLAs may in some circumstances be extended by Vodafone providing prior written consent to extend the customer delivery date (“**CDD**”). BT’s practice is to deem such consent to have been given in certain circumstances.

17. The dispute concerns the purported application by BT of “deemed consent” and, in particular BT’s breaches of the CSA and of its SMP conditions in:

- a. purporting to apply “deemed consent” in circumstances not contemplated by the CSA from 1 September 2012 to 31 January 2014 (the “**Relevant Period**”); and
- b. consequently, failing to credit Vodafone with the full SLG payments payable for the Relevant Period.

18. Specifically, Vodafone alleges that:

- a. the actual application of “deemed consent” in relation to the specific circumstances of the disputed orders investigated by Vodafone for September 2012, March 2013 and September 2013 was not permitted by the CSA;
- b. if (contrary to Vodafone’s allegation above) the application of “deemed consent” for any such order was permitted by the CSA, then BT’s provision of the service was not on “fair and reasonable” terms and therefore did not comply with the SMP conditions;
- c. BT’s failure to retain records from September 2012 to refute Vodafone’s substantiated, bona fide complaints regarding the use of deemed consent from orders in that month cannot be used to relieve or reduce BT’s liability. Such an outcome would be particularly perverse given that:
 - i. Ofcom’s policy position and BT’s contractual obligation is that BT must proactively monitor its performance in provision and proactively compensate Vodafone for failing to meet the SLAs; and
 - ii. none of the regulatory obligations Ofcom imposes on BT in relation to SLAs for Ethernet services contemplate the use of deemed consent at all, and therefore it is incumbent on BT to address any reasonable complaint raised by Vodafone in relation to BT’s application of deemed consent; and
- d. these failures were widespread and systematic; therefore, although Vodafone has undertaken a manual investigation and review of the disputed specific orders for September 2012, March 2013 and September 2013, it should not be required to undertake a similar review for the other months in the Relevant Period. This is important given the significant costs and resources required to conduct a further investigation; the likelihood that BT will not have information for at least a number of the remaining months of the Relevant Period; the systematic frequency with which misuse of deemed concern occurred; and, most importantly, BT’s obligations to provide *proactive* payments without Vodafone being required to proactively investigate and/or make claims. In these circumstances, the

only appropriate solution is to apply the proportion of successful challenges in those months across the whole Relevant Period.

19. The provisioning timeframes of BT's Openreach division have been a significant cause of concern for the industry as a whole, including for other CPs, other parts of BT and for Ofcom. The misuse of deemed consent has been a core aspect of those concerns. By way of context to this dispute, Vodafone notes that:

- a. the practice of deeming consent is found only in contract. The practice finds no support or basis in the SMP conditions or the direction under which (pursuant to the SMP conditions) Ofcom has directed that BT's contracts for providing certain Ethernet services provide for SLAs and SLGs (the "**SLG Direction**").⁷ Indeed, it is entirely inconsistent with the intent of the SLG Direction (which requires CP consent for extensions beyond a specified period) for BT to circumvent the need for such consent in specific circumstances. That inconsistency cannot be saved through semantic acrobatics, such as referring to this practice as "deeming consent" when such consent has not been given as a matter of fact. Any ability for BT to "deem consent" must therefore be interpreted in a manner which (at the very least) is sufficiently constrained to preserve the policy intention of the SLG Direction and the SLA regime generally (i.e. that BT proactively monitor its compliance with provisioning SLAs and proactively make SLG payments – a situation that must require actual consent to be given for CDD changes in general). "Deemed consent" should not be interpreted in a manner that subverts the SLG Direction and the SLA regime generally by creating a *de facto* situation where BT is free to "deem consent" without scrutiny and CPs consequently incur the burden (as Vodafone has done) of proactively investigating use of deemed consent; and
- b. while it was implemented at BT's request, the original intention was that "deemed consent" could be applied only in relation to Excess Construction Charges. In practice, the use of "deemed consent" has grown to cover a significant proportion of all circuit orders and in a wide variety of circumstances. Ofcom recently found that more than 70% of all Ethernet orders are subject to "deemed consent"⁸ meaning that what was originally intended as a mechanism to deal with a narrow set of circumstances has now become the *de facto* experience across the industry of how BT's Openreach division will treat Ethernet orders.

20. For the avoidance of doubt, although this dispute relates solely to the Relevant Period, being the period in which Vodafone has – at considerable expense – investigated and audited BT's use of "deemed consent" for a representative sample of months, Vodafone's view is that the breaches detailed in paragraph 17 are ongoing. Vodafone's ongoing program of monitoring and challenging BT's application of the deemed consent mechanism shows that there has been no reduction from 1 February 2014 to 31 March 2015 – indeed, the proportion of Vodafone's

⁷ The SLG Direction is found in Ofcom's 20 March 2008 statement entitled *Service Level Guarantees: Incentivising performance*; it was re-imposed under the new SMP conditions (see para 1.45 of the 2008 BCMR Statement).

⁸ 2015 BCMR Consultation Document para 13.45.

challenges to BT's initial decisions to apply "deemed consent" over this period which were successful stands at 42.6%.

21. This is clearly a dispute which falls under section 185(1A) of the Communications Act, being a dispute between a communications provider (Vodafone) and a person subject to an SMP condition (BT). The dispute falls squarely within the intended scope of section 185(1A) because:

- a. the parties to the dispute are BT and Vodafone. BT is subject to the SMP conditions. The conditions include obligations that "the Dominant Provider must provide network access to a Third Party where that Third Party, in writing, reasonably requests it". "Third Party" means a person providing a public electronic communications service or a person providing a public electronic communications network. Vodafone provides public electronic communications services and public electronic communications networks and is therefore within the class of persons identified in the SMP conditions;
- b. the parties are clearly in dispute. They disagree about the application and interpretation of the "deemed consent" provisions in the CSA and whether such provisions comply with the SMP conditions, and therefore the extent to which Vodafone is entitled to SLG payments. In the *Orange v Ofcom* [2007] CAT 36 Judgment on the Preliminary Issues, the CAT emphasised that "dispute" was a broad term encompassing different types of disagreement. In particular, it determined that a "dispute" could arise within the framework of an on-going agreement and despite any dispute resolution procedure within that agreement, and regardless of whether there was any risk to ongoing interconnection;⁹
- c. the dispute relates to entitlements to network access required to be provided under section 45. Specifically, the dispute relates to Vodafone's entitlement to network access under the CSA, which BT is required to provide under SMP condition 1.2, and (to the extent Ofcom may determine that BT's behaviour the subject of this dispute is permitted under the CSA) whether the terms of the CSA comply with SMP conditions. By virtue of section 185(8)(a), a dispute relating to entitlements to network access is to be read as including any dispute "as to the terms or conditions on which network access is or may be provided in a particular case"; and
- d. the disputed "network access" at issue is the provision of Ethernet services which are essential for Vodafone and other CPs to compete with BT – both for providing retail leased lines, and for providing other retail electronic communications services for which Ethernet is an essential input. The provision of Ethernet services clearly comprises "network access" within the meaning of section 151(3) of the Communications Act, being services by which Vodafone is able (for the purposes of providing its own electronic communication services) to make use of electronic communications services provided by BT.

22. Accordingly, Vodafone's position is that section 186(1A) applies,¹⁰ and therefore Ofcom must handle the dispute pursuant to section 186(3) unless there are alternative means available to

⁹ *Orange v Ofcom* [2007] CAT 36 Judgment on the Preliminary Issues, para 79.

¹⁰ However, if Ofcom does not accept that this is a dispute which falls within section 185(1A) (despite the comprehensive reasons set out above), VF submits that this is nevertheless a dispute under section 185(2)

resolve the dispute; resolution in such a way is consistent with Community requirements; and a prompt and satisfactory resolution is likely using such alternative means.

23. In relation to section 186(3) of the Communications Act, Vodafone submits that there is no more appropriate alternative means to resolve this dispute:

- a. as is evident from Ofcom's decision that BT holds SMP in relation to the provision of the services in dispute, there is an imbalance of negotiating power such that it is unlikely that commercial negotiation would be an appropriate alternative means to resolve the dispute. Ofcom's dispute resolution guidelines recognise that the success of alternative dispute resolution "depends on the motives and incentives of the Parties involved to reach a commercial solution".¹¹ Based on BT's SMP in the relevant market and its negotiating posture to date, there is no evidence that BT has the motive or incentive to agree a reasonable commercial outcome with Vodafone;
- b. as set out in Section C of this referral, Vodafone has exhausted every available means of attempting to resolve the dispute itself, including through bilateral correspondence and negotiations, efforts to develop and/or reform industry processes and contract review processes. Despite those efforts, the parties have been unable to resolve the dispute; and
- c. as set out in paragraphs 47 and 48 below, although Ofcom is proposing to make changes to the SMP conditions relating to the services and BT is trialling changes to its provisioning processes, these do not resolve this historical dispute and do not properly address the underlying cause of the dispute or of the ongoing misapplication of deemed consent by BT.

24. As a remedy to resolve this dispute, Vodafone requests that Ofcom make:

- a. a declaration under section 190(2)(a) that BT has failed to comply with the CSA in relation to its failure to provide all the SLG payments in dispute for the Relevant Period and clarifying BT's rights to deemed consent in the circumstances covered by this dispute;
- b. to the extent Ofcom determines not to make such a declaration in relation to any disputed order, a declaration under section 190(2)(a) that BT has consequently failed to comply with the SMP condition to provide the relevant services on fair and reasonable terms and conditions; and
- c. a direction under section 190(2)(d) that (having regard to the declarations above) BT must pay to Vodafone the amount of SLG payments owed plus interest.

Section B: The issues in dispute

(being a dispute relating to rights conferred by or obligations imposed under an SMP condition – namely, BT's obligation to provide Ethernet services on fair and reasonable terms and conditions – between different communications providers, and not being an "excluded dispute" as defined in section 185(7) because the SMP condition is not an SMP apparatus condition).

¹¹ Ofcom, *Dispute Resolution Guidelines* (7 June 2011) para 4.13.

25. The dispute relates to the provision to Vodafone of Ethernet services by BT pursuant to the CSA during the Relevant Period, for which BT purported to apply “deemed consent” to extend the CDD in circumstances not contemplated by the CSA, and in relation to which BT has failed to pay Vodafone the full SLGs owed for the Relevant Period.

26. As described more fully below, the dispute relates to:

- a. specific uses of “deemed consent” in March 2013 and September 2013, being two of the three months in which Vodafone has undertaken a manual assessment of the relevant orders and has challenged BT’s use of “deemed consent”. As a result of commercial negotiations, the parties have already agreed a number of orders for which “deemed consent” was inappropriately applied. However, many of the orders remain in dispute. A full list of the relevant orders still in dispute for these months is set out in Annex B (the **Specific Orders Dispute**);
- b. specific uses of “deemed consent” in September 2012, also set out in Annex B, being the remaining month in which Vodafone has undertaken a manual assessment of the orders and has challenged BT’s use of “deemed consent”. BT has advised Vodafone that it does not have records for September 2012 available. It has therefore refused to engage with Vodafone in relation to disputed uses of “deemed consent” in this month. Vodafone’s position is that, given BT’s demonstrated failure to administer the SLG regime consistent with its obligations to ensure that CPs do not have to proactively make claims, and given the perverse incentives that would arise if BT were permitted to benefit from not having its own records available, Vodafone’s claims should be upheld for September 2012 (the **September 2012 Dispute**); and
- c. the determination of an appropriate SLG payment for the remainder of the Relevant Period, which Vodafone contends should be based on the proportion of erroneous applications of “deemed consent” for those months in the Relevant Period for which Vodafone has not undertaken a manual assessment of the orders (the **Appropriate Proportion Dispute**). Vodafone’s methodology for determining the total SLGs payable under the Appropriate Proportion Dispute is set out in its letter to BT of 26 August 2014 (see Annex A). Vodafone notes that there are a variety of methodologies that might reasonably be used to determine the total SLGs payable, including methodologies that are more generous to Vodafone than its past requests for BT.

27. Vodafone’s position is that each of the Specific Orders Dispute, the September 2012 Dispute and the Appropriate Proportion Dispute may be resolved by reference to BT’s failure to comply with the CSA. However, should Ofcom decide that BT’s use of “deemed consent” for any challenged order was permitted by the CSA, Vodafone alleges that the terms of the CSA cannot (to the extent they authorised BT to deem Vodafone to have consented) be properly characterised as fair and reasonable. Accordingly, BT will have failed to comply with the SMP conditions – by failing to provide the services on reasonable terms and conditions.

The contractual provisions

28. At all relevant times, Schedule 4C(i) of the CSA has set out the SLA regime applicable to EAD services. The relevant provisions of Schedule 4C(i) are as follows.

29. Section 3.1 provides that (subject to certain exceptions):

BT will deliver the Service by midnight on the Contractual Delivery Date or the CP Requirement Date, whichever is the later, with handover notices made available the following Working Day. If BT fails to do this, the Communications Provider shall be entitled to the compensation set out in paragraph 4.1 of this Schedule.

30. Section 4.1 provides that:

If BT fails to meet the commitment set out in paragraph 3.1 of this Schedule, then the Communications Provider shall be entitled to 100% of the relevant individual circuits (or Bulk Transport Link where applicable) monthly rental for every Working Day or part Working Day beyond the CDD or CRD (whichever is later) up to a maximum of 60 Working Days.

31. Section 2.3 provides that:

BT will

(i) provide reasons to justify; and

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

to extend the CDD beyond the

30th Working Day for the ... Ethernet Access Direct Service Order ...

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

For the purposes of this sub-paragraph 2.3 BT may deem consent where:

(i) one of the circumstances detailed in paragraph 7 of this Schedule 4C occurs, or

(ii) there is a need for infrastructure build including, for example, situations where duct, manholes, fibre spine cable, copper cable or backhaul and core network cable are required; or

(iii) there is a cable or exchange breakdown; or

(iv) there is a collapsed, blocked (e.g. cement), or damaged duct/manhole; or

(v) notice is required under the Traffic Management Act or Traffic Scotland Act; or

(vi) there is a manhole or footway box that is contaminated with, or by, a substance which requires special treatment, e.g. petrol

(vii) asbestos has been identified; or

(viii) security clearance is required but not yet agreed; or

(ix) *main frame compression or extension is required.*

32. Section 7 provides that:

The service levels, service guarantees and any compensation payments will not apply if:

(a) *the failure by BT is due to the Communications Provider's own network or equipment or any other network or equipment outside the BT Network; or*

(b) *the Communications Provider is in breach of any part of this Contract which relates to the provision of the Service to the relevant Site or in respect of the relevant Service BT suspends the Service or any part of it in accordance with this Contract; or*

(c) *through no fault of its own or because of circumstances beyond its reasonable control, BT is unable to carry out any necessary work at, or gain access to the Site or the Communications Provider fails to agree an appointment date or work is aborted due to the Communications Provider; or*

(d) *the Communications Provider and BT agree a different timescale in writing (which shall include e-mail) for performance of the relevant Service; or*

(e) *reasonable assistance is required or information is reasonably requested by BT within a reasonable timescale from the Communications Provider or the End User or a third party and such assistance or information is not provided; or*

(f) *through no fault of its own, BT is unable to obtain any necessary permissions or consents required in connection with the performance of a particular service level; or*

(g) *the failure is due to a Force Majeure event; or*

(h) *the failure is due to a planned outage on the Legacy Platform or Emergency Service interruption; or*

(i) *the failure is due to an inaccurate Order being submitted by the Communications Provider and the Communications Provider has been informed by the end of the next Working Day ; or*

(j) *if the fault is not reported in accordance with the fault reporting provisions of Schedule 2 (paragraph 4) and the Communications Provider has been informed by the end of the next Working Day; or*

(k) *if the fault is due to a failure in the public internet.*

The SMP conditions and the SLG Direction

33. At all times during the Relevant Period, BT has been subject to SMP conditions requiring it to:

- a. provide network access to a third party where reasonably requested in writing;
- b. provide such network access as soon as reasonably practicable after receiving the request; and
- c. provide such network access on fair and reasonable terms, conditions and charges.

34. The SLG Direction provides that BT must modify the SLAs that apply to the supply of Ethernet services,¹² including to ensure that:

- a. BT must provide reasons to justify a CDD beyond the 57th day, and any such extension shall be made subject to the CP's consent (not to be unreasonably withheld);
- b. BT "shall monitor its performance against the service guarantees for fault repair [and provision] and compensate Communications Providers proactively should it fail to satisfy the service guarantees";¹³
- c. "Compensation payments shall be made as soon as possible after the event and not later than the billing cycle following the billing cycle after the event unless not practicable"; and
- d. "compensation shall be payable without the need for a Communications Provider to make a claim".

35. The last two of these provisions of the SLG Direction are reflected in paragraph 6.1 of Schedule 4C(i) of the CSA, which provides that:

"Any compensation payable will normally be made by deduction from the Communication Provider's next invoice unless not practicable. For the avoidance of doubt compensation shall be payable without the need for the Communication Provider to make a claim."

The disputes

36. The disputes relate to various aspects of compliance with the CSA and the SMP conditions. Vodafone asserts that in each case, BT has failed to pay the full SLGs to which it is entitled as required by section 4.1 of Schedule 4C(i). Vodafone is entitled to such SLGs on the basis that the relevant service was in each case delivered after the 30th working day for the order and BT:

- a. failed to provide reasons to justify the change;
- b. failed to obtain Vodafone's prior written consent to extend the CDD and was not entitled to deem Vodafone to have consented; and/or
- c. did not notify Vodafone of the application of deemed consent as soon as reasonably practicable. Indeed, in many cases BT appears to apply "deemed consent" retrospectively, which is not contemplated by the CSA. Indeed, in some cases, "deemed consent" has only been applied many weeks after the cause applied or, indeed, after the point of handover.

37. In each case, BT has not alleged that section 7 of Schedule 4C(i) of the CSA applied.

¹² The specific SLG Directions made in 2008 apply expressly to BES, WES and WEES Ethernet services. The SLG Direction made on 28 March 2013 applies to Ethernet Services generally.

¹³ Although the obligation to make proactive payments expressly relates only to repairs, Ofcom has stated that "The paragraph summarising the Ethernet proposals in the December consultation did not explicitly mention proactive payments for provisions, but this was implicit in the text. Late compensation payments for Ethernet provisions are currently made proactively by Openreach." Accordingly, Ofcom's policy is clearly to require proactive payments in relation to provisioning SLAs (which explains why the SLG Direction does not refer to it: namely, Ofcom expressly stated that the existing contractual obligations requiring proactive payments were "adequate" and that, therefore, it was not necessary for the Direction to mandate a contractual change).

38. Vodafone considers that BT's application of "deemed consent" and failure to pay SLGs in each case is a breach of the CSA or, in the alternative, of the SMP conditions. This is because to the extent Ofcom may determine that the CDD changes in dispute were permitted by the CSA, the terms on which BT provided the services were not fair and reasonable.

39. The Specific Orders Dispute and the September 2012 Dispute relate to orders in September 2012, March 2013 and September 2013, being sampled months for which Vodafone has (at considerable expense) conducted a manual review of the application of "deemed consent" to each individual order. The Appropriate Proportion Dispute relates to the appropriate level of SLG payments to be applied for the remaining months in the Relevant Period. In this respect, Vodafone notes that:

- a. the September 2012, March 2013 and September 2013 reviews show a systematic pattern of conduct by BT over the Relevant Period. BT has already agreed to pay SLG payments in relation to 37.03% of the orders initially disputed by Vodafone for March 2013 and 51.79% of the orders initially disputed by Vodafone for September 2013. The percentage of total orders with "deemed consent" applied, for which BT has agreed to pay SLG payments or which are still in dispute totals 18.12% for March 2013 and 22.51% for September 2013;
- b. following the Relevant Period, from 1 February 2014 to 31 March 2015, the proportion of Vodafone's challenges to BT's initial decisions to apply "deemed consent" over this period average 42.6%, indicating that the proportion of successful challenges remains extremely high;
- c. the SLG Direction requires compensation to be paid proactively by BT without CPs being required to make a claim. Ofcom's stated policy is that it is inappropriate for CPs to incur the costs of investigating and making claims;
- d. it is not clear the extent to which BT has retained documentation for much of the Relevant Period; and
- e. accordingly, Vodafone considers that it is appropriate and proportionate to conclude that the proportion of orders subject to inappropriate application of "deemed consent" is likely to be similar throughout the Relevant Period.

40. As a result of the identified breaches and the systematic pattern of behaviour by BT which they evidence, Vodafone considers that it is owed a significant amount of SLGs for the Relevant Period, which should be determined by smearing the proportion of invalid "deemed consent" applications from the Specific Orders Dispute and the September 2012 Dispute across the Relevant Period.

The commercial context of the dispute

41. The context of the dispute is Vodafone's concern that BT has been misapplying the concept of deemed consent in order to avoid payment of SLGs from at least September 2012 onwards.

42. BT has been subject to SLAs of 30 working days to provision EAD services since 2008. As Ofcom has recognised, BT's Openreach division suffered a significant deterioration in provisioning

timeframes from 2011 onwards.¹⁴ In relation to this deterioration, Vodafone began to be concerned at the disproportionate increased use of “deemed consent” to extend CDDs and similar inappropriate practices. Vodafone began to have concerns that BT was relying on “deemed consent” in circumstances not permitted or contemplated by the CSA, in order to limit or eliminate SLG payments for orders that were not provisioned in accordance with the contractual timeframes.

43. As a result, from 2014, Vodafone began logging the use of “deemed consent” by BT and raising challenges where it considered that “deemed consent” had been incorrectly applied on a proactive basis. The level of successful challenges created a high level of concern and, accordingly, 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. Three months were chosen – September 2012, March 2013 and September 2013 (as a representative and relatively even spread of months over the Relevant Period) – to determine whether there were systematic issues with BT’s application of “deemed consent”.¹⁵ This dispute relates to:

- a. Vodafone’s analysis of whether the application of deemed consent to specific orders in the sampled months of March 2013 and September 2013 was appropriate;
- b. the appropriate resolution of Vodafone’s disputes regarding use of “deemed consent” in September 2012, for which BT claims it no longer holds records; and
- c. the appropriate proportion of successful challenges for the sampled months to be applied across the Relevant Period.

44. In Vodafone’s view, this dispute reflects the broader context in which BT has comprehensively failed to deliver satisfactory provisioning times and to provide CPs with an appropriate level of certainty regarding those provisioning times. In its recent *Business Connectivity Market Review* consultation document, Ofcom has acknowledged that:

*a core concern of most respondents was that contractual delivery dates (CDDs) have been subject to a great deal of uncertainty due to the application of “deemed consent” by Openreach.*¹⁶

45. Ofcom went on to conclude that:

*Between 2011 and 2014, 71% of all provide and regrade orders for Ethernet products completed by Openreach, were subject to at least one deemed consent change to their CDD,*¹⁷

and that, over 2011 to 2014, there was:

¹⁴ 2015 BCMR Consultation Document paras 13.64 and 13.67.

¹⁵ These particular months were chosen as (i) most likely to be representative of the whole Relevant Period (for example, excluding months over the holiday period and February as a disproportionately short month); and (ii) providing a reasonably even sample across the Relevant Period.

¹⁶ 2015 BCMR Consultation Document para 13.21.

¹⁷ 2015 BCMR Consultation Document para 13.45.

*a clear deterioration in the frequency with which customers face changes to the delivery dates of their orders and the length of time they have to wait for the orders to be completed.*¹⁸

46. As Ofcom has acknowledged, the inappropriate use of “deemed consent” to extend CDDs and subject CPs including Vodafone to high levels of uncertainty about the delivery of services has many impacts. In relation to Vodafone, these impacts include:

- a. direct costs in managing customers and dealing with BT. For example, Vodafone estimates that BT’s performance has resulted in a 15% increase in its service desk workload (the equivalent of 10 full time equivalent staff with a mean annual salary of around £26k) and the process of chasing up BT for updates on behalf of retail customers comprised 60% of this additional workload. In addition, Vodafone staff have faced a growing volume of expedite requests, particularly since mid-2014, which are requests from end customers or their account teams when a CDD provided by Openreach is considered to represent an unacceptable delay. These requests contribute significantly to the workload of Vodafone staff;
- b. costs of paying compensation payments to Vodafone’s retail customers for non-delivery; and
- c. other costs in the form of reputational damage from the failure to provide the retail services that are reliant on EAD services in an acceptable timeframe and with acceptable certainty, which harms Vodafone’s future business opportunities.

47. The widespread dissatisfaction with BT’s performance and Ofcom’s own analysis of these issues in the business connectivity market review has led Ofcom to propose new SLAs on BT going forward, including SLAs which require BT to complete a minimum percentage of orders by the initial CDD. While, in general, such new SLAs would be welcome:

- a. they offer no resolution to the historical use of “deemed consent” by BT and its failure to make appropriate SLG payments; and
- b. they only constrain the frequency with which BT uses “deemed consent”, not the appropriateness of any use of “deemed consent”. The new SLA does not provide any additional oversight over BT’s use of “deemed consent” and so Ofcom’s resolution of this dispute remains critical to provide oversight of BT’s use of the mechanism.

48. Similarly, BT has introduced a “differentiated order journey” (“**DOJ**”) trial in an effort to improve its performance. However, it is clear that this process will not and cannot serve as an appropriate alternative means to resolve this dispute:

- a. it offers no resolution to the historical use of “deemed consent” by BT and its failure to make appropriate SLG payments;
- b. there is no certainty that the trial will be extended beyond its current limited scope or that any such extension will take place within any useful timeframes;

¹⁸ 2015 BCMR Consultation Document para 13.64.

- c. the trial appears unlikely to address and rectify the systemic misuse of “deemed consent”, given that the trial remains subject to the “deemed consent” provisions in the CSA. Indeed, BT has committed to not applying “deemed consent” only for BT-caused delay and only in 80% of cases. In any event, the lead times for the DOJ initiative have already factored into the mean time to provide the impact of BT and customer caused delays. By continuing to apply “deemed consent” within DOJ at all, Openreach is effectively “double dipping”;
 - d. the trial provides CPs with no additional oversight, transparency or ability to challenge the application of “deemed consent”; and
 - e. in any event, Vodafone understands that BT’s current intention is that the OoJ initiative will not be fully implemented until the end of next year when Openreach’s new EMP platform launches.
49. This dispute also comes amidst serious concerns from all parts of the industry about Ethernet provisioning. Annex C sets out in more detail specific past and current areas of concern, including Ofcom’s recent acknowledgement of the extent of the problem in Ethernet delivery; the issues identified by BT’s Equality of Access Board in this context; and the CMA’s observations about the risk of reduced quality of service for Ethernet services if BT’s proposed acquisition of EE proceeds.

Section C: History of commercial negotiations and calculation of SLG payments in dispute

Vodafone’s efforts to resolve the dispute

50. Vodafone has undertaken a number of efforts to agree with BT an appropriate way to resolve the dispute and address these issues going forward. Vodafone has:
- a. held weekly meetings with BT from 2014 in an attempt to hold BT to account in its use of “deemed consent”. These discussions have not resolved the outstanding disagreements which are the subject of this dispute and, indeed, have clarified where BT has taken positions that are clearly inconsistent with its obligations under the CSA. In its letter of 19 June 2015, BT continue to assert that it is unnecessary to record the dispute process applicable to the notification of “deemed consent”;
 - b. throughout 2014, engaged with BT to negotiate changes as part of the 2014 CSA Contract Review to help address the issue. Specifically, Vodafone requested that the dispute process applicable to a notification of “deemed consent” be recorded within the CSA in order to provide certainty about the process. The request was rejected on the basis that BT did not see the need for a contractual appeal process and was “working on” the dispute process in its separate Deemed Consent Guide;
 - c. engaged extensively with BT in additional meetings on 18 December 2014 and 28 January 2015 to discuss the application of “deemed consent”;
 - d. in February 2015, provided comments on BT’s Deemed Consent Guide, being the document Vodafone understands is used internally and across industry to guide the use of “deemed consent” and the process for challenging its application. Vodafone’s intention

was to ensure that the guide could be used internally and across industry to create more certainty and reduce instances of the misuse of the mechanism. Such comments have not been taken into account. In its letter of 19 June 2015, BT acknowledged that it had failed to respond to this feedback and referred the issue to be dealt with as part of the DOJ process; and

- e. engaged in correspondence with BT from August 2014 onwards specifically to resolve the present dispute, the key documents of which are summarised in paragraphs 51–61 below.

History of correspondence

51. The full history of key correspondence between the parties is set out in Annex A. The following sets out a concise summary of this correspondence and how it has informed the scope of this dispute. It is noted that the full history of correspondence does not directly correspond to the specific orders forming part of this dispute, for example because:

- a. the correspondence does not in all cases separate out the September 2012, March 2013 and September 2013 months, the specific orders for which are in dispute here;
- b. certain orders being disputed have been identified as duplicates or redundant orders; and
- c. BT has conceded its liability for SLG payments in relation to various orders, and Vodafone has chosen to narrow the scope of its dispute for the purpose of obtaining clear directions from Ofcom about the appropriate standards to which BT must adhere.

52. On 26 August 2014, Vodafone set out its claim for SLG payments avoided by BT for the Relevant Period. It did so on the basis of two types of misuse of “deemed consent” that Vodafone’s analysis identified:

- a. movement of the CDD for “deemed consent” without notification to Vodafone in the manner required by the CSA during the Relevant Period; and
- b. misuse of “deemed consent” codes for the period from 1 February 2014 to 1 July 2014.

53. On 2 October 2014, Vodafone wrote to BT setting out a list of its concerns regarding the setting of CDDs (not all of which are directly relevant to this dispute), including that BT was:

- a. failing to assess “deemed consent” challenges properly;
- b. failing to honour the outcome of successful challenges when determining whether to pay SLG claims;
- c. not notifying “deemed consent” promptly (including applying it retrospectively) or at all;
- d. delaying delivery of handover documents until the CP consented to a CDD extension;
- e. setting CDDs based on an automated process reliant on generic assumptions rather than BT’s actual ability to deliver, and therefore leading to CDDs that are inappropriate;
- f. setting CDDs that are well in excess of standard order timescales without justification;
- g. indiscriminately using the “DC22 infrastructure” “deemed consent” code without justification;

- h. applying inappropriate excess construction charges; and
- i. failing to allow Vodafone to challenge “deemed consent” because the five day window for doing so has passed, in circumstances where Vodafone was not advised that “deemed consent” had been applied.

54. On 3 October 2014, BT wrote to Vodafone. It stated that:

- a. In relation to September 2012, *“In our analysis of the CDD movements, due to data no longer being available in the Openreach systems we have been unable to check the records in respect of the Vodafone analysis”*; and
- b. in relation to March 2013 and September 2013, there were 110 items with sufficient data to make an assessment: 86 were appropriate applications of “deemed consent”, and 24 were not appropriate applications because BT did not have a record of the “deemed consent” being communicated to Vodafone.

55. On 28 October 2014, BT offered to pay SLG payments of £[CONFIDENTIAL] in relation to the inappropriate application of “deemed consent” accepted by BT.

56. On 7 November 2014, Vodafone wrote to BT setting out its view of BT’s assessment and identifying orders in which Vodafone was unable to accept BT’s findings. Vodafone’s view was set out as follows:

| Summary¹⁹ | Total |
|---|--------------|
| Orders where Vodafone disagrees with Openreach | 64 |
| Orders where Openreach now agrees with Vodafone | 24 |
| Orders where Vodafone now agrees with the Openreach assessment based upon the information presented | 23 |
| Total | 111 |

57. On 5 December 2014, BT wrote to Vodafone setting out various responses to the general concerns Vodafone had raised in its letter of 2 October 2014.

58. On 1 April 2015, BT provided its further review of Vodafone’s assessment, in which it accepted Vodafone’s analysis (in whole or in part) for a further 16 orders:

| Summary of BT's views | Total |
|--|--------------|
| Managed appropriately | 32 |
| Managed to contractual obligations but not best practice | 15 |
| Inappropriate date management | 16 |
| Total | 63 |

¹⁹ This excludes September 2012 due to the data no longer being available on Openreach systems.

59. On 5 June 2015, Vodafone wrote to BT advising of its disappointment with BT's letter of 1 April 2015 and its failure to admit (or pay SLGs on the basis of) any systemic problems, and finally requesting that BT pay the disputed SLG payments in full by 20 July 2015 for the Relevant Period. It concluded the following summary:

| Summary of BT findings (excluding September 2012) | Total |
|--|-------|
| BT views as being managed appropriately (albeit in 15 cases, not to best practice) | 47 |
| BT now agrees with Vodafone that "deemed consent" was not correctly applied | 40 |
| Vodafone now agrees with BT based on further information presented | 23 |
| Total | 110 |

60. On 19 June 2015, BT responded to Vodafone's letter of 5 June 2015, reiterating that it thought its approach was reasonable and it rejected Vodafone's proposal to determine SLG liability over the Relevant Period by reference to a sample of three months.

61. Accordingly, there remain many specific orders disputed by Vodafone in relation to March and September 2013 at issue in this dispute.

The Specific Orders Dispute

62. The specific orders in dispute fall into the categories set out in the following table, in which Vodafone also sets out its views as to why the application of "deemed consent" was not permitted pursuant to the CSA. Annex B classifies each of the specific orders in dispute by reference to these categories:

| Issue and parties' positions | March 2013 Total | September 2013 Total |
|---|------------------|----------------------|
| <p><u>Insufficient reasons given</u></p> <p><u>No reasons at all:</u> In some cases, BT has failed to provide Vodafone with any proper notification that deemed consent was being applied (see further below). In those cases, Vodafone notes that there is a clear breach of the CSA, which requires that BT must provide reasons to extend the CDD beyond the 30th day.</p> <p><u>No reason given except DC code or category 2:</u> In relation to providing only a DC code, BT considers this to be CSA compliant but concedes it is "not best practice". In its letter of 19 June 2015, BT stated that the use of a valid DC code comprised sufficient communication because "the reason for justifying the Deemed Consent would be inherent within the Deemed Consent code". BT's defence to other disputed orders is that Vodafone had been advised that the order was category 2 (and therefore infrastructure build was required). Vodafone considers these orders to be non-compliant. In most cases the code applied was DC22, for which the only explanation is that "there is a need for infrastructure build". The use of such a generic code or category does not comply with the requirement of section 2.3 of the CSA that BT "provide reasons to justify"</p> | 11 | 10 |

| Issue and parties' positions | March 2013 Total | September 2013 Total |
|---|------------------|----------------------|
| <p>the CDD extension for two reasons.</p> <p>First, BT is required to provide reasons that <u>justify the extension</u>. The mere fact that infrastructure build is required does not necessarily mean that a CDD extension is required. BT appears to have confused the two independent requirements to <u>justify the extension</u> and to apply “deemed consent” <u>only in the circumstances listed</u> (which include where infrastructure build is required). A mere reference to the fact that a circumstance allowing “deemed consent” has arisen does not automatically imply that the extension is justified. At the very least, BT would need to provide information about why the infrastructure build cannot take place within the existing CDD.</p> <p>Secondly, the requirement to provide reasons must be read in the context of section 2.3 as a whole, which provides that the ordinary course is for BT to seek the CP’s prior written consent to an extension, not to be unreasonably withheld or delayed. The degree of detail required by section 2.3 must therefore be sufficient for the CP to determine whether or not it is reasonable for BT to require a CDD extension. Such a request could not be reasonable if BT has only provided a code indicating that infrastructure build is required, without any evidence of:</p> <ul style="list-style-type: none"> • the type of infrastructure required; • the steps BT is required to take to build the infrastructure; • the estimated time period for the infrastructure build and evidence that this time period is consistent with BT’s obligations under the SMP conditions to provision the service as soon as reasonably practicable. <p>There is no basis to conclude that the degree of detail required is any less where “deemed consent” is to be applied, than where prior written consent is being sought. If anything, the requirement to provide reasons to justify the CDD extension should be interpreted <u>more</u> strictly where consent is not being sought, given that the CP may not have the right to seek further information or scrutinise the reasons in detail before consent is deemed.</p> <p><u>Other insufficient reasons:</u> In other cases, BT has provided information but it is clearly far below the standard required to comply with the CSA, as set out above. For example:</p> <ul style="list-style-type: none"> • in relation to September 2012, in three cases BT only cited a “cable date” as the reason for applying “deemed consent” (and in one of those cases, did not even provide a date²⁰); and • in relation to March 2013, BT referred only to “delays with contacting the customer and access delays” and “the ECD of external are set at 28.02.13 CAT2 plus 10 days = CDD 14.03.13” as reasons.²¹ <p>Other such examples are set out in Annex B and the correspondence</p> | | |

²⁰ Circuits ONEA710953, ONEA310972 and ONEA811086.

²¹ Circuits ONEA113213 and ONEA512898 respectively.

| Issue and parties' positions | March 2013 Total | September 2013 Total |
|--|------------------|----------------------|
| referred to in Annex A. It is clear that reasons of this type and level of detail fall well short of the standards required by the CSA. | | |
| <p><u>Reasons not valid / CDD not set as soon as reasonably practicable</u></p> <p>In other cases, the reasons provided by BT simply do not stand up to scrutiny: they either are not a circumstance which is listed in Schedule 4C to the CSA for deeming consent, or does not amount to setting the new CDD as soon as reasonably practicable. Examples include:</p> <ul style="list-style-type: none"> • application of “deemed consent” because BT now purports that there was an internal error in setting the original CDD.²² However, internal “errors” are not a legitimate circumstance in which “deemed consent” may be applied; • setting a new CDD that incorporates into the delivery timeframe <u>past</u> delays which were caused solely by BT, and which were not of themselves circumstances permitting the application of “deemed consent”.²³ If, when BT applies “deemed consent” for a permitted reason, it is permitted to take into account all pre-existing delays caused by BT that were not legitimate reasons for applying “deemed consent”, then it is clear that the purpose of the regime (and the strict circumstances outlined in Schedule 4C) will be entirely undermined and BT will have no incentive to manage any aspect of the provisioning process efficiently in relation to orders that it knows it will have the opportunity to deem consent for; and • reasons that are not coherent, such as claiming “deemed consent” a second time for a reason that had already been resolved, without any further explanation.²⁴ | 3 | 6 |
| <p><u>No proactive written communication that “deemed consent” applied</u></p> <p>In some cases, no communication of the application of “deemed consent” was provided at all – in such cases, it is clear that BT has failed to comply with the CSA. However, in some instances, BT has claimed that its records show that communication of delay and/or deemed consent was provided by telephone. Vodafone does not have a record of such communication and believes that in the vast majority of cases no such call was made.</p> <p>However, it is unnecessary for Ofcom to resolve whether there was such telephone communication as a matter of fact. This is because the CSA does not permit communication to be made by telephone. Specifically:</p> <ul style="list-style-type: none"> • section 2.3 of Schedule 4C(i) provides that where BT intends to deem consent, it must “notify the Communications Provider as soon as reasonably practicable”; • section 20 of the head terms of the CSA provide that “All notices given under this Contract must be in writing and may be delivered by | 3 | 6 |

²² Circuit ONEA412618.

²³ Circuit ONEA412644.

²⁴ Eg, circuit ONEA315400, where deemed consent was claimed for the presence of a skip, but VF and BT had already agreed that the skip had been removed.

| Issue and parties' positions | March 2013 Total | September 2013 Total |
|--|------------------|----------------------|
| <p>hand, fax, e-mail or first class post"; and</p> <ul style="list-style-type: none"> • Vodafone has never consented to receiving notification from BT that it intends to deem consent via telephone. <p>As such, it was and is Vodafone's expectation that verbal communication of delay and/or "deemed consent" would be followed up in writing by BT however this has not happened.</p> <p>In other circumstances, BT's alleged "notification" is in fact a silent IT-based update that provides no proactive notification that a change has been made, and can only be identified by Vodafone by manually checking each in-flight order on the system. It is equally clear that such a "silent update" cannot comply with the requirements of the CSA.</p> <p>Given the significant consequences of changes to the CDD for Vodafone's business and its ability to serve its customers, and in particular Vodafone's concerns regarding BT's misuse of "deemed consent", Vodafone requires BT to comply with the requirement that such notifications be provided in writing and to be actively <u>notified</u> to Vodafone, in accordance with the CSA. In the initial stages where "deemed consent" was a rare occurrence, Vodafone can appreciate the value of telephone calls (in addition to written notifications to alert CPs of changes to the CDD. However, it is not acceptable to rely on "silent updates" or telephone calls in circumstances where the vast majority of Ethernet orders processed by Openreach are subject to at least one "deemed consent" change. In particular, BT is well aware of Vodafone's program of scrutinising the application of "deemed consent", which requires a detailed assessment of the reasons provided by BT and whether they justify the application of "deemed consent". In these circumstances, it is particularly concerning that BT seeks to rely on alleged telephone conversations or "silent updates" to provide information on "deemed consent" and purports that they comply with the CSA.</p> <p>In almost all cases, where no proper written communication of the application of "deemed consent" was received, it follows that BT also failed to comply with its obligations to provide reasons for the application of "deemed consent".</p> | | |
| <p><u>Retrospective application of "deemed consent"</u></p> <p>In its letter of 5 December 2014, BT states that <i>"We do not agree with Vodafone that under the terms of Connectivity Services Agreement application of Deemed Consent cannot in all cases be applied retrospectively, either during the order journey or after circuit completion"</i>. It explained this on the basis that there are circumstances where the application (or full impact) of the "deemed consent" justification is only apparent afterwards.</p> <p>Allowing the retrospective application of "deemed consent" essentially permits BT to move the CDD at any stage of the provisioning process. This has two highly detrimental impacts on CPs. First, those CPs lose any ability to provide certainty to their customers about likely provisioning timeframes because BT may wait until the initial CDD has passed (indeed,</p> | 2 | 3 |

| Issue and parties' positions | March 2013 Total | September 2013 Total |
|---|------------------|----------------------|
| <p>until handover) to apply "deemed consent". This has hugely detrimental consequences for all CPs that rely on its Ethernet products.</p> <p>Second, any ability to change the CDD at any point is likely to pose an irresistible temptation to avoid or minimise SLG payments. Indeed, Vodafone has observed exactly this type of behaviour, with BT retrospectively identifying periods that "could have been" subject to "deemed consent" at the very end of the provisioning process when its liability for SLG payments is about to crystallise. This contributes substantially to the unpredictability of eventual provisioning dates, an issue which Ofcom has identified as being the most important for CPs. Vodafone's view is that the CSA does not contemplate retrospective application of "deemed consent". In this respect:</p> <ul style="list-style-type: none"> • first and most obviously, there is nothing in the CSA that contemplates or permits retrospective application of "deemed consent". An ordinary reading of section 2.3 is that BT is permitted a CDD extension where it becomes aware of issues in the provisioning process. There would need to be express words in the contract to permit retrospective application; • secondly, BT is wrong to state that the deemed justification will only be apparent afterwards. Even if the full impact or length of a delay is not immediately known (especially if it is ongoing), it will be apparent to BT at the time that a delay occurs whether or not it is a justification for "deemed consent". To comply with the requirement that BT notify Vodafone "as soon as reasonably practicable", it must advise Vodafone immediately – it is not permitted to fail to claim "deemed consent" at the first opportunity on the basis that it can reverse back on that decision later; and • thirdly, "deemed consent" operates as a mechanism to avoid the need to obtain the CP's "<u>prior</u> written consent". There is simply no basis to conclude that the mechanism of "deemed consent" can be any broader than the mechanism it replaces. In either case, consent must be obtained <u>prior</u> to the CDD change. | | |
| <p><u>Delays in processing un-suspension requests</u></p> <p>A number of orders in dispute are those where Vodafone suspended the order and then subsequently lifted the suspension (in both cases, this will typically be at the request of its customer). In these cases, BT extended the CDD by a disproportionate amount when the suspension request was lifted. For example, where an order has been suspended for three days at the request of Vodafone's customer, a greater number of days have been added to the CDD by BT.</p> <p>BT has claimed that "There is no contractual stipulation setting out how quickly un-suspend requests are dealt with".</p> <p>However, while there is no contractual provision expressly setting out how un-suspension requests are to be actioned, in fact BT remains bound at all times to:</p> <ul style="list-style-type: none"> • deliver the service as soon as reasonably practicable (pursuant to its SMP conditions); and | 10 | 0 |

| Issue and parties' positions | March 2013 Total | September 2013 Total |
|---|------------------|----------------------|
| <ul style="list-style-type: none"> when extending the CDD, ensuring any subsequent CDD is as soon as reasonably practicable and that reasons are provided to justify the CDD extension. <p>Accordingly, contrary to BT's assertions, it clearly does have an obligation to process un-suspend orders as promptly as possible and to provide clear reasons for any CDD extension. Vodafone accepts that a CDD extension for the period of any suspension is reasonable. Vodafone does not accept that additional extensions of time are acceptable in the absence of justified reasons for those extensions. In relation to the standard of reasons and level of detail required, see our comments in relation to the first row of this table above. BT has clearly failed to meet this standard for each relevant order by relying on a blanket claim that there was an un-suspension order.</p> | | |

63. To the extent Ofcom considers that (despite Vodafone's views) any of these circumstances permit the use of "deemed consent", then Vodafone alleges that (for the reasons set out above, including the policy consequences) the terms on which BT supplies the services are not "fair and reasonable" and therefore fail to comply with the SMP condition.

64. As set out in Annex B, these disputes relate to 29 circuits in March 2013 for the amount of £[CONFIDENTIAL] plus interest and 25 circuits in September 2013 for the amount of £[CONFIDENTIAL] plus interest.

The September 2012 Dispute

65. On 3 October 2014, BT advised Vodafone that it no longer held any data relating to Vodafone's disputed orders for September 2012. It stated that:

In our analysis of the CDD movements, due to data no longer being available in the Openreach systems we have been unable to check the records in respect of the Vodafone analysis.

66. It is unclear why data is no longer available for September 2012. It is inexplicable that data which is less than 36 months old would not be retained, especially given the prospect of future disputes or litigation. BT has provided no explanation as to why the data is no longer available.

67. In these circumstances, it would clearly be inappropriate for BT to take advantage of its own failure to retain evidence. This would create perverse incentives on BT to ensure that additional data which does not support its position is destroyed or made "no longer available", which cannot be an acceptable position.

68. Nor would it be appropriate to simply treat the month as part of the Appropriate Proportion Dispute. This would similarly fail to address BT's incentives – in circumstances where CPs like Vodafone had performed manual analyses of particular months, BT would be incentivised to ensure the data is not available for those months where such data is less favourable to BT, thereby lowering the average of the sampled manual analyses.

69. Further, the operation of the “deemed consent” principle is such that BT unilaterally determines when it may be applied and plays the role of judge and jury in determining disputes, in circumstances where there is a significant information asymmetry between BT and the CPs subject to “deemed consent”. Accordingly, there is no basis on which BT should be entitled to the benefit of the doubt in relation to any aspect of how it has applied “deemed consent”. It is BT that chooses when to apply “deemed consent”, and therefore BT must be in a position to provide evidence that the application of “deemed consent” is justified in any case where it is reasonably challenged.

70. This is the only approach consistent with the legal principle of *contra preferentem*, which provides that:

*in case of doubt, wording in a contract is to be construed against a party who seeks to rely on it in order to diminish or exclude his “basic obligation, or any common law duty which arises apart from contract”.*²⁵

71. It is also consistent with Ofcom’s own policy priorities. In making the SLG Direction, Ofcom considered whether to require BT to require external auditors to review its records. Ofcom considered this was inappropriate for the very reason that a failure to accurately do so would breach BT’s obligations:

*The Directions are clear in that they require Openreach to pay compensation proactively to CPs in the event that service fails and is not repaired in line with the SLG requirements or is not provided on the date specified. Therefore, Openreach is under an obligation to do this accurately and **any failure to do so would breach the requirements of the Directions** (Emphasis added).*²⁶

72. Vodafone notes that in relation to all orders it has disputed in September 2012, it has provided cogent prima face evidence that BT’s application of deemed consent has been inappropriate. Given the failure of BT to adduce any evidence to dispute Vodafone’s claims, the only appropriate approach is for Ofcom to conclude that Vodafone’s disputes in relation to these specific orders should be upheld.

73. As set out in Annex B, these disputes relate to 34 circuits, and are for the amount of £[CONFIDENTIAL] plus interest.

The Appropriate Proportion Dispute

74. The third part of Vodafone’s claim relates to the Relevant Period. Vodafone’s position is that the proportion of invalid “deemed consent” applications should be smeared across the whole Relevant Period, rather than require Vodafone to undertake individual analyses of orders in each month of the Relevant Period at considerable expense.

²⁵ *Youll v Bland Welch & Co Ltd* [1992] 2 Lloyd’s Rep 127 at 134.

²⁶ Ofcom 20 March 2008, *Service Level Guarantees: Incentivising performance – Statement and Directions* para 3.54.

75. On 3 October 2014, BT wrote to Vodafone stating that it did not “consider that it is reasonable, or sound, to take an assumed level of error and simply spread this over a larger time period”. On 19 June 2015, BT reiterated its view that it did not agree that a sample “should be taken as being representative of the entire population of circuits”.

76. This ignores:

- a. The significant proportion of instances from Vodafone’s review that BT has upheld as inappropriate uses of “deemed consent”. Of the orders Vodafone has disputed for the sampled months, BT agreed to pay the disputed SLG payments in full in relation to 37.03% of disputes in March 2013 and 51.79% of disputes in September 2013. Even taking BT’s own accepted figure, there is clearly a systematic issue with BT’s application of “deemed consent”.
- b. The inappropriately high cost to Vodafone of undertaking a detailed order-by-order analysis for each and every month in the Relevant Period. As noted above, Vodafone has undertaken this assessment in relation to three months, at a cost of approximately £[CONFIDENTIAL] and after expending significant internal resources to log, investigate and/or analyse BT’s use of “deemed consent”. It would be entirely disproportionate for Vodafone to be required to be required to undertake such an expensive and significant process – which would likely take a prolonged period of time, in light of Ofcom’s limited timeframe to resolve the dispute (which is not conducive to bringing extremely complex and numerous factual matrices before Ofcom) and the existence of this dispute resolution framework as an option to provide a value for money solution. Ofcom’s own policy position – set out when it first introduced the direction that BT make payments proactively – is that it is wholly inappropriate that CPs have to bear the cost of claiming compensation:

“Ofcom considers that in principle compensation payments should be made proactively. At present, the SLAs for WLR and LLU services require CPs to make compensation claims which Openreach will then assess to enable it to verify whether compensation is due. In other words, Openreach is assessing each claim and checks whether it has or has not breached its SLAs. Ofcom considers that this is inappropriate. Instead, Ofcom considers that Openreach should monitor its performance against the relevant SLAs and compensate CPs should it breach the terms of those SLAs proactively. CPs should not need to make a claim.

Where the costs of claiming compensation are high, the cost of actually claiming the compensation could be thought of as an additional cost to CPs of Openreach’s failure...”²⁷

- c. The results of Vodafone’s ongoing monitoring and challenge program show that from 1 July 2014 to 31 March 2015, Vodafone’s successful “deemed consent” challenges stand at 42.6% (corresponding to 1,187 of inappropriate CDD changes), providing further support to Vodafone’s view that the delays are systemic.

²⁷ Ofcom, 10 December 2007 consultation document, *Service Level Guarantees: incentivising performance*, paras 3.23 and 3.24.

- d. BT's obligation pursuant to the SLG Direction that it proactively monitor its provisioning performance and make proactive SLG payments were necessary, "as soon as possible after the event" and without any requirement for the CP affected to make a claim itself. Ofcom's policy was to impose this obligation on the basis that the previous arrangements for claiming SLG payments were "onerous and this acted as a disincentive to making any claims" such that the mere liabilities to pay compensation "were not in themselves providing Openreach with a sufficient financial incentive to maintain a consistent level of service performance".²⁸
- e. The remarkable level of consistency in the figures across the three months sampled, and between those three months and Vodafone's subsequent period of active monitoring and challenges to BT's use of "deemed consent". For example, across March 2013 and September 2013, BT agreed to pay SLG payments for an average of 44.41% disputed orders (the remainder of which largely remain in dispute); and in Vodafone's proactive challenge program of 1 July 2014 to 31 March 2015, 42.6% of all challenges were upheld.

77. There is no evidence that the proportion of orders subject to "deemed consent" that were inappropriately applied will vary significantly over the course of the Relevant Period. Within that period, BT did nothing (and has still done nothing) to address the underlying systemic causes of this issue, for example by amending its Deemed Consent Manual to clarify when "deemed consent" may be applied; training its staff appropriately; proactively monitoring the use of "deemed consent" as required; or proactively paying Vodafone and other CPs appropriate SLG payments.

78. In its letter of 19 June 2015, BT rejected Vodafone's proposal to apply the proportion of inappropriate "deemed consents" identified across the Relevant Period, on the basis that:

- a. It "ignores the likelihood of inherent bias in the sample" – however, BT has provided no evidence that there is any inherent bias in the sample. On the contrary, the months for which 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; and
- b. It "assumes that the characteristics of the sample should be assumed to be the same for all other orders without any forensic justification". However, for the reasons set out above, the potential underlying causes of the errors have not been addressed to any extent by BT, either within the Relevant Period or at all. Accordingly, there is no basis on which the sample can be assumed to be unrepresentative – and, in any event, no such assumption should be made. Consistent with BT's obligation to proactively monitor its SLAs and make SLG payments without CPs being required to make claims, it is not for Vodafone to demonstrate that the issues are continuing. BT is therefore wrong to assert, in its letter of 19 June 2015, that it is appropriate and compliant with the CSA for BT "to evaluate each order where Vodafone has provided 'evidence' that needs to be assessed, and where sufficient information is available to make a reasonable assessment".

²⁸2008 BCMR Statement, paras 8.487–8.489.

79. In the absence of any proportionate alternative means to calculate the SLGs payable in relation to the parts of the Relevant Period where Vodafone has not conducted a manual investigation and analysis, and in light of the system nature of the problems identified by Vodafone, the only appropriate solution is to apply the result of Vodafone’s analysis to the full Relevant Period. To do otherwise would ignore both the letter and the spirit of the obligation on BT to proactively assess and pay compensation.

Section D: Ofcom’s statutory and community duties

Statutory duties and Community duties

80. Vodafone considers that the following Communications Act principles and duties are relevant to this dispute and the manner in which Ofcom is to resolve it.

| Duty | Relevance |
|---|--|
| <p>Further the interests of citizens and consumers, where appropriate by promoting competition – section 3(1)</p> <p>Have regard to the interests of consumers in respect of choice, price, quality of service and value for money – section 3(5)</p> <p>Promote the interests of EU citizens – section 4</p> | <p>Payment of SLGs is essential to ensure that BT is held to account with respect to its use of “deemed consent” and therefore faces appropriate incentives to provision services in a timely way and provide CPs with certainty about delivery timeframes.</p> <p>Certainty regarding provisioning timeframes is in the interests of citizens and consumers, since they are essential wholesale inputs to retail services which Vodafone uses to serve both residential and (in particular) business customers. Without such certainty, Vodafone and other CPs are unable to provide clear and reliable timeframes for their consumers about the delivery of those CPs’ retail telecommunications services and suffer unnecessary delays in the delivery of their services. Such an impact is contrary to the interests of consumers – who will, in turn, suffer from poor delivery timeframes and uncertainty regarding those timeframes for their retail services that rely on BT’s wholesale EAD services as inputs. Further, as Ofcom acknowledged in the BCMR, “CPs purchasing material volumes of wholesale Ethernet services from Openreach have incurred costs in the increased activity they have experienced particularly in terms of managing their customers and Openreach” and these costs will inevitably need to be passed on in the form of higher costs faced by consumers.</p> <p>The majority of end users are now aware of the Openreach service crisis and see many of their orders delayed, giving them an appreciation of the situation that their CP finds itself in. They recognise that raising a complaint around an individual circuit is unlikely to make a significant difference, particularly if they have been impacted by the service crisis on a range of orders. This is likely to lead to general disengagement and lack of customer confidence in the market generally.</p> <p>The SLA regime is of particular importance given BT has SMP in the provision of such services. This explains why the SLA regime is underpinned by the SLG Direction and the SMP conditions. Confidence in the SLA regime is necessary to ensure that there is a commercial incentive on BT to maintain acceptable quality of</p> |

| | |
|--|---|
| | service, since CPs such as Vodafone will not have an alternative choice of supplier. |
| Have regard to the desirability of promoting competition and encouraging investment, innovation and the availability and use of high speed data transfer services – section 3(4) | Failure to address BT’s misuse of the “deemed consent” mechanism would have detrimental impacts on competition, investment and therefore the use and availability of services. |
| Promote competition – section 4(3)(a) | In relation to competition, BT’s poor performance distorts competition by providing disincentives to use services that rely on its wholesale Ethernet products as inputs. In relation to investment, the consequences of BT’s performance are likely to include decreased customer satisfaction and confidence in the market – meaning depressed demand for services and limiting the case for CPs to further invest in services that rely on wholesale BT EAD inputs. |
| Encourage provision of network asset to secure efficiency, competition, investment and innovation – section 4(3)(7) and (8) | In relation to availability of services, as noted above, a failure to require BT to pay the SLGs subject to dispute would not properly incentivise BT to improve its provisioning standards and therefore: (i) contribute to a general lack of confidence by consumers in, and therefore investment by CPs in, services that rely on BT’s EAD inputs; and (ii) impose costs on CPs like Vodafone, which need to be passed on in higher retail costs – reducing the availability of services. |

Relationship to broader regulatory issues and policies

- 81.As noted above, BT is required to provide the relevant services pursuant to the SMP conditions and the SLG Direction.
- 82.Ofcom is currently reviewing the business connectivity market, in which the relevant services are supplied, and as part of this review examined the quality of service of BT’s EAD services. Ofcom acknowledged in its most recent BCMR consultation document that there were “growing concerns about the provisioning of new Ethernet lines” and that it had been “monitoring the situation for some time”. As part of the consultation, Ofcom commissioned research which supported the conclusions of stakeholders that there had been a serious service crisis, with delivery timeframes and certainty falling significantly from BT’s performance at mid-2011, and identified that stakeholders valued certainty of delivery date as being of greatest importance.
- 83.Vodafone welcomes Ofcom’s recognition of the long-term concerns expressed across the industry (including within BT) at the service crisis, and the move to introduce stricter SLA targets based on initial CDDs, including a new minimum target for services provisioned by the date of the initial CDD.
- 84.However, for the reasons set out in more detail in paragraph 47 above, Ofcom’s improvements to the SMP conditions are not an appropriate means of resolving the dispute: indeed, the directions sought by Vodafone complement and buttress those SMP conditions.
- 85.Specifically, while Ofcom’s new SMP condition aims to reduce the extent to which BT relies on “deemed consent” overall, it does not impose any additional oversight or constraint to ensure BT is applying the mechanism appropriately. The directions Vodafone seeks in this dispute will

ensure that BT faces appropriate incentives to comply with its obligations to apply “deemed consent” only in appropriate circumstances; to proactively monitor its compliance with the SLAs including where “deemed consent” may have been inappropriately applied; and to make SLG payments without proactive monitoring or applications by CPs.

Regulatory principles and statutory duties pursuant to section 190(2A)

86.To the extent Ofcom considers that the dispute falls within section 185(1) of the Communications Act, it is required to resolve the dispute in a way that seems most appropriate to it for the purpose of securing the following objectives. In each case, we note that the broader and longer-term effect of resolving the dispute in Vodafone’s favour and implementing the remedies Vodafone seeks, will be to make BT aware that CPs will challenge its application of “deemed consent” if applied inappropriately, and therefore to impose tighter discipline to ensure “deemed consent” is applied only where specifically permitted.

| Objective | Relevance |
|--|---|
| Efficiency | As noted above, BT’s poor performance distorts competition by providing disincentives to use services that rely on its wholesale Ethernet products as inputs. In turn, this leads to inefficient outcomes as compared to what would be achieved if BT’s Ethernet services were supplied in a competitive market. |
| Sustainable competition | |
| Efficient investment and innovation | As noted above, the consequences of BT’s performance are likely to include decreased customer satisfaction and confidence in the market – meaning depressed demand for services and limiting the case for CPs to further invest in services that rely on wholesale BT EAD inputs. |
| The greatest possible benefit for end users of public electronic communications services | Ofcom has acknowledged in the most recent BCMR consultation document that “there is a risk that poor quality of service offered by BT in the provision and repair of wholesale services will impact detrimentally on all downstream providers of leased lines, including BT’s retail businesses, and ultimately to the detriment of end-users.” |

Section E: Proposed remedy

87.As a remedy to resolve this dispute, Vodafone requests that Ofcom make:

- a. declaration under section 190(2)(a) that BT has failed to comply with the CSA in relation to its failure to provide all the SLG payments in dispute for the Relevant Period and regarding BT’s rights to deem consent in the circumstances covered by this dispute. Vodafone submits that such a declaration is required in order to provide BT with a clear direction as to the appropriate use of the “deemed consent” mechanism going forward, in order to ensure that BT’s behaviour is addressed and it is unable to subvert the purpose of Ofcom’s SLA regime and the SLG Direction going forward;
- b. to the extent Ofcom determines not to make such a declaration in relation to any disputed order, a declaration under section 190(2)(a) that BT has consequently failed to comply with the SMP condition to provide the relevant services on fair and reasonable terms and

conditions. This would provide an appropriate remedy if Ofcom was unable to find that BT's use of "deemed consent" was inconsistent with the CSA, while still recognising the detrimental and unfair impact that the misuse of "deemed consent" has across the industry and its impact on competition;

- c. a declaration under section 190(2)(a) that BT has consequently failed to comply with the SLG Direction by failing to ensure its contracts require it monitor its performance and require it to pay SLGs promptly without the need for CPs to proactively make a claim. This is critical to addressing BT's incentives going forward. As the experience of BT's use of "deemed consent" has shown, other CPs are unlikely to be willing or able to expend the resources and time required to fully research, investigate and analyse BT's use of "deemed consent", and BT has exploited this unwillingness by increasing the frequency and circumstances in which it will apply "deemed consent" over time, on the assumption that CPs will largely leave such misuse unchallenged. The SLG Direction clearly indicates that it is inappropriate for CPs to incur such costs and expenses and such a declaration is required to restore a situation where CPs receive the full SLG payments to which they are entitled; and
- d. a direction under section 190(2)(d) that (having regard to the declarations above) BT must pay to Vodafone the amount of SLG payments owed plus interest.

88. Vodafone also requests that Ofcom require BT to pay all of the costs and expenses incurred by it in connection with the reference of the dispute to Ofcom, pursuant to section 190(6). Vodafone submits that, if it succeeds in whole or in part, this can be the only appropriate outcome given the requirements of the SLG Direction that CPs are entitled to SLG payments without proactively making a claim. A failure to require BT to pay Vodafone's full costs would essentially leave Vodafone out of pocket, for pursuing SLG payments that should have been proactively paid by BT. This would be clearly inappropriate and contrary to Ofcom's own stated policy positions that:

- a. it is unnecessary for external auditors to review BT's records because it would already be a breach of the SLG Directions for BT not to pay compensation proactively or accurately;²⁹ and
- b. that obligation was imposed on BT by Ofcom because the previous arrangements for claiming SLG payments were "onerous and this acted as a disincentive to making any claims" and this led to BT facing insufficient incentives to perform.³⁰

²⁹ Ofcom 20 March 2008, *Service Level Guarantees: Incentivising performance – Statement and Directions* para 3.54.

³⁰ 2008 BCMR Statement, paras 8.487–8.489.

Declaration of truth

Before making this submission to Ofcom, to the best of my knowledge and belief, Vodafone Ltd has sought to resolve this dispute through commercial negotiation.

All information and evidence provided in referring this dispute to Ofcom is, to the best of my knowledge and belief, true and accurate.

Signed: _____

Position in the company: _____

Date: _____

Annex A: Chronology of core correspondence in the dispute and index of attachments

The following chronology includes a number of letters that relate to broader disputes between Vodafone and BT regarding Ethernet provisioning and the use of “deemed consent”. Letters highlighted in grey below are those directly pertinent to this dispute, and which relate to orders set out in Annex B, which form the scope of this dispute.

| Tab | Date | Correspondence | Summary |
|-----|------------------|---|---|
| A | 26 August 2014 | Letter from Matthew Braovac, Head of Regulation, Vodafone to Alan Lazarus, Director of Regulatory Affairs, Openreach | Explained Vodafone’s general concerns regarding BT’s use of “deemed consent”, including failure to provide reason and the impact on Vodafone. |
| B | 2 October 2014 | Letter from Neil Smith, Head of Commercial Data, Vodafone to Tim Barclay, Managing Director, Sales and Customer Experience, Openreach | Explained Vodafone’s general concerns regarding BT’s SLG payment avoidance, including its failure to properly assess challenges to “deemed consent”; failure to honour the outcome of challenges; and inappropriate use of “deemed consent” in certain circumstances. |
| C | 3 October 2014 | Letter from Alan Lazarus, Director of Regulatory Affairs, Openreach to Matthew Braovac, Head of Regulation, Vodafone | Provided a detailed analysis of Vodafone’s spreadsheets of 17 September 2014 and 2 September 2014. OR stated it did not have data for September 2012. |
| D | 6 October 2014 | Email from Alan Lazarus, Director of Regulatory Affairs, Openreach to Matthew Braovac, Head of Regulation, Vodafone | Attaching spreadsheet to be read with letter of 3 October 2014. |
| E | 28 October 2014 | Letter from Alan Lazarus, Director of Regulatory Affairs, Openreach to Matthew Braovac, Head of Regulation, Vodafone | Provided assessment of SLGs owing in cases accepted by BT in its letter of 3 October 2014. |
| F | 7 November 2014 | Letter from Matthew Braovac, Head of Regulation, Vodafone to Alan Lazarus, Director of Regulatory Affairs, Openreach | Provided assessment of BT’s letters of 3 October and 28 October, disagreeing with BT’s assessment of most cases where it believes no error occurred. |
| G | 5 December 2014 | Letter from Alan Lazarus, Director of Regulatory Affairs, Openreach (on behalf of Tim Barclay) to Neil Smith, Head of Commercial Data, Vodafone | Response to Vodafone’s letter of 2 October 2014, defending BT’s practices in relation to the circumstances complained of by Vodafone, and including a spreadsheet responding to particular examples alleged by Vodafone. |
| N/A | 18 December 2014 | Meeting between Vodafone and BT | BT agreed to certain principles, including that CDD changes should be clearly communicated; that |

| | | | |
|-----|------------------|--|---|
| | | | application of “deemed consent” should be evidence based and with sufficient justification; BT should aim to notify of “deemed consent” in advance; BT should adhere to its own processes; transparent guidance to be provided; and information flow to be improved. |
| H | 19 December 2014 | Letter from Alan Lazarus, Director of Regulatory Affairs, Openreach to Matthew Braovac, Head of Regulation, Vodafone | Response to Vodafone’s letter of 27 November 2014, including a spreadsheet of outstanding issues. |
| I | 19 January 2015 | Letter from Towerhouse LLP on behalf of Vodafone to John Ewbank, Openreach | Relates to Vodafone’s position on the 2014 Contract Review of the CSA. |
| N/A | 28 January 2015 | Meeting between Vodafone and BT | Discussion of a number of issues relating to provisioning, including an update on weekly calls challenging application of “deemed consent”; a commitment by BT to move CDDs for wayleaves and traffic management only when the resolution timescale is known; and proposed changes to the Deemed Consent Guide. |
| J | 16 February 2015 | Email from Iain Chaney, Carrier Performance Manager, Vodafone to S Lawley, Openreach | Provided feedback from Vodafone regarding the Deemed Consent Guide. |
| K | 20 February 2015 | Email from S Lawley, Openreach to Iain Chaney, Carrier Performance Manager, Vodafone | Acknowledged receipt of email of 16 February 2015 |
| L | 1 April 2015 | Letter from Alan Lazarus, Director of Regulatory Affairs, Openreach to Matthew Braovac, Head of Regulation, Vodafone | Response to Vodafone letter of 7 November 2014, setting out BT’s views of the 118 orders with disagreement and including a spreadsheet regarding the same. |
| M | 5 June 2015 | Letter from Matthew Braovac, Head of Regulation, Vodafone to Alan Lazarus, Director of Regulatory Affairs, Openreach | Response to letter of 1 April, noting Vodafone’s disappointment and requesting BT to review its analysis. |
| N | 19 June 2015 | Letter from Alan Lazarus, Director of Regulatory Affairs, Openreach to Matthew Braovac, Head of Regulation, Vodafone | Setting out BT’s final view of the disputed claim; the remaining areas of disagreement form the basis of this dispute. |

Annex B: Specific orders to which the dispute relates

Summary

| | Sep-12 | | |
|--|-----------|---------------------------------|---------------------|
| | Total | % of orders with deemed consent | % of total disputed |
| Orders delivered in month where “deemed consent” was applied | 195 | | |
| Still in dispute ³¹ | 34 | 17.44% | 100% |
| Vodafone withdrew dispute | 0 | 0% | 0% |
| BT paid disputed SLG in full | 0 | 0% | 0% |
| Total disputed | 34 | 17.44% | 100% |

| | Mar-13 | | |
|--|-----------|---------------------------------|---------------------|
| | Total | % of orders with deemed consent | % of total disputed |
| Orders delivered in month where “deemed consent” was applied | 254 | | |
| Still in dispute | 29 | 11.42% | 52.73% |
| Vodafone withdrew dispute | 14 | 5.51% | 25.45% |
| BT paid disputed SLG in full | 12 | 4.72% | 21.82% |
| Total disputed | 55 | 21.65% | 100% |

| | Sep-13 | | |
|--|-----------|---------------------------------|---------------------|
| | Total | % of orders with deemed consent | % of total disputed |
| Orders delivered in month where “deemed consent” was applied | 231 | | |
| Still in dispute | 25 | 10.82% | 44.64% |
| Vodafone withdrew dispute | 10 | 4.33% | 17.86% |
| BT paid disputed SLG in full | 21 | 9.09% | 37.50% |
| Total disputed | 56 | 24.24% | 100% |

Following this summary is a categorisation of the specific circuits which remain in dispute. The circuits have been categorised by reference to the issues set out in the table in paragraph 61 of Vodafone’s submission, which sets out in more detail the particular category of issue and the reasons why Vodafone considers that the use of “deemed consent” in that category of circumstances is not permitted.

By way of summary in relation to the Specific Orders Dispute, those categories are as follows. Note that in some cases (as set out in the tables below) Vodafone relies on more than one ground why BT was not permitted to apply “deemed consent”. For the purposes of this table, Vodafone only records each order once, for the primary ground for dispute:

| Primary ground for dispute | March 2013 Total | September 2013 Total |
|----------------------------|------------------|----------------------|
|----------------------------|------------------|----------------------|

³¹ Either because no agreement was reached between Vodafone and Openreach or because Openreach only agreed to pay an SLG for part of the disputed period.

| Primary ground for dispute | March 2013 Total | September 2013 Total |
|---|-------------------------|-----------------------------|
| Insufficient reasons given: | | |
| A. No reason given except “deemed consent” code | 7 | 1 |
| B. No reason given except “category 2” | 3 | 0 |
| C. Other insufficient reasons | 1 | 9 |
| Reason not valid (including internal errors by BT and revised CDDs not being set as soon as reasonably practicable) | 3 | 6 |
| No proactive written communication that deemed consent applied (and in each case, no reasons provided) | 3 | 6 |
| Retrospective application of deemed consent | 2 | 3 |
| Delay in processing un-suspension requests | 10 | 0 |

Detailed information setting out Vodafone’s and BT’s respective views of the facts in relation to each circuit are set out in the spreadsheets exchanged between the parties.

September 2012

| Ground for dispute | Total | Circuit references | Monthly Rental (£) | Days | Total (£) | Notes / additional grounds |
|--------------------|----------------|--------------------|--------------------|--------|----------------|--|
| No reasons given | 26 | ONEA603656 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In each case, no written notification was received by Vodafone setting out that its consent to a change of the CDD was being deemed. This comprises an <u>additional</u> reason (beyond the absence of reasons) why the application of “deemed consent” was not permitted. |
| | | ONEA110877 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA710996 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA610974 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA410750 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA910749 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA311028 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA510661 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA510872 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA809886 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA910319 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA910101 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA210717 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA409874 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA411068 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA410772 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| ONEA910931 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | | | |
| ONEA210886 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | | | |

| | | | | | | |
|---|-----------|------------|----------------|--------|----------------|--|
| | | ONEA409366 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA711320 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA511521 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA910196 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA410966 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA509936 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA411020 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA210821 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| Insufficient reasons given | 3 | ONEA710953 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In each case, the only detail provided was a “cable date”, and in the case of ONEA811086 not even a specific date was provided. |
| | | ONEA310972 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA811086 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| No (or untimely) written communication that “deemed consent” applied or reasons given | 2 | ONEA611002 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In this case, no reasons were provided at all, comprising an <u>additional</u> reason why the application of “deemed consent” was not permitted. |
| | | ONEA310466 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| Retrospective application of “deemed consent” at handover | 3 | ONEA711022 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In each case, there was no written notification that Vodafone’s consent had been deemed, comprising an <u>additional</u> reason why the application of “deemed consent” was not permitted. |
| | | ONEA310491 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA509021 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | 34 | | | | [CONFIDENTIAL] | |

March 2013

| Ground for dispute | Total | Circuit references | Monthly Rental (£) | Days | Total (£) | Notes / additional grounds |
|---|-------|--------------------|--------------------|--------|----------------|---|
| No reasons given other than "deemed consent" code | 7 | ONEA912653 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA613406 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA913421 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA212883 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA313239 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA712912 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA312993 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| No reasons given other than the order was category 2 | 3 | ONEA313264 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In relation to circuit ONEA512898, the only reason was "The ECD of external are set at 28.02.13 CAT2 plus 10 days = CDD 14.03.13" |
| | | ONEA513460 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA512898 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| Insufficient detail in reasons | 1 | ONEA113213 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In relation to circuit ONEA113213, the only reason provided was "delays with contacting the customer and access delays" |
| Applied "deemed consent" for a delay that had already been taken into account | 1 | ONEA313299 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| No written communication that "deemed consent" applied or | 3 | ONEA713286 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In relation to circuit ONEA713404, the failure to give reasons or |

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| reasons given | | ONEA713404 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | communication relates to the CDD change for planning delays. |
| | | ONEA913155 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| Retrospective application of “deemed consent” at handover | 2 | ONEA113407 (note: also no written communication) | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In relation to circuit ONEA113407, there was no written communication of Vodafone’s consent being deemed, comprising an <u>additional</u> reason why the application of “deemed consent” was not permitted. In relation to circuit ONEA212793, BT provided reasons for delay at KCI3 but reasons were not provided when Vodafone’s consent was deemed at handover. |
| | | ONEA212793 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| Delay in applying un-suspension requests | 10 | ONEA510496 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In relation to circuit ONEA913065, BT has accepted four days were incorrectly applied but Vodafone considers an additional day is still unjustified. |
| | | ONEA712782 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA512900 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA313386 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
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| | | ONEA113791 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA113235 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA913065 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA813134 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA713060 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |

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| | | ONEA813179 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| Incorrect notification of original CDD | 1 | ONEA412618 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | BT has stated the original CDD provided was a “manual error”. However, this is nevertheless the CDD which was contractually notified. |
| Revised CDD not as soon as reasonably practicable, because earlier delays caused solely by BT were incorporated into the CDD | 1 | ONEA412644 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | 29 | | | | [CONFIDENTIAL] | |

September 2013

| Ground for dispute | Total | Circuit references | Monthly Rental (£) | Days | Total (£) | Notes / additional grounds |
|---|-------|--------------------|--------------------|--------|----------------|--|
| No reasons given other than “deemed consent” code | 1 | ONEA614748 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| Insufficient detail in reasons | 9 | ONEA113852 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | The reasons provided by BT referred to the need for a “fit and proper” test but did not even state whether it was customer or Openreach delay in performing fit and test. Also, a subsequent CDD change was not notified to Vodafone at all, comprising an <u>additional</u> reason why the application of “deemed consent” was not permitted. |

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| | | ONEA215108 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | The only reason provided by BT was “dependent on B end traffic management”. No other detail was provided. |
| | | ONEA315400 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | The only reason provided by BT was presence of a skip blocking access. This was the second “deemed consent” application for presence of a skip, but BT had already agreed with Vodafone that the skip had been removed, so BT’s notification gives no reason why access was still being denied. |
| | | ONEA315921 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | The only reason provided by BT was difficulties in contacting the customer, but BT provided no details as to how or when it attempted to contact the customer. |
| | | ONEA415610 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | There were no details provided about the access problems leading to delay. |
| | | ONEA504564 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | The only reason provided by BT was “downtime required” but there was no explanation of when or why. |
| | | ONEA614721 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | The only reason provided by BT was “Openreach infrastructure”. In fact, it took 5 working days further to reach KCI2, with no further reasons provided by BT other than “category 2” at KCI2 and KCI3. |

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| | | ONEA915155 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | Not informed of CDD change. |
| | | ONEA215612 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | Not informed of CDD change. BT has agreed to pay [CONF] days, [CONF] days are outstanding. |
| Reason not valid | 5 | ONEA113251 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | BT claimed an existing circuit ref was not provided, but it has never been necessary to provide an existing ref and it was not reasonable for BT to delay for this reason. |
| | | ONEA113304 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In this case, the CDD was changed before wayleave was sent to grantor. Openreach cited an issue between its planner and wayleave department, not the grantor. |
| | | ONEA515893 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | Vodafone and BT agree the appropriate period of delay is [CONF] working days, but the actual change applied was [CONF] working days ([CONF]). |
| | | ONEA115624 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | Appears to be a BT internal error because a B end address was listed as needing to be checked in the "deemed consent" notification, which address never formed part of Vodafone's order. |
| | | ONEA114611 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | Fibre ECD was not provided. BT has paid [CONF] of [CONF] days, leaving [CONF] days payable. |
| No written communication | 6 | ONEA115764 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In relation to circuit ONEA213707, a |

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| that "deemed consent" applied or reasons given | | ONEA215243 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | "progression note" was received from BT but no notification was received that "deemed consent" was applied |
| | | ONEA411579 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA915283 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In relation to circuit ONEA516075, BT's notification did not state that consent had been deemed: it said only that F&T test access was necessary but did not refer to any CDD impact |
| | | ONEA213707 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| | | ONEA516075 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | |
| Retrospective application of "deemed consent" at handover | 3 | ONEA315635 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In this case, the CDD was changed at handover and the only previous notifications were by phone. |
| | | ONEA615102 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In this case, "downtime" was requested but BT did not notify Vodafone that its consent had been deemed or provided new details of the CDD until handover, comprising <u>additional</u> reasons why the application of "deemed consent" was not permitted. |
| | | ONEA115483 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In this case, BT has agreed to pay 1 day's SLG but VODAFONE's dispute relates to the entire delay from [CONF], which was not notified prior to handover |
| Revised CDD not as soon as reasonably practicable | 1 | ONEA515317 | [CONFIDENTIAL] | [CONF] | [CONFIDENTIAL] | In this case, there was delay of one month between being informed blockage to clearance, with no intermediate updates. This suggests BT deprioritised resolution of the |

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| | | | | | | issue because it could be subject to “deemed consent”, and therefore the CDD was not as soon as reasonably practicable. |
| | 25 | | | | [CONFIDENTIAL] | |

Annex C: Context to the dispute

1. This annex briefly sets out three factors that provide important context for Ofcom’s resolution of the dispute, being:
 - a. the industry-wide recognition that the performance of BT’s Openreach division in provisioning Ethernet services has been unsatisfactory and declining for a number of years;
 - b. the ongoing concerns that Openreach’s performance may not be reflecting true equivalence in how Ethernet services are provisioned for BT’s other divisions and for external customers; and
 - c. concerns raised by industry and recognised by the CMA, that BT’s intended acquisition of EE Limited is likely to increase incentives for BT to reduce the quality of its Ethernet services used for mobile backhaul and provided to other MNOs such as Vodafone.
2. First, as outlined in more detail elsewhere in this dispute referral, Ofcom has acknowledged in its most recent BCMR consultation document that there are “growing concerns about the provisioning of new Ethernet lines” by BT and that it had been “monitoring the situation for some time”.³² Ofcom has identified long-standing concerns by CPs that the performance of BT’s Openreach division in the provision of new Ethernet services has been deteriorating over a number of years and “there is a risk that poor quality of service offered by BT in the provision and repair of wholesale services will impact detrimentally on all downstream providers of leased lines, including BT’s retail businesses, and ultimately to the detriment of end-users.” It has commissioned research showing that delivery date uncertainty is of great concern, and has found that CPs purchasing wholesale Ethernet services have had to incur costs as a result of BT’s performance. These costs will inevitably need to be passed on in the form of higher costs faced by consumers and impact competition in the market. In this context, it is critical that steps are taken to address BT’s misuse of deemed consent to avoid and/or minimise its SLG payments, and to address the direction of resources away from the needs of Openreach’s customers.
3. Secondly, BT’s own Equality of Access Board (“EAB”) reports (although they review performance against BT’s undertakings rather than its contracts or SMP obligations) show that there is a **substantial difference** between the provisioning of Ethernet services ordered by other parts of BT, and those ordered by other CPs. For example, the 2015 EAB annual report notes that:

*EAD provision performance appears to have favoured BT CPs for the majority of the year, although the gap has been narrowing. The EAB found that the ways in which different CPs require orders and order dates to be managed affected performance. Additionally, **Openreach use of the ‘deemed consent’ process caused delays to the completion of non-BT CP orders, while this did not affect BT CP orders in the same way.***³³

There is no explanation in the report of why BT orders are not affected “in the same way”, but Vodafone has significant concerns that this may reflect an underlying lack of equivalence in

³² See Ofcom’s 15 May 2015 consultation document entitled *Business Connectivity Market Review — Review of competition in the provision of leased lines* (“**2015 BCMR Consultation Document**”) para 13.18.

³³ EAB Annual Report 2015, p 20.

process. If this is the case, then even though the 2015 report shows that “EAD provision performance appears to have favoured BT CPs for the majority of the year”, even the figures provided would be misleading, since “on time performance” presumably measures performance against the *final CDD*, and therefore entirely ignores the detrimental effect of applying “deemed consent” to orders.

4. It is particularly concerning, in this context, that past EAB annual reports reflect similar concerns. For example, the 2014 EAB annual report acknowledges “inconsistencies” in how “deemed consent” applies. Although the EAO blames this on “different policies of CPs towards accepting a deemed consent”,³⁴ there is no explanation of how these “inconsistencies” affect BT over other CPs. The overall provisioning timeframes similarly reflect a noticeable gap between BT and other CPs in terms of provisioning performance: a trend which has been reflected for a number of years.³⁵
5. Thirdly, it appears likely that any incentives BT may have to reduce service quality for Ethernet services will only increase in light of its intended acquisition of EE Limited. EE is currently a significant acquirer of Ethernet services from BT’s Openreach division, including for mobile backhaul purposes. If the acquisition proceeds, there will be a significant additional market segment in which BT and Vodafone compete and for which Ethernet services are a necessary input. The CMA has recognised the potential concern in its recent Statement of Issues, noting that “There is a vertical link between the parties in that BT provides mobile backhaul services to EE, as well as to the other MNOs”.³⁶ It has indicated that:
 - a. a core concern it will need to investigate is the risk that the acquisition would give BT additional incentives to engage in input foreclosure for mobile backhaul services, including by lowering the quality of products supplied to competing MNOs like Vodafone; andit would need to consider the restrictions imposed on BT by regulation and existing contracts and its ability to vary prices and quality. In its Phase II Reference Decision, the CMA determined that the long-term contracts and significant minimum volume requirements in BT’s contracts with MNOs (together with the limited competition in the leased lines market) would limit those MNOs’ ability to switch suppliers and means that MNOs “could have to accept a deterioration in service quality under the current contracts”.³⁷

³⁴ 2014 EAB annual report, pp 8 and 19.

³⁵ See, eg, 2013 EAB annual report, p 25.

³⁶ CMA, *Anticipated Acquisition by BT Group Plc of EE Limited: Statement of Issues* (17 July 2015) para 25. See also CMA, *Anticipated Acquisition by BT Group plc of EE Limited – Decision* (9 June 2015) (“Phase 2 Reference”), para 86, noting that “the CMA has identified vertical concerns in relation to the supply of ... fibre mobile backhaul services to MNOs in the UK”.

³⁷ Phase II Reference, para 117.