

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

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# About this document

This document sets out for comment Ofcom's proposal for resolving a regulatory dispute between BT and Vodafone in relation to allegations that BT has misused a clause in its Connectivity Service Agreement ("CSA"), allowing it to deem Vodafone's consent in extending the contractual delivery dates for the provision of Ethernet services.

BT's CSA is its Reference Offer that sets out the terms and conditions upon which BT, via its Openreach division, supplies various regulated wholesale leased line products collectively referred to as Ethernet services.

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## Glossary of terms

**2003 Act:** The Communications Act 2003.

**2008 BCMR Statement:** Ofcom's 2008 Business Connectivity Market Review Statement.

**2013 BCMR Statement:** Ofcom's 2013 Business Connectivity Market Review Statement.

**BT:** British Telecommunications plc whose registered company number is 01800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

**CDD:** Contractual Delivery Date.

**COSMOSS:** An internal Openreach system for the management of circuits. Used for managing the provision of new and existing orders.

**CP:** Communications Provider.

**CSA:** Connectivity Services Agreement. The CSA is BT's Reference Offer contract that sets out the terms and conditions upon which BT, via its Openreach division, supplies various regulated wholesale leased line products collectively referred to as Ethernet services.

**Deemed Consent:** A contractual process, set out in the CSA, that allows Openreach to vary the CDD in certain defined circumstances.

**DC codes:** Deemed Consent Codes. DC codes are communicated to the CP when BT notifies them of its intention to deem consent.

**The Dispute:** this regulatory dispute between BT and Vodafone, in relation to allegations that BT has misused Deemed Consent, opened on 8 September 2015.

**eCo:** A customer facing order management system, where CPs can submit, modify and manage orders. Openreach also uses the system to manage orders and store emails that are used to update and interact with the CP.

**Ethernet services:** Services, presented with the standard networking protocol defined under that name in IEEE 802.3 and published by the Institute of Electrical and Electronics Engineers, that provide dedicated transmission capacity at a range of bandwidths between sites.

**In-flight order:** A term used by Openreach to describe an active order i.e. orders that have been validated and are being progressed through the stages of its provisioning process and have not been suspended or completed.

**Openreach:** A BT group business offering CPs products and services that are linked to BT's nationwide local access network.

**The Parties:** Vodafone and BT.

**The Relevant Period:** 1 September 2012 to 31 January 2014.

**Sky:** Sky UK Ltd.

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**SLA:** Service Level Agreement. The SLA is contained within the CSA and outlines the terms for the provision of certain Ethernet services, including the timescales within which BT has to complete the provision of an order.

**SLGs:** Service Level Guarantee compensatory payments. A payment made by BT to the affected CP where it fails to provide the requested Ethernet service on the CDD in line with the SLA.

**SLG Direction:** Ofcom's 2008 Statement 'Service level guarantees: incentivising performance' <http://stakeholders.ofcom.org.uk/consultations/slg/statement/>.

**SMP:** Significant Market Power. A market position, individually or jointly with others, equivalent to dominance, i.e. a position of economic strength affording the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

**SMP conditions:** Regulatory conditions imposed on a specific CP that has been found to have SMP in a market reviewed by Ofcom.

**Suspended order:** A term used by Openreach to refer to orders which have been validated but not completed and have been paused at some point during the provisioning process. Suspension of an order can happen for a variety of reasons including at the request of the CP.

**TalkTalk:** TalkTalk Telecom Group plc.

**Vodafone:** Vodafone Ltd whose registered company number is 01471587, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

**Vodafone's Dispute Submission:** Vodafone's dispute submission of 14 August 2015.

## Section 1

# Summary

- 1.1 This document (the "Provisional Conclusions") sets out for comment Ofcom's proposal for resolving a dispute between British Telecommunications plc ("BT") and Vodafone Limited ("Vodafone") (together, the "Parties") in relation to allegations that BT has misused a clause in its Connectivity Service Agreement ("CSA"), allowing it to deem Vodafone's consent in extending the contractual delivery dates for the provision of Ethernet services.

## Background

### BT's regulatory obligations

- 1.2 On 8 December 2008 and 28 March 2013, Ofcom published its 2008 Business Connectivity Market Review ("BCMR") Statement<sup>1</sup> and 2013 BCMR Statement<sup>2</sup> respectively. Both these Statements determined that BT has Significant Market Power ("SMP") in the provision of Ethernet services and imposed SMP Conditions on BT. They include obligations on BT to:
- (i) provide its services as soon as reasonably practicable and on fair and reasonable terms;
  - (ii) publish reference offers containing the terms and conditions for the provision of Ethernet services and to not depart from these; and
  - (iii) provide services on such terms, conditions and charges as Ofcom may from time to time direct (see paragraphs 2.1 to 2.4 below).
- 1.3 On 20 March 2008, Ofcom also imposed the SLG Direction which required BT to amend the terms and conditions for the supply of Ethernet services to provide, amongst other things, that BT must give reasons to justify provision of its services beyond the 57th day and to request the consent of the relevant CP for any such extension. The Direction also required BT to make compensatory payments in the event of late provision of its services. In 2013, Ofcom decided to re-impose the SLG Direction (see paragraphs 2.5 and 2.6 below).

### BT's CSA

- 1.4 BT's CSA is its Reference Offer that sets out the terms and conditions upon which BT, via its Openreach division, supplies various regulated wholesale leased line products collectively referred to as Ethernet services.
- 1.5 The CSA includes a Service Level Agreement ("SLA") which outlines certain quality of service parameters for the provision of Ethernet services by BT. These include the timescales within which BT has to complete the provision of an order. Where BT's services are delivered beyond these timescales, the CSA requires BT to make Service Level Guarantee compensatory payments ("SLGs") to the affected Communications Provider ("CP").

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<sup>1</sup> See <http://stakeholders.ofcom.org.uk/consultations/bcmr08/>.

<sup>2</sup> See <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/>.

- 1.6 For the majority of cases, the CSA stipulates that the Contractual Delivery Date ("CDD") for BT's Ethernet services should be within 30 working days from receiving the relevant order. BT may only extend a CDD beyond this timeframe with the CP's prior consent. Where such consent has been validly obtained, BT will not be liable for SLG payments.

### Deemed Consent

- 1.7 The CSA also includes a 'Deemed Consent' provision, allowing BT to deem, in certain circumstances specified in the CSA, that a CP has consented to the extension of the CDD (in lieu of obtaining actual consent from that CP). This mechanism was designed to avoid the time involved in seeking explicit consent that would otherwise add to the time taken to complete the individual order.

### The Dispute

- 1.8 The Dispute was referred to Ofcom by Vodafone against BT. Vodafone alleged that BT has misused Deemed Consent during the period between 1 September 2012 and 31 January 2014 (the "Relevant Period"). Vodafone claimed that this has resulted in BT failing to meet its obligations in relation to the timeframes for the provision of its services.<sup>3</sup>
- 1.9 On 8 September 2015, we accepted the Dispute for resolution. The scope of the Dispute is to determine:
1. *whether the use by BT of the "Deemed Consent Mechanism" (as contemplated by [Paragraph] 2.3 of Schedule 4C(i) of the Contract for Connectivity Services ("CSA")) over the period 1 September 2012 to 31 January 2014 in relation to the provision of Ethernet Services falling within the specific categories identified in Vodafone's dispute referral of 14 August 2015 was:*
    - a. *in accordance with the CSA such that BT complied with Condition HH5.9 (imposed pursuant to a notification of 8 December 2008 and Condition 6.9 (imposed pursuant to a notification of 28 March 2013); and*
    - b. *consistent with such services being provided on fair and reasonable terms and conditions in accordance with Condition HH1.2 (imposed pursuant to a notification of 8 December 2008) and Condition 1.2 (imposed pursuant to a notification of 28 March 2013).*
  2. *any appropriate exercise by Ofcom of its powers under section 190(2) of the Communications Act 2003 as part of Ofcom's determination resolving this dispute.*

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<sup>3</sup> Paragraph 7, Vodafone's Dispute Submission.

## **Ofcom's provisional assessment of the matters in dispute**

- 1.10 We have assessed the following seven categories of behaviour allegedly undertaken by BT against 1a and 1b of the Scope:
- 1.10.1 Category 1: No notice given of BT's intent to deem consent for a change of CDD;
  - 1.10.2 Category 2: Insufficient level of reasoning provided by BT;
  - 1.10.3 Category 3: No reliance on DC Codes in the CSA for the application of Deemed Consent;
  - 1.10.4 Category 4: New CDD date set under Deemed Consent incorporating additional delays that did not amount to circumstances permitting the application of Deemed Consent;
  - 1.10.5 Category 5: Notice of Deemed Consent not provided in writing;
  - 1.10.6 Category 6: Retrospective application of Deemed Consent to change the CDD; and
  - 1.10.7 Category 7: Extension of the CDD of un-suspended orders for a period longer than the initial suspension period.
- 1.11 In conducting our analysis we did not analyse specific orders or reach a view on whether BT had indeed engaged in the specific behaviour described under each category. Rather, we considered whether the types of alleged behaviour listed above were consistent with BT's SMP obligations. As a first step in our assessment we look at whether the type of behaviour concerned would be consistent with BT's obligations under the CSA. Having considered the arguments of the Parties and undertaken our assessment of each of these categories we have reached the provisional conclusions listed in Table 1 below:



**Table 1: Deemed Consent: High level summary of Preliminary Conclusions by Category**

Category	Provisional conclusion regarding the CSA	Provisional conclusion regarding BT's SMP obligations
1	Not in accordance with the terms of the CSA.	In breach of BT's SMP obligations to provide its services: <ul style="list-style-type: none"> <li>on fair and reasonable terms; as soon as reasonably practicable; and on such terms as Ofcom may from time to time direct; and</li> <li>on the terms and conditions in its reference offer.</li> </ul>
2	In accordance with the terms of the CSA.	In breach, under certain circumstances, of BT's SMP obligation to provide its services: <ul style="list-style-type: none"> <li>on fair and reasonable terms; as soon as reasonably practicable; and on such terms as Ofcom may from time to time direct.</li> </ul>
3	Not in accordance with the terms of the CSA.	In breach of BT's SMP obligations to provide its services: <ul style="list-style-type: none"> <li>on fair and reasonable terms; as soon as reasonably practicable; and on such terms as Ofcom may from time to time direct; and</li> <li>on the terms and conditions in its reference offer.</li> </ul>
4	Not in accordance with the terms of the CSA.	In breach of BT's SMP obligations to provide its services: <ul style="list-style-type: none"> <li>on fair and reasonable terms; as soon as reasonably practicable; and on such terms as Ofcom may from time to time direct; and</li> <li>on the terms and conditions in its reference offer.</li> </ul>
5	Email notification (including via eCo) would have been in accordance with the terms of the CSA.  Notification not in writing (including telephone) would not have been in accordance with the CSA.	Notification by means other than in writing would not have been in breach of BT's SMP obligations.
6	Notification on the day of the CDD would have been in accordance with the terms of the CSA under certain	Notification on the day of the CDD would not have been in breach of BT's SMP obligations in some

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	<p>circumstances.</p> <p>Notification on a day after the original CDD would not have been in accordance with the terms of the CSA.</p> <p>Notification of the revised CDD on a date after that of the original CDD would have been in accordance with the terms of the CSA under some circumstances.</p>	<p>circumstances.</p> <p>Notification of intent to deem consent after the CDD would have been in breach of BT's SMP obligations to provide its services:</p> <ul style="list-style-type: none"> <li>• on fair and reasonable terms; as soon as reasonably practicable; and on such terms as Ofcom may from time to time direct; and</li> <li>• on the terms and conditions in in its reference offer.</li> </ul> <p>Notification of the revised CDD on a date after that of the original CDD would not have been in breach of BT's SMP obligations under some circumstances.</p>
7	<p>Extension of the CDD following suspension of an order for longer than the requested suspension period would have been in accordance with the terms of the CSA provided BT provided reasons to justify and set the new CDD as soon as reasonably practicable.</p> <p>Where BT extended the CDD for longer than the period needed to provision the order this would not have been in accordance with the terms of the CSA.</p>	<p>Where BT extended the CDD for longer than the period needed to provision the order, this would have been in breach of BT's SMP obligations to provide its services:</p> <ul style="list-style-type: none"> <li>• on fair and reasonable terms; as soon as reasonably practicable; and on such terms as Ofcom may from time to time direct; and</li> <li>• on the terms and conditions in in its reference offer.</li> </ul>

1.12 In light of our provisional conclusions for Category 5, we do not go on to consider remedies for this Category.

1.13 In relation to remedies for the other Categories, we propose to exercise our powers under section 190(1)(a) to declare the Parties' rights and obligations under the CSA. Specifically we propose:

- in relation to Categories 1, 3, 4, 6 and 7 to declare (i) that BT's practice would be in breach of its SMP obligations and (ii) the Parties' rights and obligations under the CSA;
- in relation to Category 2, to declare that BT's practice would be in breach of its SMP obligations.

1.14 Were Ofcom to decide that it was appropriate to exercise its powers accordingly, we would expect BT to take this into consideration both in relation to these orders, during the Relevant Period, for which BT engaged in the practices we would have found to be in breach of its regulatory obligations and in relation to its overall approach to Deemed Consent. We note that Ofcom has opened a separate own-initiative investigation into the circumstances under which BT used Deemed

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Consent to extend the delivery timeframes for its Ethernet services during the period between 1 September 2012 and 31 December 2014.

### Structure of the remainder of this document

- 1.15 In line with Ofcom's *Dispute Resolution Guidelines*,<sup>4</sup> this document sets out for comment the main elements of our provisional reasoning and assessment in relation to the matters in dispute.
- 1.16 The introduction and background to this Dispute are set out in **Section 2**, our analytical framework for assessing the matters in dispute is set out in **Section 3** and the analysis underpinning our provisional reasoning and assessment is set out in **Section 4**.

### Next steps

- 1.17 Given the nature of the matters in dispute, we consider it appropriate to set a consultation period of 10 working days.<sup>5</sup> Accordingly, the Parties and other interested parties have until **5pm on 20 November 2015** to comment on these Provisional Conclusions.
- 1.18 After considering any comments received, Ofcom will make a final determination. Details of how to respond to these Provisional Conclusions are set out in **Annexes 1 and 2**.

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<sup>4</sup> *Dispute Resolution Guidelines*, 7 June 2011. See: <http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>.

<sup>5</sup> In line with the *Dispute Resolution Guidelines*, 7 June 2011, we have considered whether to set a consultation period of up to 15 working days. Given the nature of this Dispute, we consider 10 working days appropriate.

## Section 2

# Introduction and background

## Regulatory requirements on BT

- 2.1 On 8 December 2008 and 28 March 2013, Ofcom published its 2008 Business Connectivity Market Review ("BCMR") Statement<sup>6</sup> and 2013 BCMR Statement<sup>7</sup> respectively. Both these Statements determined that BT has SMP in the provision of Ethernet services and imposed regulatory obligations on BT via SMP Conditions.<sup>8</sup>
- 2.2 Specifically, both Condition HH5.9 (imposed pursuant to the notification of 8 December 2008) and Condition 6.9 (imposed pursuant to the notification of 28 March 2013) state that:
- "The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart therefrom either directly or indirectly."*
- 2.3 Condition HH1.2 (imposed pursuant to the notification of 8 December 2008) states that:
- "The provision of Network Access in accordance with paragraph HH1.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms and conditions (excluding charges) and on such terms and conditions (excluding charges) as Ofcom may from time to time direct".*
- 2.4 Condition 1.2 (imposed pursuant to the notification of 28 March 2013) states that:
- "the provision of network access by the Dominant Provider in accordance with this Condition must—*
- (a) take place as soon as reasonably practicable after receiving the request from a Third Party;*
- (b) be on fair and reasonable terms, conditions and charges; and*
- (c) be on such terms, conditions and charges as Ofcom may from time to time direct."*
- 2.5 On 20 March 2008, Ofcom issued a Statement and Directions regarding BT's SLGs for services including Ethernet provision.<sup>9</sup> In regards to Ethernet services, the SLG Direction aimed to re-structure compensation payments for late provision and repair to better reflect CPs' average losses. Ofcom considered that Openreach's contracts for Ethernet services did not provide Openreach with "*sufficient incentive to maintain an appropriate level of performance*" and that Openreach was "*not providing service on fair and reasonable terms*".<sup>10</sup> The new arrangements put in place by the 2008 SLG

<sup>6</sup> See <http://stakeholders.ofcom.org.uk/consultations/bcmr08/>.

<sup>7</sup> See <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/>.

<sup>8</sup> See Annex 7 2008 BCMR Statement: Notification under sections 48(1) and 79(4) of the Communications Act 2003; and Annex 7 2013 BCMR Statement: Notification under sections 48(1) and 79(4) of the Communications Act 2003.

<sup>9</sup> See <http://stakeholders.ofcom.org.uk/binaries/consultations/slg/statement/statement.pdf>.

<sup>10</sup> Paragraph 1.7 and 2.6 of the 2008 SLG Direction.

Direction were intended to give Openreach "*an appropriate financial incentive to maintain and provision service at an efficient level*".<sup>11</sup> The SLG Direction concerned matters to which Condition HH1.2 related<sup>12</sup> and required BT to amend the terms and conditions which govern the supply of Ethernet services to provide that:

*"a)...any extension of the CDD beyond the 57th [day] shall be made subject to the consent of the Communications Provider concerned whose consent shall not be unreasonably withheld;*

...

*h) 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. 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. For the avoidance of doubt, compensation shall be payable without the need for a Communications Provider to make a claim."*

- 2.6 In the 2013 BCMR Statement Ofcom decided to re-impose the 2008 SLG Direction.<sup>13</sup> We said that we considered that the conclusions we reached in 2008 remained valid. We said in particular that we considered it unlikely, absent specific obligations, that Openreach would set SLG compensation arrangements such that it would have a strong incentive to sustain service performance. In light of the opposing commercial interests, we also considered it likely that commercial negotiations would again be unsuccessful.<sup>14</sup>
- 2.7 In the remainder of this document we will be referring to our 2008 and 2013 SLG Directions as the "SLG Direction".

### **BT's Contractual Obligations<sup>15</sup>**

- 2.8 BT's CSA is its Reference Offer that sets out the terms and conditions upon which BT, via its Openreach division, supplies various regulated wholesale leased line products collectively referred to as Ethernet services. The CSA includes a SLA which outlines certain quality of service parameters for the provision of Ethernet services by BT. These include the timescales within which BT has to complete the provision of an order. Where BT's services are delivered beyond these timescales, the CSA requires BT to make SLGs to the affected CP.
- 2.9 BT modified the CSA in line with the SLG Direction. However, BT chose to set the CDD at 30 working days rather than the 57 days stipulated in the SLG Direction. Therefore, under the CSA, BT may only extend a CDD beyond 30 days with the CP's prior consent. Where such consent has been validly obtained BT will not be liable for SLG payments.

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<sup>11</sup> Paragraph 3.59 of the 2008 SLG Direction.

<sup>12</sup> See Recital (c) to Annex 3 of the SLG Direction.

<sup>13</sup> See Annex 8, Schedule 2, to 2013 BCMR Statement.

<sup>14</sup> See paragraphs 12.236 and 12.237 of the 2013 BCMR Statement.

<sup>15</sup> The provisions set out in this section were replicated as such in the different versions of the CSA that applied during the Relevant Period. The relevant clauses of the CSA are reproduced in Annex 3.

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- 2.10 In March 2009, BT added a 'Deemed Consent' provision at Paragraph 2.3 of Schedule 4C(i) of the CSA (see Annex 3) which allows BT to deem, in certain circumstances specified in the CSA, that a CP has consented to the extension (in lieu of obtaining actual consent from that CP). BT explained that this clause was included to cover circumstances outside of BT's reasonable control which cause a delay in the provisioning process such that the CDD needs to be extended, and aimed at "*minimising the additional time that would otherwise be injected into the provisioning process by obtaining explicit consent*".<sup>16</sup>
- 2.11 Condition 3.1(d) of the CSA stipulates that BT agrees to "*use reasonable endeavours to provide the Service by the Contractual Delivery Date or Customer Committed Date in accordance with the service levels set out in Schedule 4 but all dates are estimates and except as set out in the service guarantee provisions of Schedule 4B, C or D BT has no liability for failure to meet any date provided that BT has complied with its obligations to use reasonable endeavours to meet the aforementioned dates*".
- 2.12 Schedule 1 of the CSA defines the CDD as:
- the 30th Working Day after the Ethernet Access Direct Service..., Ethernet Backhaul Direct Service, Wholesale Extension Service, WEES Service or Backhaul Extension Service Order is Processed by BT;
  - or such later date where consent is obtained or deemed pursuant to paragraph 2.3 of Schedule 4C.
- 2.13 Paragraph 2.3 of Schedule 4C(i) of the CSA provides that BT will:
- (i) provide reasons to justify, and
  - (ii) obtain the Communications Provider's prior written consent (not to be unreasonably withheld or delayed)
- to extend the CDD beyond the
- (a) 30th Working Day for the Ether Backhaul Direct Service Order, TDM Access Order or 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.

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<sup>16</sup> Paragraph 10, BT's letter to Ofcom of 25 September 2015.

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- 2.14 Paragraph 2.3 goes on to set out the circumstances under which BT may deem consent.
- 2.15 Paragraph 3.1 of the Schedule ("Service Guarantees"/"Provision") stipulates that BT will deliver its services by midnight on the CDD. If BT fails to do this, the CP shall be entitled to the compensation set out in paragraph 4.1 of the Schedule. Paragraph 3.1 is subject to paragraph 7, which sets out the circumstances in which service guarantees and any compensation payments will not apply. Paragraph 4.1 ("Compensation"/"Late Provision") provides that if BT fails to meet the commitment set out in paragraph 3.1, then the CP shall be entitled to compensation.
- 2.16 Paragraph 6.1 of the Schedule provides that compensation shall be payable without the need for the CP to make a claim. Paragraph 6.2 clarifies that any compensation payable shall be without prejudice to any right or remedy including any right to claim additional loss.
- 2.17 The full text of these provisions is set out at Annex 3.

### **Provisioning of Ethernet services**

- 2.18 BT provided Ofcom with an outline of the Ethernet provisioning journey.<sup>17</sup> In this, BT explains that there are a large number of factors that influence the manner and time in which an Ethernet circuit is delivered. BT explained that once an order has been accepted BT conducts a survey of the site; this may be a desk based survey only or both a desk based and physical survey, depending on whether the presence of working fibre and duct capacity can be established by the desk based survey.<sup>18</sup>
- 2.19 Following this, the Ethernet order is placed into one of four categories that describe the level of existing infrastructure available for the completion of work. The given category will inform the CDD given.<sup>19</sup> The categories used by BT are described in Table 2 below:

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<sup>17</sup> Annex II to BT's letter to Ofcom of 25 September 2015.

<sup>18</sup> Page 1 and 2, Annex II, BT's letter to Ofcom of 25 September 2015.

<sup>19</sup> Page 2, Annex II, BT's letter to Ofcom of 25 September 2015.

**Table 2: Openreach provision categories for Ethernet products**

Category	Definition
1	Existing infrastructure exists between the Openreach exchange and the CP building. It is likely here that only blow/splice of fibre is required. <sup>20</sup>
2	No fibre to the CP building exists, but core routing is available nearby. It is likely that only a short distance of duct, cabling or tubing is required (prior to blow and splice) anywhere from the node <sup>21</sup> right up to the termination point.
3	There is no existing fibre from the exchange to the customer site. A new spine <sup>22</sup> and node is required.
4	No spare core cable is available for the desired route and therefore a new core of tie cable is required

Source: Annex II, BT's letter to Ofcom of 25 September 2015.

2.20 As noted in paragraph 2.10 above, BT may deem consent under certain circumstances outlined in Paragraph 2.3 of the CSA. BT explained that Deemed Consent and the associated date management process is managed by BT's Job Control function. BT told us that: "*The Ethernet JC [Job Controller] is responsible for managing the day to day delivery of Ethernet products for BT...The JC updates CPs with any issues affecting the delivery of their circuits*".<sup>23</sup>

2.21 BT also explained that two of its delivery systems are relevant to the application of Deemed Consent, 'COSMOSS' and 'eCo':

2.21.1 COSMOSS is an internal Openreach system for the management of circuits and is used for managing the provision of new and existing orders. This system is updated by all groups of Openreach staff responsible for managing orders (Job Controllers, planners, field engineers etc). The information contained in COSMOSS is for internal use only, but it can be added in a format which sends a note to the CP via eCo; and

2.21.2 eCo is a customer facing order management system, where CPs can submit, modify and manage orders. Openreach also uses the system to manage orders and store emails that are used to update and interact with the CP.<sup>24</sup>

<sup>20</sup> Fibre splicing is a product technique used to connect multiple parts of a fibre route using special lighting equipment. Fibre splicing can occur at exchanges, in the external network and at a customer's premises. Where the technique involves a splice from an existing fibre to new fibre, a period of downtime will occur. The fibre is blown down protective tubing by a machine to prevent it from getting damaged or breaking.

<sup>21</sup> A node acts as a point of aggregation within a network.

<sup>22</sup> A fibre spine connects common points in a network.

<sup>23</sup> Page 4, BT's 8 October 2015 response to Ofcom's s191 information request.

<sup>24</sup> Page 4, BT's 8 October 2015 response to Ofcom's s191 information request.



## Application of Deemed Consent

2.22 BT explained that the following steps apply to the use of Deemed Consent:<sup>25</sup>

2.22.1 When the field engineers or planning staff encounter a delay that prevents them from progressing the provision order, they submit a date change request to the Job Controller through the COSMOSS system. The request will include full details of the reason for the request to change the CDD, including names and telephone numbers of contacts that they have called and whether the contact was made successfully. This information can then be used to verify if the request for a date change is valid or not in the event of an appeal;

2.22.2 The Job Controller checks the notes on the order and if a request for a CDD change has been made, and is legitimate, then the Job Controller will amend the dates and advise the CP accordingly, as soon as is practically possible. The Job Controller then updates the COSMOSS notes and priority marker for the order;

2.22.3 Once the CP has confirmed that the issue triggering the Deemed Consent is resolved, the Job Controller must progress the order as normal so that the provision process can continue. Notes are entered into COSMOSS and eCo to ensure any future audit of the circuit provides clear information as to why the CDD has been amended; and

2.22.4 Once the matter causing the delay has been resolved, a system message is sent to the planner or field team to direct them to the updated note on COSMOSS. Any legitimate date movement by Openreach would be completed using the eCo system and an email would be sent to the CP with the relevant information.

2.23 BT explained that it uses "nearly 30 different categories" of Deemed Consent codes ("DC codes"),<sup>26</sup> which link back to the circumstances set out in the CSA. DC codes are communicated to the CP when an order is at risk of delay beyond the CDD and BT believes that delay would fit within the eligible categories for Deemed Consent.<sup>27</sup> The DC codes used by BT are listed in Table 3 below. [X<]

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<sup>25</sup> Page 4 and 5, BT's 8 October 2015 response to Ofcom's s191 information request.

<sup>26</sup> Page 1, Annex II, BT's letter to Ofcom of 25 September 2015.

<sup>27</sup> Page 2 and 3, Annex II, BT's letter to Ofcom of 25 September 2015.

**Table 3: Deemed Consent codes and their meanings<sup>28</sup>**

Clause	Deemed Consent Code	Description
(2.3ii)	DC21	There is a need for infrastructure build including, for example, situations where duct, manholes, fibre spine cable, E side copper cable or backhaul and core network cable are required.
(2.3ii)	DC22	There is a need for infrastructure build including, for example, situations where duct, manholes, fibre spine cable, E side copper cable or backhaul and core network cable are required.
(2.3iii)	DC23	There is cable or exchange breakdown
(2.3iv)	DC24	There is a collapsed, blocked (e.g. cement) or damaged duct/manhole
(2.3v)	DC25	Notice is required under the Traffic Management Act or Traffic Scotland Act
(2.3ix)	DC29	Main frame compression or extension is required.
(2.3vi)	DC26	There is a manhole or footway box that is contaminated with or by a substance that requires special treatment.
(2.3vii)	DC27	Asbestos has been identified.
(2.3viii)	DC28	Security clearance is required but not yet agreed.
(7.1a)	DC7A	The failure by BT is due to the CP's own network or equipment or any other network or equipment outside the BT Network.
(7.1b)	DC7B	The CP is in breach of any part of the contract, or BT suspends the service or any part of it in accordance with the contract.
(7.1c)	DC7C	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 CP's site or End-customer site, or the CP fails to agree an appointment date or work is aborted.
(7.1d)	DC7D	The CP and BT agree a different timescale for delivery of the service and a new CDD is agreed.
(7.1e)	DC7E	Reasonable assistance is required or information is reasonably requested from the CP, end-customer or a third party and such assistance or information is not provided.
(7.1f)	DC7F	Wayleaves are required.
(7.1g)	DC7G	The failure is due to a Force Majeure event.
(7.1h)	DC7H	The failure is due to a scheduled service outage.
(7.1i)	DC7I	The failure is due to an incorrect order being submitted by the CP.
(7.1c)	DC7J	Through no fault of its own or because of

<sup>28</sup> [X]

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		circumstances beyond its reasonable control, BT is unable to carry out any necessary work at, or gain access to the CP's site or end-customer's site, or the CP fails to agree an appointment date or work is aborted.
(7.1c)	DC7K	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 CP's site or end-customer's site, or the CP fails to agree an appointment date or work is aborted.
(7.1c)	DC7L	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 CP's site or end-customer's site, or the CP fails to agree an appointment date or work is aborted.
(7.1c)	DC7M	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 CP's site or end-customer's site, or the CP fails to agree an appointment date or work is aborted.
(7.1c)	DC7N	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 CP's site or end-customer's site, or the CP fails to agree an appointment date or work is aborted.
(7.1c)	DC7O	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 CP's site or end-customer's site, or the CP fails to agree an appointment date or work is aborted.
(7.1c)	DC7P	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 CP's site or end-customer's site, or the CP fails to agree an appointment date or work is aborted.
(7.1c)	DC7Q	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 CP's site or end-customer's site, or the CP fails to agree an appointment date or work is aborted.
(7.1c)	DC7R	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 CP's site or end-customer's site, or the CP

		fails to agree an appointment date or work is aborted.
(7.1c)	DC7S	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 CP's site or end-customer's site, or the CP fails to agree an appointment date or work is aborted.

Source: BT 8 October 2015 response to Ofcom's s191 information request.

## Issues in dispute

### Submissions from Vodafone

- 2.24 Vodafone's Dispute Submission concerns BT's application of Deemed Consent. Vodafone submitted that in the Relevant Period BT inappropriately used Deemed Consent, which has resulted in Openreach failing to meet SLA timescales and failing to make SLG payments to Vodafone in accordance with the CSA.
- 2.25 Vodafone claimed that *"while the concept of "deemed consent" was introduced without formal industry challenge, it was introduced with the expectation of being applied in very limited circumstances"*<sup>29</sup> but that BT has applied 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.<sup>30</sup>
- 2.26 Vodafone stated that: *"BT determines for itself whether circumstances permit the mechanism to be used and when it can 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 are in any event determined by BT in the first instance, which has a vested interest in upholding its original application of deemed consent"*.<sup>31</sup>
- 2.27 Vodafone argued that it *"cannot be fair and reasonable to "deem consent" in circumstances that are to any extent within BT's control"*.<sup>32</sup>
- 2.28 Vodafone selected three one month samples (September 2012, March 2013 and September 2013) within the Relevant Period, for which it conducted an analysis of each application of Deemed Consent.<sup>33</sup>
- 2.29 Vodafone stated that BT refused to engage in relation to orders from September 2012 as it advised that it does not have those records available. We note that BT has since been able to extract records from its archives for September 2012 and that it wrote to Vodafone on 29 October 2015 in relation to the orders disputed for that month.<sup>34</sup>
- 2.30 In relation to March and September 2013, Vodafone advised that it has reached agreement with BT on some of these orders; for some, BT responded to Vodafone's

<sup>29</sup> Paragraph 3a, Vodafone's letter to Ofcom of 22 September 2015.

<sup>30</sup> Paragraph 5, Vodafone's Dispute Submission.

<sup>31</sup> Paragraph 4, Vodafone's Dispute Submission.

<sup>32</sup> Paragraph 3c, Vodafone's letter to Ofcom of 22 September 2015.

<sup>33</sup> Paragraph 6, Vodafone's Dispute Submission.

<sup>34</sup> [34]

challenges and, in response, Vodafone has accepted that BT correctly applied the Deemed Consent mechanism; for others BT has accepted that it did not correctly notify the use of Deemed Consent [§<]<sup>35</sup> For the remaining orders BT and Vodafone remain in dispute.

- 2.31 Vodafone argued that its analysis "*shows that BT has engaged in sustained and systematic breaches of its contractual and regulatory requirements*".<sup>36</sup> In regards to the specific orders in dispute, Vodafone considered 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*".<sup>37</sup>
- 2.32 Vodafone submitted that it considers that it is owed SLGs for the Relevant Period, which should be determined on a pro-rata basis by applying the results of the samples across the Relevant Period. In this regard Vodafone made the following statements:
- 2.32.1 "*Vodafone has – at considerable expense – investigated and audited BT's use of "deemed consent" for a representative sample of months*",<sup>38</sup>
- 2.32.2 "*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*";<sup>39</sup> and
- 2.32.3 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 sample months (September 2012, March 2013 and September 2013) across the Relevant Period.<sup>40</sup>
- 2.33 In outlining its case, Vodafone grouped into categories the examples of where it believes BT has incorrectly applied Deemed Consent to its orders and for which the Parties are still in dispute. The categories are described in Section 3 at paragraph 3.26.<sup>41</sup>

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<sup>35</sup> [§<]

<sup>36</sup> Paragraph 10, Vodafone's Dispute Submission.

<sup>37</sup> Paragraph 38, Vodafone's Dispute Submission.

<sup>38</sup> Paragraph 20, Vodafone's Dispute Submission.

<sup>39</sup> Paragraph 39, Vodafone's Dispute submission.

<sup>40</sup> Paragraph 40, Vodafone's Dispute Submission.

<sup>41</sup> Vodafone's categories are outlined in the table at paragraph 62 of its Dispute Submission.

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- 2.34 Vodafone stated that for the 34 circuits for September 2012 it is owed £[<] plus interest,<sup>42</sup> for the 29 circuits in dispute for March 2013 it is owed £[<] plus interest and for the 25 circuits in dispute in September 2013 it is owed £[<] plus interest.<sup>43</sup> Vodafone also submitted that its analysis in bringing the Dispute incurred significant costs and significant resources.<sup>44</sup>
- 2.35 The remedies Vodafone requested are outlined in paragraphs 4.84 and 4.85, in Section 4.

### Submissions from BT

- 2.36 We provided a copy of Vodafone's Dispute Submission to BT on 18 August 2015. BT provided its initial comments on Vodafone's Dispute Submission and whether we should open the Dispute on 26 August 2015. These are summarised below:

2.36.1 BT submitted that the issues in dispute are contractual in nature<sup>45</sup>. BT further submits that "*Vodafone has not substantiated any of the claims made about BT's compliance with applicable regulatory conditions*".<sup>46</sup>

2.36.2 BT did not consider that it would be an appropriate use of section 185 of the 2003 Act for Ofcom to determine Vodafone's allegations of breach of contract.<sup>47</sup>

2.36.3 Further, BT argues that the inclusion of Deemed Consent was agreed with industry and that the CSA offers a process for CPs to challenge BT's use of it, noting that "*Section 16 of the CSA sets out a process for escalation and dispute resolution...*"<sup>48</sup> and that "*The DC challenge process is a mechanism giving CPs the right to query / challenge applications that will affect SLG payments*" adding that this mechanism "*does not represent a general failure by BT to make SLG payments proactively*".<sup>49</sup>

- 2.37 BT provided further comments on Vodafone's submission and the way in which it should be addressed by Ofcom in a letter to Ofcom on 25 September 2015. These comments are summarised below:

2.37.1 BT stated that Deemed Consent is "*a necessary and reasonable mechanism to manage the operational risk inherent in the delivery of complex engineering services and operates to qualify the obligation to deliver a service by the CDD in circumstances where on time delivery is not possible*" and the "*circumstances in which it is appropriate and reasonable to move the CDD were discussed and approved by CPs, the OTA and Ofcom in 2008*".<sup>50</sup>

2.37.2 BT said that one alternative to using Deemed Consent would be to require explicit consent on a circuit by circuit level. However, in BT's view this would

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<sup>42</sup> Paragraph 73, Vodafone's Dispute Submission.

<sup>43</sup> Paragraph 64, Vodafone's Dispute Submission.

<sup>44</sup> Paragraph 18(d), Vodafone's Dispute Submission.

<sup>45</sup> Paragraphs 1, 5, 14 and 17, BT's letter to Ofcom of 26 August 2015.

<sup>46</sup> Paragraph 10, BT's letter to Ofcom of 26 August 2015.

<sup>47</sup> Paragraph 4, 13 and 14, BT's letter to Ofcom of 26 August 2015.

<sup>48</sup> Paragraph 25, BT's letter to Ofcom of 26 August 2015.

<sup>49</sup> Paragraph 26, BT's letter to Ofcom of 26 August 2015.

<sup>50</sup> Paragraph 8, BT's letter to Ofcom of 25 September 2015.

introduce a further step into an already complex delivery process, leading to further delay to the detriment of end users.<sup>51</sup>

- 2.37.3 BT also stated that *"it would have been less costly for Vodafone to address and escalate when required the issues at the time they arose, making use of the processes that were available (none of which are burdensome), rather than going through a retrospective exercise of reviewing each order"*.<sup>52</sup>
- 2.37.4 BT provided specific comments on Vodafone's categories of disputed orders, which are set out in Section 4. BT also made a number of arguments about the nature of the matters in dispute and regarding Ofcom's role in resolving these matters. These arguments are summarised and addressed in Section 3 of this document.
- 2.37.5 In reference to Vodafone's proposed remedy, BT said that Vodafone cannot rely on a three month sample to extrapolate its conclusions over 17 months as it cannot be determined whether the sample months are reflective of the entire period. BT also stated that it is for the complainant to prove loss, not for BT to prove compliance and that BT should not be required to pay Vodafone's costs. BT argued that it has fully engaged in commercial negotiations, and Vodafone did not challenge the application of Deemed Consent at the time, which would have been more efficient than waiting two years to begin negotiations.<sup>53</sup>
- 2.37.6 BT argues that its regulatory obligation is to contract with all CPs on the basis of a Reference Offer and not to contract with others on the basis of terms which are different from those contained in the Reference Offer. *BT "strongly objects to the allegation that, by breaching the contract provisions (which it denies), it has also breached the regulatory obligations on it"*.<sup>54</sup> BT's arguments regarding the relevance of its regulatory obligations to the matters in dispute and Ofcom's view are detailed in Section 3 of this document (see paragraphs 3.6 to 3.10)
- 2.37.7 In BT's view, the issues raised by Vodafone's submission are *"not instances where BT has misused the concept of Deemed Consent ("DC"). They are process-related and depend on the interpretation and application of the Connectivity Service Agreement"*.<sup>55</sup> BT adds that it has internal mechanisms and processes in place to ensure that Deemed Consent is applied according to the provisions within that contract.<sup>56</sup> BT states that *"The issues at stake in Vodafone's allegations... are not instances of misusing the concept of "DC" or compliance-related issues. They are process-related and the processes are being reviewed and worked on via industry negotiations"*.<sup>57</sup>
- 2.37.8 BT's arguments regarding remedies and Ofcom's view in regards to these are detailed in Section 3 of this document (paragraphs 3.12 to 3.20).

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<sup>51</sup> Paragraph 10, BT's letter to Ofcom of 25 September 2015.

<sup>52</sup> Paragraph 84, BT's letter to Ofcom of 25 September 2015.

<sup>53</sup> Paragraphs 80 to 86, BT's letter to Ofcom 25 September 2015.

<sup>54</sup> Paragraph 31, BT's letter to Ofcom of 25 September 2015.

<sup>55</sup> Paragraph 2, BT's letter to Ofcom of 25 September 2015.

<sup>56</sup> Paragraph 18, BT's letter to Ofcom of 25 September 2015.

<sup>57</sup> Paragraph 52, BT letter to Ofcom of 25 September 2015.

## Legal framework for the consideration of disputes

- 2.38 Section 185(1)(a) of the Communications Act 2003 (the "2003 Act") provides (in conjunction with section 185(3)) that in the case of a dispute relating to the provision of network access between different CPs, any one or more of the parties to such a dispute may refer it to Ofcom. Section 185(1A) of the 2003 Act provides (in conjunction with section 185(3)) that in the case of a dispute relating to the provision of network access between a CP and a person who is identified, or is a member of a class identified, in a condition imposed on the CP under section 45 of the 2003 Act, and where the dispute relates to entitlements to network access that the CP is required to provide to that person by or under that condition, any one or more of the parties may refer it to Ofcom.
- 2.39 Section 186(2) of the 2003 Act provides that where a dispute is referred to Ofcom in accordance with section 185, Ofcom must decide whether or not it is appropriate to handle it. Section 186(3) provides that Ofcom must decide that it is appropriate for it to handle a dispute falling within section 185(1A) unless there are alternative means available for resolving the dispute. A resolution of the dispute by those means must be consistent with the Community requirements set out in section 4 of the 2003 Act, and those alternative means must be likely to result in a prompt and satisfactory resolution of the dispute.
- 2.40 Ofcom's powers in relation to making a dispute determination are limited to those set out in section 190 of the 2003 Act. Except in relation to disputes relating to the management of the radio spectrum, Ofcom's main power is to do one or more of the following:
- (i) make a declaration setting out the rights and obligations of the parties to the dispute (section 190(2)(a));
  - (ii) give a direction fixing the terms or conditions of transactions between the parties to the dispute (section 190(2)(b));
  - (iii) give a direction imposing an obligation to enter into a transaction between themselves on the terms and conditions fixed by Ofcom (section 190(2)(c)); and
  - (iv) give a direction requiring the payment of sums by way of adjustment of an underpayment or overpayment, in respect of charges for which amounts have been paid by one party to the dispute, to the other (section 190(2)(d)).
- 2.41 A determination made by Ofcom to resolve a dispute binds all the parties to that dispute (section 190(8)).
- 2.42 When resolving a dispute under the provisions set out in sections 185 to 191 of the 2003 Act, Ofcom is exercising one of its functions. As a result, when Ofcom resolves disputes it must do so in a manner which is consistent with both Ofcom's general duties in section 3 of the 2003 Act, and (pursuant to section 4(1)(c) of the 2003 Act) the six Community requirements set out in section 4 of the 2003 Act, which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive.<sup>58</sup>

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<sup>58</sup> Directive 2002/21/EC of 7 March 2002.



## Accepting the Dispute for resolution

- 2.43 An enquiry phase meeting ("EPM") between the Parties and Ofcom was held on 2 September 2015.
- 2.44 Having considered submissions from Vodafone and BT, and the positions of both Parties as explained at the EPM, we reached the view that this was a dispute between CPs within the meaning of section 185(1A) of the 2003 Act. We were also satisfied that there were not alternative means for resolving the dispute and that it was appropriate for Ofcom to handle it.
- 2.45 In reaching this view, we took into account that the Parties had previously engaged in lengthy negotiations relating to the issues raised in this dispute. We also considered that given that certain aspects of this dispute related to BT's compliance with its SMP obligations, alternative means might not have provided an adequate resolution. Accordingly, we opened the Dispute and on 8 September 2015 we informed the Parties of our decision.

## Scope of the Dispute

- 2.46 We issued a draft scope to the Parties for comment on 3 September 2015. BT and Vodafone provided comments on the draft scope, on 4 and 7 September 2015 respectively.
- 2.47 Taking into account the views of the Parties, we defined the scope of the Dispute as determining:
1. *whether the use by BT of the "Deemed Consent Mechanism" (as contemplated by [Paragraph] 2.3 of Schedule 4C(i) of the Contract for Connectivity Services ("CSA")) over the period 1 September 2012 to 31 January 2014 in relation to the provision of Ethernet Services falling within the specific categories identified in Vodafone's dispute referral of 14 August 2015 was:*
    - a. *in accordance with the CSA such that BT complied with Condition HH5.9 (imposed pursuant to a notification of 8 December 2008 and Condition 6.9 (imposed pursuant to a notification of 28 March 2013); and*
    - b. *consistent with such services being provided on fair and reasonable terms and conditions in accordance with Condition HH1.2 (imposed pursuant to a notification of 8 December 2008) and Condition 1.2 (imposed pursuant to a notification of 28 March 2013).*
  2. *any appropriate exercise by Ofcom of its powers under section 190(2) of the Communications Act 2003 as part of Ofcom's determination resolving this dispute.*
- 2.48 This scope was published on the Competition and Consumer Enforcement Bulletin on 9 September 2015.<sup>59</sup>

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<sup>59</sup> See [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01165/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01165/).

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### **Interested parties**

2.49 TalkTalk and Sky have registered their interest in the outcome of the Dispute.

### **Information relied upon in resolving the Dispute**

2.50 These Provisional Conclusions draw on information provided by the Parties. This includes:

- Vodafone's Dispute Submission of 14 August 2015 and representations of 22 September 2015;
- BT's representations of 26 August 2015 and 25 September 2015; and
- BT's response of 8 October 2015 to Ofcom's section 191 ("s191") Notice information request of 24 September 2015.

2.51 Our analysis also refers to:

- BT's CSA;
- Ofcom's 2008 Statement and Directions regarding BT's SLGs for services including Ethernet provision; and
- Ofcom's 2008 and 2013 BCMR Statements.

## Section 3

# Analytical framework

## Introduction

- 3.1 In this section we set out our provisional response to the Parties' submissions relating to Ofcom's powers in determining this Dispute and the relationship between BT's contractual obligations, the SMP conditions and Ofcom's SLG Direction. We then set out our proposed analytical framework for approaching this Dispute.

## Application of SMP conditions to this case and Ofcom's dispute resolution powers

### Vodafone's arguments

- 3.2 Vodafone submitted that the Dispute relates to various aspects of compliance with the CSA and BT's SMP conditions. Vodafone considers that BT's application of Deemed Consent and failure to pay SLGs in each case is a breach of the CSA. Vodafone said that if Ofcom were to determine that the practices in dispute were permitted by the CSA, it should then also consider whether the terms of the CSA are (to the extent they permit that behaviour) fair and reasonable.<sup>60</sup>
- 3.3 Vodafone referred in particular to BT's SMP obligations to provide network access to a third party where reasonably requested in writing; and to provide such access as soon as reasonably practicable and on fair and reasonable terms, conditions and charges.<sup>61</sup>

### BT's arguments

- 3.4 In our letter sent to BT on 8 September 2015 we said that the scope of this Dispute was to assess whether the practices at issue were in accordance with BT's obligations under the CSA, such that BT complied with its SMP obligation to provide its services in accordance with its Reference Offer (see paragraph 2.2). We also said that we would consider whether use of Deemed Consent in these circumstances was consistent with such services being provided on fair and reasonable terms, in accordance with BT's SMP obligation.
- 3.5 BT argued that its SMP obligations were not engaged in this Dispute.<sup>62</sup> In BT's view, the regulatory points raised by Vodafone "*have been manufactured in order to artificially broaden the scope of a dispute which is essentially about alleged contractual breaches*"<sup>63</sup> It said in particular that even if there were instances of contractual breaches, this did not mean that BT had breached its SMP obligation to provide its services in accordance with its Reference Offer.<sup>64</sup> BT argued that if this were accepted, it would expose Ofcom to a requirement to open a dispute and examine it every time an allegation of a breach of the Reference Offer was made, even where the issues were contractual in nature. Ofcom would then be required to interpret and apply the contract provisions – which is classically a legal, rather than a

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<sup>60</sup> Paragraph 17 and 18, Vodafone's Dispute Submission.

<sup>61</sup> Paragraph 33, Vodafone's Dispute Submission.

<sup>62</sup> See for example BT's letter 26 August 2015.

<sup>63</sup> Paragraph 5, BT's letter to Ofcom of 26 August 2015.

<sup>64</sup> Page 11, BT's letter to Ofcom of 25 September 2015.

- regulatory exercise – as well as to investigate and make findings of facts in relation to the alleged breaches.<sup>65</sup>
- 3.6 BT submitted that its obligation under Condition HH5.9 and Condition 6.9 was to contract with all CPs on the basis of a Reference Offer and not to depart from that Offer.<sup>66</sup> If this SMP obligation was construed as a requirement not to breach the contract itself, this would have huge impractical consequences and would downgrade the importance of parties entering into commercial contracts underpinned by contractual remedies.<sup>67</sup>
- 3.7 Referring to the Supreme Court's ruling in *BT v Telefonica* (2014),<sup>68</sup> BT said that there is no reason under Article 8 of the Framework Directive why the parties to a Reference Offer contract would need to seek additional and speedy remedies from Ofcom in the form of administrative declarations in relation to past breaches of contract. The time-frames and procedural framework in relation to commercial litigation are far better suited to resolution of these issues.<sup>69</sup>
- 3.8 BT also said that it would be contrary to the requirements of contractual certainty to make retrospective changes to the Reference Offer, which would be the effect of finding that BT's approach to Deemed Consent was not fair and reasonable even though it accorded with the CSA.<sup>70</sup>
- 3.9 BT added that there are ongoing discussions in industry to deliver changes to the Deemed Consent mechanism and that this is the appropriate forum to discuss these issues. BT pointed to the consideration of Deemed Consent in the 2015 BCMR consultation and stated that "*Ofcom may conclude there is a need to impose specific regulatory conditions or that matters should be dealt with via industry discussions*".<sup>71</sup>
- 3.10 BT also argued that in the May 2015 BCMR consultation,<sup>72</sup> Ofcom provisionally considered that introducing specific rules as to the use of Deemed Consent may lead to unintended consequences or interfere with the development of the new industry process. BT argued that Ofcom should decline to determine issues relating to the specific rules for Deemed Consent in the context of a dispute.<sup>73</sup>

#### Ofcom's view

- 3.11 We agree with BT that disagreements about the operation of the CSA raise contractual issues between the parties to this agreement. However, as explained paragraphs 2.2 to 2.4, BT's SMP obligations include a requirement to provide network access at the charges, terms and conditions in the relevant Reference Offer and not to depart therefrom either directly or indirectly. It is our view that action by BT

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<sup>65</sup> Paragraph 29, BT's letter to Ofcom of 25 September 2015.

<sup>66</sup> Paragraph 30, BT's letter to Ofcom of 25 September 2015.

<sup>67</sup> Page 11, BT's letter to Ofcom of 25 September 2015.

<sup>68</sup> [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0204\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0204_Judgment.pdf).

<sup>69</sup> Page 12, BT's letter to Ofcom of 25 September 2015.

<sup>70</sup> Page 14, BT's letter to Ofcom of 25 September 2015.

<sup>71</sup> Paragraph 14, BT's letter of 26 August 2015.

<sup>72</sup> Paragraph 13.118, [http://stakeholders.ofcom.org.uk/binaries/consultations/bcmr-2015/summary/BCMR\\_Sections.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/bcmr-2015/summary/BCMR_Sections.pdf).

<sup>73</sup> Page 16, BT's letter to Ofcom of 25 September 2015.

which is not in accordance with its contractual obligations is also capable of being in breach of this regulatory obligation.<sup>74</sup>

- 3.12 Where Ofcom finds that BT has acted in a way that is in breach of its SMP obligation regarding compliance with its Reference Offer, Ofcom may, pursuant to its powers under section 190(2) of the 2003 Act, declare the parties' rights and obligations, or impose further obligations aimed at putting the parties into the position they would have been in had BT complied with its regulatory obligation. In cases where Ofcom concludes that BT has not provided its services in accordance with the contractual provisions that reflect its Reference Offer, it may consider appropriate to declare the Parties' rights and obligations under these contractual provisions.
- 3.13 We disagree in this respect with BT's argument that this SMP obligation only requires it to enter into a contract on the terms of its Reference Offer and that giving effect to the resulting contractual obligations falls outside the scope of this obligation (and Ofcom's dispute resolution function). If it was permissible for BT only to contract on the terms of its Reference Offer but to then depart materially from it when providing its services in practice, the effectiveness of Condition HH5.9 or Condition 6.9 would be undermined.
- 3.14 In addition, Ofcom considers that action by BT which is not in accordance with its obligations under the CSA is capable of also being in breach of its obligation to provide its services under fair and reasonable terms as well as to comply with the SLG Direction made pursuant to that requirement. For this reason, we have proposed to include this aspect as an element of our analysis.
- 3.15 We accept, however, that contractual rights and obligations should only be considered as part of a dispute under section 185(1A) of the 2003 Act in order to examine compliance with the relevant regulatory obligations. From this perspective, we agree with BT that in this case not every contractual breach will automatically equate to a breach of the SMP conditions. In approaching this Dispute, we have therefore considered whether any action by BT which would not be in accordance with its obligations under the CSA would also be in breach of its SMP obligations. In doing so, we have taken into account, pursuant to our duties under section 3 of the 2003 Act and pursuant to the six Community requirements set out in section 4 of the 2003 Act, the seriousness of each relevant issue, by reference to the objectives that the SMP conditions aim to achieve.
- 3.16 Specifically, the requirement to publish a Reference Offer and to provide services on its terms, serves the following purposes: to assist transparency for the monitoring of potential anti-competitive behaviour; and to give visibility to the terms and conditions under which other providers will purchase wholesale services. The SMP condition also aims at ensuring that CPs have the necessary information to allow them to make informed decisions about purchasing Ethernet services in order to compete in downstream markets. This helps to ensure stability in markets without which incentives to invest might be undermined and market entry may be rendered less likely.<sup>75</sup>

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<sup>74</sup> It is also possible for an action which is in accordance with BT's contractual obligations to be in breach of its other regulatory obligations.

<sup>75</sup> See <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/> paragraphs 12.339 – 12.340 and 12.349. See also <http://stakeholders.ofcom.org.uk/consultations/bcmr08/>, Table 8.11.

- 3.17 The principal aim of the requirement for BT to provide its services on fair and reasonable terms is to prevent supply of such services on terms that amount to a refusal to supply or which would otherwise prevent or restrict competition in the relevant markets and enable BT to monopolise the provision of services in the related downstream markets.<sup>76</sup>
- 3.18 In assessing BT's compliance with its SMP obligation to provide its services on fair and reasonable terms and as soon as reasonably practicable, we also take into account the SLG Direction issued by Ofcom under section 49 of the 2003 Act. As set out in paragraph 2.5 and 2.6 above, this Direction required BT to amend the terms and conditions which govern the supply of its Ethernet services to require, amongst other things, that any extension of the delivery timeframes for these services shall be made subject to the consent of the CP concerned.
- 3.19 We also consider that it is possible in principle for BT to have been in breach of the SMP obligation to provide its services on fair and reasonable terms even where it has provided its services in accordance with the CSA. We do not consider that a finding that BT has acted in breach of its SMP conditions would in these circumstances undermine the requirements of contractual certainty. The assessment of BT's past compliance with its SMP obligations is in our view inherent in the dispute resolution mechanism introduced by the 2003 Act.
- 3.20 We note BT's reference to the mechanisms enshrined in the CSA for resolving contractual disputes between the Parties and its argument that these were more appropriate means for resolving the matters referred to us by Vodafone. As set out in our letter of 8 September 2015, Ofcom reached the view, at the end of the Enquiry Phase, that this was a dispute falling within section 185(1A) of the 2003 Act and that it was appropriate to handle it. In reaching this view we considered whether there were alternative means available for resolving the dispute, pursuant to section 186(3) of the 2003 Act. As set out in paragraphs 2.44 and 2.45 above, our decision was that no such alternative means existed to resolve the Dispute promptly and satisfactorily.
- 3.21 We also note BT's reference to our comments in the May 2015 BCMR consultation document<sup>77</sup>. We emphasise, however, that the forward looking assessment we undertake for the purposes of our current BCMR is different from the framework that we apply when resolving disputes in relation to BT's adherence to its existing regulatory obligations.

## Analytical Framework

- 3.22 This section sets out our proposed analytical framework for the assessment of the dispute, which is structured around three questions:
- 3.22.1 First; was use of Deemed Consent by BT during the Relevant Period in the specific categories of circumstances identified in Vodafone's Dispute Submission in accordance with the CSA?
- 3.22.2 Second; are there any reasons to consider that:

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<sup>76</sup> See paragraph 9.12 to 9.18, Figure 11.4 and paragraph 11.48 of <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/>. See also Table 8.11 of <http://stakeholders.ofcom.org.uk/consultations/bcmr08/>.

<sup>77</sup> <http://stakeholders.ofcom.org.uk/consultations/bcmr-2015/>.

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- (i) any behaviour by BT that was not in accordance with the terms of the CSA would also be considered to be in breach of:
  - BT's SMP obligations relating to the provision of its services at the terms in its Reference Offer, and/or
  - BT's SMP obligations relating to the provision of its services as soon as reasonably practicable; on fair and reasonable terms; and, in accordance with Ofcom's SLG Direction, or
- (ii) even where BT's behaviour was in accordance with the terms of the CSA, was the use of Deemed Consent nevertheless in breach of BT's SMP obligations relating to the provision of its services as soon as reasonably practicable; on fair and reasonable terms; and, in accordance with Ofcom's SLG Direction?

3.22.3 Third; in light of our answer to the above, is there any appropriate exercise by Ofcom of its powers under section 190(2) of the 2003 Act as part of Ofcom's determination resolving this Dispute?

### Focus of Analysis

- 3.23 As set out paragraph 2.33, Vodafone classified the individual orders it disputes into a number of categories. These were set out in paragraph 62 of Vodafone's referral. Vodafone also provided a breakdown of the individual orders it disputes, under each of these categories, together with a short description of the issues arising for each category.
- 3.24 In determining this Dispute, we believe it is appropriate to focus on the categories of practices set out by Vodafone, rather than assessing the individual orders disputed by it. We believe this is consistent with our overall approach to this Dispute, as set out paragraph 2.47, which aims at assessing the regulatory issues that arise. In addition, we do not believe it is practicable, in the statutory timeframe available, to assess and reach a determination for all individual orders that have been detailed by Vodafone. In line with this approach, we do not propose to assess whether BT has engaged in the practices at issue in each individual order disputed by Vodafone. Our analysis is instead focussed on the type of practice concerned, should this have been applied by BT to any individual order during the Relevant Period
- 3.25 As discussed in paragraph 2.33, Vodafone has grouped the examples of where it believes BT has misapplied Deemed Consent into the following categories:
- (i) Insufficient reasons given;
  - (ii) Reasons not valid/CDD not set as soon as reasonably practicable;
  - (iii) No proactive written communication that Deemed Consent applied;
  - (iv) Retrospective application of Deemed Consent; and
  - (v) Delays in processing un-suspension requests.
- 3.26 These categories form a starting point on which to base our analysis. However, we note that each of Categories (i)-(iii) above raise a number of issues. We have separated these out to create a total of seven categories warranting distinct

consideration by us (and for clarity, we have also amended Categories (iv) and (v) above to more accurately reflect what we understand to be the overarching concerns raised by Vodafone). The seven Categories are:

- Category 1: No notice given of the intention to deem consent for a change of CDD;
- Category 2: Insufficient level of reasoning provided by BT;
- Category 3: No reliance on DC Codes in the CSA for the application of Deemed Consent;
- Category 4: New CDD date set under Deemed Consent incorporating additional delays that did not amount to circumstances permitting the application of Deemed Consent;
- Category 5: Notice of Deemed Consent not provided in writing;
- Category 6: Retrospective application of Deemed Consent to change the CDD; and
- Category 7: Extension of the CDD of un-suspended orders for a period longer than the initial suspension period.

3.27 We note that some of the orders in dispute might fit into more than one of the categories above (e.g. in some cases, notice to extend the CDD was allegedly given retrospectively and only a DC code was provided as a reason to justify the extension). However, for clarity our provisional conclusions assess each category of alleged behaviour individually.

### **Analytical framework**

3.28 For this Dispute, we are therefore assessing each of the seven categories by going through the following steps.

3.29 In **Step 1** we consider for each of the seven categories whether, if BT had engaged in that type of behavior, this would not be in accordance with the terms of the CSA.

<b><i>Step 1. Was use of Deemed Consent by BT during the Relevant Period in the specific categories of circumstances identified in Vodafone’s Dispute Submission in accordance with the CSA?</i></b>	
<u>Category of complaint, as described by Vodafone</u>	<u>Key considerations</u>
1. No notice given of the intention to deem consent for a change of CDD.	Was the application of Deemed Consent without notice in accordance with the CSA?
2. Insufficient level of reasoning provided by BT.	Does Paragraph 2.3 require that ‘reasons to justify’ will always be provided where BT deems consent?  If so, what level of detail was required when providing “reasons to justify”?:



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	<ul style="list-style-type: none"> <li>• what purpose must provision of "reasons to justify" meet?</li> <li>• is communication of the relevant DC code sufficient?</li> <li>• can the same DC code be applied more than once?</li> </ul>
3. No reliance on DC Codes in the CSA for the application of Deemed Consent.	Was use of Deemed Consent for reasons other than the ones listed in Paragraph 2.3 of schedule 4C(i) the CSA permissible under the CSA?
4. New CDD date set under Deemed Consent incorporating additional delays that did not amount to circumstances permitting the application of Deemed Consent.	Was setting the CDD in this way in accordance with the requirements of the CSA?
5. Notice of Deemed Consent not provided in writing.	Was notification of Deemed Consent by means other than in writing in accordance with the CSA?
6. Retrospective application of Deemed Consent to change the CDD.	Under what circumstances, if any, was such retrospective application in accordance with the requirements of the CSA?
7. Extension of the CDD of un-suspended orders for a period longer than the initial suspension period.	Was extending the CDD in this way in accordance with the requirements of the CSA?

- 3.30 Under **Step 2** we assess whether there are any reasons to consider that the behaviour under each category would be in breach of the relevant SMP obligation (see paragraphs 2.2 to 2.4. Step two comprises two alternative questions, depending on the outcome to our assessment under Step 1 (Steps 2a and 2b).
- 3.31 Step 2a applies to those categories for which we have provisionally concluded that BT's practice would not be in accordance with the CSA. For these categories, we go on to consider whether BT would also have been:
- 3.31.1 In breach of HH5.9 or Condition 6.9 (i.e. the requirement to provide access at the terms and conditions in the relevant Reference Offer and not to depart therefrom either directly or indirectly); and/or
- 3.31.2 In breach of Condition HH1.2 or Condition 1.2 (i.e. the regulatory requirements to provide access on fair and reasonable terms; as soon as reasonably practicable; and, in accordance with Ofcom's SLG Direction).
- 3.32 In making this assessment, we consider in particular whether BT's behaviour would depart from the requirements of the CSA such that it would undermine the purposes of these Conditions.
- 3.33 Step 2b applies to those categories of practices for which we have provisionally concluded that BT would have acted in accordance with the CSA. For these categories, we go on to consider whether there are any other reasons to believe that BT would nonetheless have been in breach of Condition HH1.2 or Condition 1.2.

**Step 2a. Where we provisionally conclude that use of Deemed Consent by BT WAS NOT in accordance with the CSA, are there any reasons to consider that the practice would also have been in breach of:**

- (i) BT's SMP obligations set out in Condition HH5.9 or Condition 6.9, and/or**
- (ii) BT's SMP obligations set out in Condition HH1.2 or Condition 1.2,**

**Step 2b. Where we provisionally conclude that use of Deemed Consent by BT WAS in accordance with the CSA, are there any other circumstances indicating that use of Deemed Consent would have been in breach of BT's SMP obligations set out in Condition HH1.2 or Condition 1.2.**

- 3.34 In **Step 3**, we consider whether it is appropriate to determine any remedy in light of a) our analysis under Steps 1 and 2 and b) the Parties' arguments regarding remedies.

**Step 3. In light of our analysis under Question 1 and/or 2, is there any appropriate exercise by Ofcom of its powers under section 190(2) of the Communications Act 2003 as part of Ofcom's determination resolving this Dispute.**

## Section 4

# Analysis and provisional conclusions

## Introduction

- 4.1 In this section we set out our provisional assessment of each of the seven categories of practices set out in Vodafone's Dispute Submission by reference to our analytical framework. We then present our proposals on remedies.

## Assessment by category

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

#### Vodafone's arguments

- 4.2 Vodafone alleged that "*in some cases, BT has failed to provide Vodafone with any proper notification that deemed consent was being applied. In those cases, Vodafone notes that there is a clear breach of the CSA*".<sup>78</sup>

#### BT's arguments

- 4.3 BT stated that it has previously accepted that there were circumstances in which it had not provided any communication [X]<sup>79</sup>
- 4.4 In its s191 response, BT stated that "*BT's policy is that notice of a 'reasonable time period' must be given to the CP when DC is applied on a circuit which results in a change of CDD. BT's process does not provide for a situation when no notice is given to deem consent for a change of CDD*".<sup>80</sup>

#### Ofcom's view

#### **Step 1: Would the practice be in accordance with the CSA?**

- 4.5 Vodafone has made a number of allegations regarding failure by BT to provide "proper" notification of its intention to rely on Deemed Consent. As set out in our analytical framework, at paragraph 3.26, we have considered it necessary to separate Vodafone's allegations that *no* notice has been given (Category 1, which we discuss here) from allegations concerning the content (see Categories 2, 3 and 7 below), timing (see Categories 6 and 7) or form of the notification (see Category 5 below) in cases where notice was given.
- 4.6 Paragraph 2.3 of the CSA requires *that BT will notify the Communications Provider as soon as reasonably practicable where it intends to deem consent*.<sup>81</sup> Our provisional view is that BT would not have acted in accordance with this clause in cases where it deemed Vodafone's consent, without notifying it of its intent to do so.

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<sup>78</sup> Paragraph 62, page 21 of Vodafone's Dispute Submission.

<sup>79</sup> Paragraph 68, BT's letter to Ofcom of 25 September 2015.

<sup>80</sup> Page 14, BT's 8 October 2015 response to Ofcom's s191 information request.

<sup>81</sup> See Annex 3 to this document.

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4.7 We note that the Parties appear to dispute whether or not notice had been given by BT in some circumstances.<sup>82</sup> For the purposes of our analysis, and consistent with our overall approach, we have not considered whether notification was actually given in these individual cases.

**Step 2: Are there any reasons to consider that the practice would also have been in breach of Conditions HH5.9 or 6.9 and/or HH1.2 and 1.2:**

4.8 The provisions of the CSA regarding the provision of Ethernet services within specified timeframes contribute towards ensuring that BT complies with its SMP obligation to provide its services on fair and reasonable terms and as soon as reasonable practicable. As set out by BT, Deemed Consent was aimed to "*minimise the additional time that would otherwise be injected into the provisioning process by obtaining explicit consent*".<sup>83</sup> We consider a key aspect of this mechanism to be that CPs should be notified of BT's intention to rely on Deemed Consent. This was also the position underlying the SLG Direction, which requires that BT provides reasons, and obtains prior consent for, any extensions to the delivery timelines stipulated in the SLG Direction.

4.9 Failure by BT to notify the CP of its intent to deem consent risks reducing the effectiveness of BT's obligations in relation to the provision of its services. Specifically, notifying a CP of an upcoming delay (and the reasons for such a delay), allows that CP to manage the provision of its services with its end-user, where applicable. In the context of the CSA, such notification also allows CPs to appeal the use of Deemed Consent and/or the length of the CDD extension. Failure to do so removes that transparency. Departure by BT from the terms of the CSA also undermines the certainty that publication of its Reference Offer aims to achieve about the terms under which it will provide its services.

4.10 For these reasons we provisionally conclude that where BT gave no notice of its intention to deem consent for a change of the CDD it would have been in breach of its obligations under Condition HH5.9 or 6.9 and Condition HH1.2 or 1.2. BT's practice would also be in breach of the SLG Direction in cases where, by deeming consent in this way, BT delivered its services after the 57th day (see paragraphs 2.6 to 2.8).

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

Vodafone's arguments

4.11 Vodafone believes that BT did not comply with its contractual obligations where it only gave a DC code (see Table 3 in Section 2) or referred to the order being a "category 2" (see Openreach's provision categories for Ethernet products at Table 2 in Section 2 above) as a reason to extend the CDD. It argues that a "*mere reference to the fact that a circumstance allowing "deemed consent" has arisen does not automatically imply that the extension is justified*".<sup>84</sup>

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<sup>82</sup> Based on Vodafone's submission, the relevant orders appear to be ONEA912653, ONEA312993, ONEA513460, ONEA713404, ONEA412618, ONEA615102, ONEA915155, ONEA215612 and ONEA114611. In line with our analysis and overall approach, we have not taken a view on individual orders.

<sup>83</sup> Paragraph 10, BT's letter to Ofcom of 25 September 2015.

<sup>84</sup> Paragraph 62, page 22, Vodafone's Dispute Submission.

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- 4.12 Vodafone pointed in particular to BT's use of the DC22 code (relating to the need for infrastructure build - see Table 3 in Section 2), arguing that the fact that infrastructure build is necessary is insufficient information for Vodafone to establish whether a CDD extension is reasonably required and does not comply with the CSA's requirement that BT "provide reasons to justify".
- 4.13 Vodafone submitted that,<sup>85</sup> when relying on DC22, BT cannot meet the requirements of the CSA to deem consent without providing the following information:
- the type of infrastructure required;
  - the steps BT is required to take to build the infrastructure; and
  - the estimated time period for the infrastructure build and evidence that this time is consistent with BT's SMP obligation to provide the service as soon as reasonably practicable.
- 4.14 Vodafone also alleged that, for some orders, BT has used Deemed Consent to extend the CDD more than once for the same incident, without giving any further explanation.<sup>86</sup>

#### BT's arguments

- 4.15 BT argued that the provision of the code alone is compliant with the CSA as each DC code already has a full description associated with it which aligns with the justifications set out in the CSA and is readily available to CPs. BT states that "*The contract requires that a party provide 'reasons to justify' the use of DC [Deemed Consent] and the provision of the code satisfies this requirement*".<sup>87</sup>
- 4.16 In its response to our s191 information request, BT said that "*The JC [Job Controller] should always aim to elaborate and provide a brief explanation of why the particular DC reason has been used... Human error may occur whereby a fuller explanation is not provided alongside the relevant code, however the codes represent specific and distinct scenarios and therefore a code in itself should be sufficient explanation of the reason for extension of the CDD*".<sup>88</sup> BT further submits that "*...there may be occasions where the DC code is repeated, but it would be for a new event, not for a reason that has already been resolved*".<sup>89</sup>

#### Ofcom's view

##### **Step 1: Would the practice be in accordance with the CSA?**

- 4.17 Paragraph 2.3 provides that "*BT will (i) provide reasons to justify, and (ii) obtain the Communications Provider's prior written consent (not to be unreasonably withheld or delayed) to extend the CDD beyond (...). 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*".

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<sup>85</sup> Paragraph 62, page 22, Vodafone's Dispute Submission.

<sup>86</sup> Paragraph 62, page 23, Vodafone's Dispute Submission.

<sup>87</sup> Paragraph 59, BT's letter to Ofcom of 25 September 2015.

<sup>88</sup> Page 16, BT's 8 October 2015 response to Ofcom's s191 information request.

<sup>89</sup> *Ibid.*

- 4.18 It is our provisional view that, under a proper reading of the provision, the requirement under (i) of Paragraph 2.3 (to "provide reasons to justify") applies whether BT obtains or deems consent for extending the CDD pursuant to (ii) of that Clause. Our provisional conclusion is that in providing a DC Code as part of the notification of an intention to deem consent, BT was acting in accordance with this requirement. We also consider that the same conclusion would apply in circumstances where BT has applied the same Code more than once, without giving any further explanation for this.
- 4.19 In relation to identifying an order as "category 2", we note that the CSA only allows BT to deem a CP's consent in the circumstances listed in Paragraph 2.3 of Schedule 4C(i). BT's "category 2" description refers to circumstances where "*no fibre to the CP building exists, but core routing is available nearby*" and that duct, cabling or tubing is required.<sup>90</sup> This would appear to relate to one of the circumstances listed under Paragraph 2.3 ("need for infrastructure build") and reliance on this reason would therefore be in accordance with the CSA. Reference to BT's "category 2" also appears to meet the CSA requirement that BT should provide "reasons to justify" its reliance on Deemed Consent. For these reasons, our provisional view is that citing "category 2" would be in accordance with BT's contractual obligations.

**Step 2: Are there any reasons to consider that the practice would also have been in breach of Conditions HH5.9 or 6.9 and/or HH1.2 and 1.2:**

- 4.20 The practice in dispute in this Category involves BT providing notification of its intent to deem consent as well as giving a justification that falls within the list of circumstances in which BT is allowed to deem consent under the CSA.
- 4.21 In respect of BT's SMP obligations, Vodafone's concern is that BT's application of a DC code alone does not provide sufficient information to demonstrate that the extended CDD is consistent with BT's regulatory requirement to provide the service 'as soon as reasonably practicable'. Vodafone's separately argues that terms permitting BT to deem consent in circumstances where a CP would have otherwise reasonably withheld consent, cannot be fair and reasonable.<sup>91</sup>
- 4.22 Our provisional view is that notification by BT of its intent to deem consent must provide sufficient information for the CP to be able to: understand the reasons for the delay and the relationship between the reasons and the extent of the delay; where applicable, manage the extension of the CDD with its customer; and, challenge BT's reliance on Deemed Consent. In cases where BT provided insufficient transparency to meet these purposes, our provisional view is that BT would have been in breach of its obligation to provide its services on fair and reasonable terms.
- 4.23 We consider that provision of BT's DC Codes would be likely to offer sufficient transparency for the CP to be able to understand the circumstances and the likely impact on timescales in the following circumstances:
- 4.23.1 where the relevant DC Code relates to CP-instigated action or inaction, as is the case with DC7B and DC7D, which refer to scenarios in

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<sup>90</sup> Page 2, Annex II, BT's letter to Ofcom of 25 September 2015. Available to CPs at [https://www.cvf.openreach.co.uk/org/home/products/ethernet-services/downloads/ethernet\\_portfolio\\_training\\_pack.pdf](https://www.cvf.openreach.co.uk/org/home/products/ethernet-services/downloads/ethernet_portfolio_training_pack.pdf).

<sup>91</sup> Page 2, Vodafone's letter to Ofcom of 22 September 2015.

which an agreement has been reached between BT and the CP concerned; and/or

- 4.23.2 where the relevant DC Code provides sufficiently specific information for the CP to understand the circumstances that cause the stated delay, as is the case with DC27, which concerns asbestos contamination, and the reason for the delay in this example is very specific.
- 4.24 For the remaining DC Codes, our provisional view is that they would appear unlikely to offer sufficient transparency for the CP to understand the specific circumstances that cause the delay and the likely impact on timescales, particularly in cases where the delay is due to reasons which are outside the CP's control. In these cases, CPs would need to seek additional information in order to understand the circumstances under which consent is being deemed. We consider that this would particularly be the case where the same description is provided for multiple Codes, as is the case with 11 of the DC codes (DC7C and DC7J as well as DC21 and DC22); or, where the description provided for the relevant DC Code refers to a number of different circumstances, as is the case with DC7C, DC7J-DC7S and, DC21 and DC 22. We disagree with BT's submission that the DC Codes would in these circumstances refer to "specific and distinct scenarios". [§].
- 4.25 In reaching our provisional view, we acknowledge that, as submitted by BT, the provisioning of Ethernet services can be complex. However, the evidence we have seen suggests that more detailed information was readily available to BT and that this could have been communicated to CPs at a relatively low cost. We note in particular that when deeming consent for individual orders, BT appears to record in its system information that goes beyond the descriptions that it provides to CPs. Specifically, BT indicated in its response to our information request, that request for a CDD extension from within Openreach occurs via COSMOSS. BT advises that:
- "when the field engineers or planning staff encounter a delay that prevents them from progressing the provision order, they submit a date change request to the JC through the COSMOSS system. The request will include full details of the reason for the request to change the CDD, including names and telephone numbers of contacts that they have called and whether the contact was made successfully".<sup>92</sup>*
- 4.26 BT further advised that the Job Controller will use this information to check the legitimacy of a CDD date change request. In addition, BT said that it can send notes to CPs via its eCo system.<sup>93</sup>
- 4.27 Our provisional view is that, in light of the above, BT would, in certain circumstances, have been in breach of its SMP obligation to provide its services on fair and reasonable terms and as soon as reasonably practicable where it deemed consent without providing Vodafone any information beyond the applicable DC Code or "category 2" reference. In addition, we consider that in cases where, after deeming consent in this way, BT delivered its services after the 57th day, BT's action would also have been in breach of Ofcom's SLG Direction.

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<sup>92</sup> Page 4, BT's 8 October 2015 response to Ofcom's 191 information.

<sup>93</sup> Page 4, BT's 8 October 2015 response to Ofcom's 191 information.

### Category 3: Reliance on reasons not listed in the CSA for the application of Deemed Consent

#### Vodafone's arguments

- 4.28 Vodafone alleges that BT has used Deemed Consent for reasons that are not included in the CSA as circumstances under which Deemed Consent can be used, such as for correcting an internal error in setting the initial CDD.<sup>94</sup>

#### BT's arguments

- 4.29 BT believes that it has complied with the contract for all the orders in this category but noted that there seem to be differences in Vodafone and BT's views of the facts in some cases. BT provided the example of order ONEA113304 where; "*BT contended that it did everything according to the contract and the reason used was valid*".<sup>95</sup> Vodafone argued that it was not valid for BT to deem consent to move the CDD [§<]<sup>96</sup>
- 4.30 BT argued that "*Even if errors occur from time to time in the application of DC, this does not mean that BT is abusing the system or systematically mis-using it, or that the overall application of DC itself [is] not fair and reasonable*".<sup>97</sup> and Deemed Consent "*is not used in anyway outside of the manner in which it was intended for, and there is no process to depart from it. On occasions where BT errors or delays occur, the circuit will not be date managed and the CP is made aware, via formal means, that the order will fail its CDD*".<sup>98</sup>

#### Ofcom's view

##### **Step 1: Would the practice be in accordance with the CSA?**

- 4.31 Our provisional view is that on a proper interpretation of this provision, Paragraph 2.3 sets out an exhaustive list of the circumstances under which consent may be deemed. This is consistent with this mechanism being set out in the CSA as an exception to the general obligation of BT to obtain consent prior to extending a CDD. For these reasons, we provisionally conclude that BT would not have acted in accordance with the terms of the CSA, where it used reasons which are not outlined in Paragraph 2.3 of Schedule 4C(i) to deem consent. This would for example be the case where BT relied on "internal errors" on its part. In such circumstances it would appear that BT is required under the CSA to "*obtain the Communication Provider's prior written consent (not to be unreasonably withheld or delayed)*".
- 4.32 We note BT's view that the Parties seem to be in disagreement about the facts for some of the orders in dispute under our Category 3. Consistent with our overall approach to this Dispute (see paragraphs 3.24 to 3.34 above), we have not considered whether the practice described in this Category was indeed followed by BT in the individual cases disputed by Vodafone.

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<sup>94</sup> Paragraph 62, page 23, Vodafone Dispute Submission.

<sup>95</sup> Paragraph 66, BT's letter to Ofcom of 25 September 2015.

<sup>96</sup> [§<]

<sup>97</sup> Paragraph 3, BT's letter to Ofcom 25 September 2015.

<sup>98</sup> Page 16, BT's 8 October 2015 response to Ofcom's s191 information request.



**Step 2: Are there any reasons to consider that the practice would also have been in breach of Conditions HH5.9 or 6.9 and/or HH1.2 and 1.2:**

- 4.33 Where BT has used Deemed Consent on the basis of a justification not listed in the CSA, our preliminary view is that BT would have been in breach of its SMP obligations. Specifically, Ofcom considers that it is important that the Deemed Consent mechanism should only be used in exceptional circumstances, given its overall operation as a mechanism for extending the timeframes set in the SLA. This is also in breach of Ofcom's SLG Direction, which introduced the requirement that BT should obtain a CP's explicit consent to extend delivery deadlines. In this context, we believe that it is important for the effective operation of the Conditions HH1.2 and 1.2 that BT only relies on Deemed Consent in the limited circumstances agreed by the Parties. Adherence to these terms also ensures that there is sufficient transparency regarding the terms under which BT will be providing its services, as was intended by Conditions HH5.9 and 6.9.
- 4.34 Our preliminary view is therefore that reliance on reasons not listed in the CSA to apply Deemed Consent would have been in breach of the above SMP Conditions. Where, after deeming consent in this manner, BT extended the CDD beyond the 57th day, BT would also have been in breach of the SLG Direction (see paragraph 2.6).

**Category 4: New CDD date set under Deemed Consent incorporating additional delays that did not amount to circumstances permitting the application of Deemed Consent**

Vodafone's arguments

- 4.35 Vodafone alleged that in some instances in which it used Deemed Consent to extend a CDD, BT incorporated into that extension of the CDD past delays that "*were caused solely by BT*" and not reflecting the circumstances permitting the application of Deemed Consent as set out in Schedule 4c(i) of the CSA.<sup>99</sup> Vodafone points to an order (Circuit ONEA412644) by way of example.
- 4.36 In Vodafone's view, BT acted in breach of the CSA by not setting the revised CDD 'as soon as reasonably practicable'.<sup>100</sup>

BT's arguments

- 4.37 As with Category 3, BT believes it was in compliance with the contract for all orders in this category. For example, for order ONEA113251 BT argued that the delay was due to it waiting for information from Vodafone,<sup>101</sup> while Vodafone argued that:
- [redacted]<sup>102</sup>
- 4.38 In its response to our s191 information request BT told us that "*There is not policy or process in place whereby the CDD is moved for reasons other than that which is stated by the DC code description*".<sup>103</sup>

<sup>99</sup> Paragraph 62, Page 23 of Vodafone's Dispute Submission.

<sup>100</sup> Paragraph 62, Page 23 of Vodafone's Dispute Submission.

<sup>101</sup> Paragraph 65, BT's letter to Ofcom of 25 September 2015.

<sup>102</sup> [redacted]

<sup>103</sup> Page 15, BT's 8 October 2015 response to Ofcom's s191 information request.

Ofcom's view

**Step 1: Would the practice be in accordance with the CSA?**

- 4.39 Our provisional view is that any extension of a CDD which was not justified by one of the circumstances listed in the CSA would give rise to the same situation as that described in Category 3 above. For the reasons set out at paragraph 4.31, our provisional view is that such practice would therefore not be in accordance with the terms of the CSA.
- 4.40 We also note that Paragraph 2.3 of Schedule 4C(i) of the CSA requires that where BT deems consent to extend the CDD beyond the contractual deadlines, 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.*
- 4.41 Our provisional view is that the clear wording of this provision requires that the new CDD is set by BT as soon as reasonably practicable. We note that this interpretation is consistent with BT's SMP condition to provide network access as soon as reasonably practicable after receiving the request from a CP. In light of this, our provisional view is that BT's actions would not have been in accordance with this requirement in circumstances where it extended the CDD for a period going beyond what was justified by its reason for deeming consent.
- 4.42 Our provisional view is, therefore, that where BT set a new CDD that incorporates delays that are not covered by the circumstances listed at clauses 2.3 and 7 of Schedule 4C(i) of the CSA, it would have acted in a way that is not in accordance with its contractual obligations.

**Step 2: Are there any reasons to consider that the practice would also have been in breach of Conditions HH5.9 or 6.9 and/or HH1.2 and 1.2:**

- 4.43 Our provisional view regarding Category 4 is that where BT, after using Deemed Consent, set a new CDD which incorporated delays that did not amount to circumstances permitting the application of Deemed Consent, it would have been in breach of its SMP obligations.
- 4.44 Specifically, the requirement in the CSA that where BT deems consent it should set the revised CDD for as soon as reasonably practicable, reflects BT's SMP obligation to provide its services within this timeframe. Adherence to this obligation would require that any extension of the delivery timeframes reflects the reasons that justify it, i.e. that it is for no longer period than what is reasonably justified by the specific circumstances. For the reasons set out in paragraph 4.33, Ofcom also considers that it is important that the Deemed Consent mechanism is only used to the extent that is justified by the limited circumstances agreed by the Parties.
- 4.45 Our provisional conclusion is therefore that BT would have been in breach of its SMP obligations under Conditions HH1.2 and 1.2 and HH5.9 and 6.9 in cases where it set a new CDD which incorporated delays that did not amount to circumstances permitting the application of Deemed Consent. Where, after deeming consent in this manner, BT extended the CDD beyond the 57th day, BT would also have been in breach of the SLG Direction.

## Category 5: Notice of Deemed Consent not provided in writing

### Vodafone's arguments

- 4.46 Vodafone argued that BT's notification of its intention to deem consent "*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*".<sup>104</sup>
- 4.47 Vodafone stated that "*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*".<sup>105</sup>
- 4.48 Vodafone submitted that "*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*".<sup>106</sup>
- 4.49 Vodafone also argued that the CSA requires that notice must be given in writing by hand, fax, e-mail or first class post. Therefore, in Vodafone's view, BT has not acted in compliance with the CSA in all cases where written notification was not given, regardless of whether a phone call giving notice was recorded.<sup>107</sup>

### BT's arguments

- 4.50 BT explains that its "*policy and practice require job controllers to provide an email to the CP (via its Eco system) when a date change is appropriate. Eco system is an email based notification system. The accounts to which it communicates are provided by the CP and should, therefore, be actively monitored by the CP. BT does not accept any suggestion that the use of this system is somehow different from any other email based notification or amounts to "silent IT based updates"*".<sup>108</sup>
- 4.51 BT argues that it is not clear what Vodafone means by 'active' notification but there is no requirement for 'active' notification in the provisions of the contract and that, in any case, the notice requirements are clearly satisfied by email notification through the eCo system.<sup>109</sup> BT also notes that a telephone call which is followed up in writing would be a valid notification for the purposes of Deemed Consent.<sup>110</sup>
- 4.52 In response to our s191 information request BT states that "*The JC [Job Controller] must provide a written update on eCo in the form of an email to the CP. If a written update on eCo is not provided, DC cannot apply*".<sup>111</sup>

### Ofcom's view

#### **Step 1: Would the practice be in accordance with the CSA?**

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<sup>104</sup> Paragraph 62, page 24, Vodafone's Dispute Submission.

<sup>105</sup> Paragraph 62, page 23, Vodafone's Dispute Submission.

<sup>106</sup> Paragraph 62, page 24, Vodafone's Dispute Submission.

<sup>107</sup> Paragraph 62, page 23 and 24, Vodafone's Dispute Submission.

<sup>108</sup> Paragraph 69, BT's letter of 25 September 2015.

<sup>109</sup> Paragraph 69, BT's letter of 25 September 2015.

<sup>110</sup> Paragraph 70, BT's letter of 25 September 2015.

<sup>111</sup> Page 15, BT's 8 October 2015 response to Ofcom's s191 information request.

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4.53 The means by which BT may give notice under the CSA are set out in Condition 21 as follows:

## **21. NOTICES**

*21.1 All notices given under this Contract must be in writing and may be delivered by hand, fax, e-mail or first class post to the following:*

- (a) to the appropriate person for that matter indicated on the Customer Service Plan;*
- (b) for all other matters, in the case of notices from the Communications Provider, to the Communications Provider's BT Customer Business Manager;*
- (c) for all other matters, in the case of notices from BT, to the Communications Provider's registered office address or a fax number at its registered office or any alternative address or fax number or e-mail address which the Communications Provider notifies to BT*

*provided that any notice relating to contract termination, suspension or breach must be delivered by hand or first class post.*

*21.2 Subject to clause 21.1 above, a notice is duly served:*

- (a) if delivered by hand, at the time of delivery;*
- (b) if sent by first class post, three Working Days after the date of posting;*
- (c) if sent by fax, at the time of transmission; and*
- (d) if sent by email, at the time of transmission.*

4.54 We consider that it is clear from the wording of Condition 21 that notice must be given in writing. Therefore, we provisionally conclude that any orders for which BT provided notice to Vodafone in any form other than by hand, fax, e-mail or first class post would not be in accordance with the CSA.

4.55 As both Parties accept, we consider that notice by telephone which is subsequently followed up by written confirmation would satisfy the contractual notification requirements. However, we note that, as follows from the clear wording of Condition 21, notice can only be taken as served on the date when it is provided in writing in accordance with Condition 21.2.

4.56 As described in paragraph 4.46 above, Vodafone argued that BT's notification (through its eCo system) is a '*silent IT-based update that provides no proactive notification that a change has been made*'. We understand Vodafone's argument to be that the eCo system updates do not satisfy the requirement for a written notification under the terms of the CSA. BT disagrees with Vodafone's argument stating that the notice requirements are clearly satisfied by email notification through the eCo system.

4.57 Our provisional view is that if emails were sent to a designated Vodafone email address, then this satisfied the requirements of the CSA. We consider this to be the case whether the email was sent through the eCo system or through any other system.

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**Step 2: Are there any reasons to consider that the practice would also have been in breach of Conditions HH5.9 or 6.9 and/or HH1.2 or Condition 1.2:**

- 4.58 Our provisional view is that notification of BT's intent to deem consent by means other than the ones provided for in the CSA would not have been in breach of BT's SMP conditions. Where BT chose to notify a CP in this way we would expect it to hold appropriate records to show that such communications did indeed take place.

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

Vodafone's arguments

- 4.59 Vodafone asserts that allowing the retrospective application of Deemed Consent would be highly detrimental to CPs because retrospective application removes the ability for CPs to provide certainty to their customers about timeframes and provides a temptation to avoid or minimise SLG payments by allowing BT to retrospectively identify "*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 crystalise.*"<sup>112</sup>
- 4.60 Vodafone submitted that "*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.*"<sup>113</sup>
- 4.61 Vodafone argued that Deemed Consent "*operates as a mechanism to avoid the need to obtain the CP's "prior 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 prior to the CDD change.*"<sup>114</sup>

BT's arguments

- 4.62 BT argued that in the specific circumstances of some of the orders in dispute, there were scenarios where BT had no choice but to apply Deemed Consent after the facts. BT stated that this "*was particularly relevant to circuits where a delay (typically associated with a customer delay) was encountered at the end of the delivery process.*"<sup>115</sup> BT gave examples of orders where the engineer had not been able to gain site access and where power was unavailable.
- 4.63 BT believes that although, for some orders, notification was provided "a short time" after the events to which they related occurred, BT notified Vodafone 'as soon as reasonably practicable' and was therefore in compliance with the contract. BT noted that "*Vodafone has not identified a single instance where notifications have occurred after handover, and there is no evidence that there was a deliberate aim of minimising SLG payments at the end of the provisioning process.*"<sup>116</sup>

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<sup>112</sup> Paragraph 62, page 24 and 25, Vodafone's Dispute Submission.

<sup>113</sup> Paragraph 62, page 25, Vodafone's Dispute Submission.

<sup>114</sup> Paragraph 62, page 25, Vodafone's Dispute submission.

<sup>115</sup> Paragraph 73, BT's letter to Ofcom of 25 September 2015.

<sup>116</sup> Paragraph 74, BT's letter to Ofcom of 25 September 2015.

- 4.64 BT told us that "*BT's policy is that the CP should be notified formally in advance. It is only in exceptional circumstances that DC would be applied retrospectively, and in these circumstances the CP would be notified as soon as practically possible after the delay. DC cannot apply retrospectively if it is not done in good time allowing the CP to inform the end-customer*".<sup>117</sup>
- 4.65 BT advised that retrospective application of DC "*is only usually made when there is a dependence on a third party, for example a local authority permitting Traffic Management*".<sup>118</sup> BT adds that it may also need to deem consent "*where a delay has occurred at the end of the delivery process and delays have occurred in quick succession*" and by example, points to a BT engineer unable to gain site access in order to complete a handover.<sup>119</sup> In BT's view, on the basis that it could not have reasonably foreseen the delay, it could only have applied Deemed Consent after the delay had occurred.

### Ofcom's view

#### **Step 1: Would the practice be in accordance with the CSA?**

- 4.66 Paragraph 2.3 requires that *BT will notify the Communications Provider as soon as reasonably practicable where it intends to deem consent*. Accordingly, once BT is aware that it intends to extend the CDD, it should notify the CP of this fact as soon as practicable.
- 4.67 We accept BT's argument that notice could not be given before BT itself became aware of the delay. By way of example, we note that BT pointed to cases where engineers arrived at the site to complete installation but were unable to gain access or were unable to gain access to power. In such circumstances, we appreciate it would not have been possible for BT to provide notice to Vodafone before the CDD.
- 4.68 Therefore, we agree that where delays occurred on the day of the CDD itself, BT cannot reasonably have been expected to notify Vodafone of the change before that day.
- 4.69 However, we would anticipate that BT would nonetheless have been able to provide notice of these events on the day of the CDD: the BT engineer would be reasonably expected to notify BT's Job Controller immediately that they are unable to carry out the planned installation. The Job Controller could then contact the CP *as soon as reasonably practicable*. Such notifications could take place via an update on the eCo system and could be completed within the same day. Based on the two areas of 'exceptional circumstances' outlined by BT (see paragraph 4.62 above), we therefore provisionally conclude that notification by BT of its intent to deem consent on a date after the CDD<sup>120</sup> would not meet the CSA's requirements.
- 4.70 Separate from the above, we accept that BT may, in certain circumstances, not be able to notify a CP of a new CDD at the time of notifying its intent to deem consent. It appears to us that the exceptional circumstances outlined by BT, most notably the reliance on third parties to advise of the length of delays, could reasonably delay notification of the new CDD.

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<sup>117</sup> Page 14, BT's 8 October 2015 response to Ofcom's s191 information request.

<sup>118</sup> Page 14, BT's 8 October 2015 response to Ofcom's s191 information request.

<sup>119</sup> Page 14, BT's 8 October 2015 response to Ofcom's s191 information request.

<sup>120</sup> I.e. the CDD in place at the time immediately before Deemed Consent is applied.

4.71 Accordingly, we provisionally conclude that:

- notification by BT of its intention to deem consent on the date of the original CDD would have been in accordance with the terms of the CSA, where this was justified in light of the circumstances that led to the CDD extension and particularly in situations where BT's engineer was not able to gain site access and where power was unavailable;
- where BT notified a CP of its intent to deem consent on a day after the original CDD, it would not have acted in accordance with the terms of the CSA requiring notification 'as soon as reasonably practicable';
- notification of the revised CDD on a date after that of the CDD would have been in accordance with the CSA, where this was justified by the circumstances, particularly when third party information needed to be obtained.

***Step 2: Are there any reasons to consider that the practice would also have been in breach of Conditions HH5.9 or 6.9 and/or HH1.2 or Condition 1.2:***

4.72 For the reasons set out above, we provisionally accept that provision of notification on the date of the CDD would have been in accordance with the CSA, where justified by the reasons for which the CDD is being extended. Where this is the case, we believe that BT's practice would not have been in breach of its SMP obligations. We have reached the same provisional conclusion in relation to situations where notification of the revised CDD occurred after the date of the CDD and this is justified by the reasons for which consent was deemed.

4.73 Our provisional conclusion is, however, that failure by BT to notify its intention to deem consent until after the date of the CDD is similar to a situation in which BT does not provide notification at all. For the same reasons set out in our provisional conclusions for Category 1 (see paragraphs 4.8 to 4.10), we therefore consider that such practice would be in breach of the SMP conditions.

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

Vodafone's arguments

4.74 Vodafone alleged that, for a number of orders, BT extended the CDD by a disproportionate amount when a suspension request from Vodafone was lifted.

4.75 Vodafone argued that "*while there is no contractual provision expressly setting out how un-suspension requests are to be dealt with*", BT has an obligation to process un-suspend orders as soon as reasonably practicable and to provide reasons to justify the CDD extension. Vodafone believes "*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*".<sup>121</sup>

BT's arguments

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<sup>121</sup> Paragraph 62, page 25 and 26, Vodafone's Dispute Submission.

- 4.76 In BT's view, when orders are suspended by the CP "*there is no obligation in the CSA for BT to deal with the order immediately after the order is un-suspended by the CP. However BT does process unsuspended orders as soon as reasonably practicable*".<sup>122</sup>
- 4.77 BT explained that when a circuit comes out of suspension, previously completed work may on occasion need to be repeated. They state that this is assessed on an order-by-order basis and the amount of time that can reasonably be added depends on the specific circumstances of the order and how long it has been suspended for. BT contends that it has not extended CDDs by a disproportionate amount of time for any of the orders in dispute.<sup>123</sup>
- 4.78 BT stated that suspending an order can often affect the overall delivery of an order if changes to the network are made during the time in which the order was suspended, for example existing fibres and capacity that were originally available may no longer be.<sup>124</sup> BT told us that "*When a circuit is being brought out of suspend BT will always still deliver the circuit as soon as reasonably practicable, but it is not always possible to un-suspend an order in the same place in the order journey as it was originally suspended in, as engineering work may have to be completely rescheduled*".<sup>125</sup>

#### Ofcom's view

##### **Step 1: Would the practice be in accordance with the CSA?**

- 4.79 Ofcom notes that the CSA does not include specific provisions regarding the processing of un-suspension requests. However, as discussed in paragraph 4.41 above, we consider that the CSA requires that where the CDD has been changed (for a reason permitted under the terms of the CSA), the new CDD must be provided as soon as reasonably practicable.
- 4.80 In principle, we consider that a CDD that incorporated days over and above the length of suspension could have been in accordance with the requirement for the new CDD to be as soon as reasonably practicable. This is because, if a CP 'un-suspends' an order, BT may not be able to immediately return to the point of the original delivery path prior to the suspension. As noted by BT, for example, the fibre capacity previously available might have been exhausted during the period of suspension.
- 4.81 However, our provisional view is that the use of Deemed Consent to extend the CDD after an 'un-suspension' request beyond the time period for which the order was suspended is subject to the requirement for BT to provide "reasons to justify" and to set any subsequent CDD for as soon as reasonably practicable. For the reasons set out in paragraphs 4.39 to 4.42 above, we provisionally conclude that where BT has not met these requirements, it would not have acted in accordance with the terms of the CSA. This would be the case where BT has extended the CDD for a period longer than justified by the need to provision an un-suspended order.

##### **Step 2: Are there reasons to consider that that the practice would also have been in breach of Conditions HH5.9 or 6.9 and/or HH1.2 or Condition 1.2?**

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<sup>122</sup> Paragraph 76, BT's letter to Ofcom of 25 September 2015.

<sup>123</sup> Paragraphs 77 and 78, BT's letter to Ofcom of 25 September 2015.

<sup>124</sup> Page 15, BT's 8 October response to Ofcom s191 information request.

<sup>125</sup> Page 15, BT's 8 October response to Ofcom s191 information request.



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4.82 Our provisional view is that, for the reasons set out in paragraph 4.44 above, BT would have been in breach of SMP Conditions HH1.2 and 1.2 and HH5.9 and 6.9 in situations where it extended the CDD for a period longer than justified by the amount of time it needed to provision the un-suspended order.

4.83 Our Provisional Conclusions are summarised in Table 1 in Section 1.

**Step 3: In light of our analysis under Question 1, is there any appropriate exercise by Ofcom of its powers under section 190(2) of the Communications Act 2003 as part of Ofcom's determination resolving this Dispute.**

Vodafone's view on remedies

4.84 Vodafone requested Ofcom to make:

- a) a declaration under section 190(2)(a) of the 2003 Act:
  - that BT has failed to comply with the CSA provisions relating to BT's use of Deemed Consent and failure to provide SLG payments in the circumstances covered by this Dispute; or, in the alternative,
  - that BT has failed to comply with its SMP obligations, and;
- b) a declaration under section 190(2)(a) that BT has consequently failed to comply with the 2008 SLG Direction requiring it to pay SLGs promptly without the need for CPs to proactively make a claim, 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 plus interest.

4.85 In so far as element b) is concerned, Vodafone submitted that undertaking a detailed order-by-order analysis for each and every month in the Relevant Period would involve inappropriately high cost to Vodafone. Referring to BT's obligation under the CSA to provide proactive compensation, Vodafone therefore submitted that the proportion of invalid "deemed consent" applications that it had identified through its sample three-month analysis should be apportioned across the Relevant Period.<sup>126</sup>

BT's view on remedies

4.86 BT submitted that Ofcom should not make the declarations sought by Vodafone as BT had not breached its obligation to provide its services on fair and reasonable terms.

4.87 Further, BT submitted that Ofcom lacks the power under section 190(2)(d) of the 2003 Act to award compensation to Vodafone. BT said that in cases where Vodafone is seeking SLG payments, it is entitled to its claim in the courts. Further, BT referred to Ofcom's previous position in the [second SLA dispute] that section 190(2)(d) of the 2003 Act cannot be construed "*broadly enough to include sums by way of liquidated damages (where there is a contract containing SLGs) or damages more generally (where the contract did not contain SLGs)*"<sup>127</sup>.

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<sup>126</sup> Paragraph 26, Vodafone's Dispute Submission.

<sup>127</sup> Paragraph 37, BT's letter to Ofcom of 25 September 2015.

Provisional Conclusions concerning a dispute between Vodafone and BT relating to BT's use of "Deemed Consent" and non-payment of SLG payments for Ethernet services

- 4.88 BT also argued that there was no basis for Vodafone to extrapolate alleged breaches of Deemed Consent provisions over the entirety of the Relevant Period. BT submitted that the claims which are the object of the Dispute are those where BT believes it has applied Deemed Consent in accordance with the contract provisions. BT said that it had in place a mechanism to ensure that it paid SLGs proactively when required under the contract.<sup>128</sup>

#### Ofcom's view

- 4.89 Section 190 of the 2003 Act sets out the powers Ofcom has when making a determination to resolve a dispute (see section 190(1) of the 2003 Act). Under section 190(2), Ofcom's main power in disputes of this kind is to do one or more of the following:
- 4.89.1 to make a declaration setting out the rights and obligations of the parties to the dispute;
  - 4.89.2 to give a direction fixing the terms of conditions of transactions between the parties to the dispute;
  - 4.89.3 to give a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
  - 4.89.4 for the purposes of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the repayment of sums by way of adjustment of an underpayment or an overpayment.
- 4.90 Ofcom has accepted this dispute as a dispute falling within the scope of section 185(1A), i.e. as relating to entitlements to network access that BT is required to provide under section 45 of the 2003 Act. In the event Ofcom concludes that if BT engaged in certain practices it would have been in breach of its SMP conditions, we would be minded to make a declaration, pursuant to section 190(2)(a). Our provisional view is that this would be the most appropriate means of resolving this dispute.
- 4.91 Our declaration under section 190(2)(a) would be different depending on whether we conclude that a given category of practice would be:
- 4.91.1 inconsistent with BT's contractual obligations, as well as the SMP conditions; or
  - 4.91.2 inconsistent with the SMP conditions only.
- 4.92 For categories of practices falling under 4.91.1, we propose to declare that BT would have been in breach of its obligations under Condition HH5.9 or 6.9 and/or Condition HH1.2 or 1.2, as applicable, including, where relevant by reason of not complying with the SLG Direction.

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<sup>128</sup> These processes consist in the filtering of monthly reports on all Ethernet provision and fault completions.

- 4.93 In addition, in relation to the Categories falling under 4.91.1, we are proposing to declare the Parties' rights and obligations under the CSA. These obligations would include, without being limited to, BT's obligation to provide compensation, in accordance with the terms of the CSA, in cases where BT has failed to deliver its services by the CDD, this date being set in accordance with the terms of the CSA.<sup>129</sup> According to our provisional conclusions this would be relevant to the practices described as Category 1, Category 3, Category 4, Category 6 and Category 7 in paragraph 1.10 above.
- 4.94 We note in this respect that BT's obligations under the CSA include the obligation to make proactive compensatory payments<sup>130</sup>. It would be for BT to devise an appropriate mechanism in order to ensure that proactive compensatory payments are made in relation to those individual instances, to the extent that they have occurred during the Relevant Period, in which inappropriate use was made of Deemed Consent. Where the cost of carrying out an assessment of each individual order is inappropriately high, BT may choose to apply a different methodology to ensure that it complies with its contractual obligations.
- 4.95 For categories of practices falling under 4.91.2, we are minded to make a determination that if BT has engaged in the relevant practice this would be in breach of its obligations under Condition HH1.2 or 1.2, including, where applicable, by reason of not complying with the SLG Direction, in relation to all orders during the Relevant Period for which BT implemented that practice. On the basis of our provisional conclusions, this would refer to Category 2.
- 4.96 We agree with BT that, for the reasons also set out in our Final Determination of the Disputes between TalkTalk and BT and Sky and BT relating to whether BT provided MPF New Provide on fair and reasonable terms and conditions<sup>131</sup>, our powers under section 190(2)(d) of the 2003 Act do not include a power to award damages or liquidated damages. Our provisional conclusion is therefore that we are unable to make a declaration to that effect.
- 4.97 We note that Vodafone also requested that Ofcom require BT to pay all of the costs and expenses incurred by it in connection with their reference of the dispute to Ofcom, pursuant to section 190(6) of the 2003 Act.<sup>132</sup> The question of costs will be considered in accordance with our guidance<sup>133</sup> after the Final Determination of this case has been issued.

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<sup>129</sup> See Paragraph 4.1, in combination with Condition 3.1 and Paragraph 2.3 of Schedule 4 to the CSA (set out in Annex 3).

<sup>130</sup> Paragraph 6.1 of Schedule 4C(i) of the CSA states "*For the avoidance of doubt compensation shall be payable without the need for the Communication Provider to make a claim.*" See <https://www.openreach.co.uk/orpg/home/products/ethernet-services/contracts/contracts.do>

<sup>131</sup> See paragraph 4.85, [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_01116/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01116/).

<sup>132</sup> Paragraph 88, Vodafone's Dispute submission.

<sup>133</sup> <http://stakeholders.ofcom.org.uk/consultations/payment-costs/>

## Annex 1

# Responding to the Provisional Conclusions

### How to respond

- A1.2 Ofcom invites written views and comments on the issues raised in this document, to be made by 5pm on 20 November 2015.
- A1.3 We would be grateful if you could assist us by completing a response cover sheet (see Annex 2), to indicate whether or not there are confidentiality issues.
- A1.4 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [gala.poole@ofcom.org.uk](mailto:gala.poole@ofcom.org.uk) attaching your response in Microsoft Word format, together with a response coversheet.
- A1.5 Responses may alternatively be posted or faxed to the address below:

Gala Poole  
4<sup>th</sup> Floor  
Competition Group  
Riverside House  
2A Southwark Bridge Road  
London  
SE1 9HA

Note that we do not need a hard copy in addition to an electronic version.

- A1.6 It would be helpful if you can explain why you hold your views and how Ofcom's proposals would impact on you.

### Further information

- A1.7 If you want to discuss the issues raised in this document, or need advice on the appropriate form of response, please contact Gala Poole on 020 7783 4338.

### Confidentiality

- A1.8 In line with our Dispute Resolution Guidelines<sup>134</sup>, as part of publishing a final determination, Ofcom may publish non-confidential versions of responses. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. For the avoidance of doubt, Ofcom

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*Dispute Resolution Guidelines - Ofcom's guidelines for the handling of regulatory disputes*

June 2011. See: <http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>.

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does not regards submissions on legal or regulatory policy to be confidential and any such submissions will normally be disclosed publicly. Further, Ofcom will sometimes be required to publish/disclose information marked as confidential in order to meet legal obligations.

- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>.

### **Next steps**

- A1.11 Ofcom intends to publish a determination by 08 January 2016.
- A1.12 Please note that you can register to receive free mail updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm).

## Annex 2

# Response cover sheet

- A2.1 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A2.2 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

## Annex 3

# Wording of relevant CSA clauses

A3.1 Paragraph 2.3 of Schedule 4C(i) of the CSA reads:

*"2.3 Provision*

*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*
- (a) 30<sup>th</sup> Working Day for the Ethernet Backhaul Direct Service Order, TDM Access Service Order or Ethernet Access Direct Service Order, or*
  - (b) 90<sup>th</sup> Working Day for the Bulk Transport Link Service Order or*
  - (c) 30<sup>th</sup> Working Day for the Wholesale Extension Service Order, Wholesale End to End Ethernet Service Order, or the Backhaul Extension 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*
- or*
- (v) notice is required under the Traffic Management Act or Transport (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"*



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A3.2 Paragraph 6 of Schedule 4C(i) of the CSA reads:

**"6. HOW BT WILL PAY COMPENSATION**

- 6.1 *Any compensation payable under paragraph 4.1 of this Schedule will be offset against the Connection Charge by BT on the Communications Provider's invoice in respect of the Connection Charge.*
- 6.2 *Any compensation payable under paragraph 4.2 of this Schedule will normally be made by deduction from the Communication Provider's next invoice unless not practicable and unless the circuit is terminated in which case a specific payment will be made. BT may offset all or part of any such amounts against any outstanding amounts due for the Service which have not been paid by the Communications Provider, except where these amounts may be disputed."*

A3.3 Paragraph 7 of Schedule 4C(i) of the CSA reads:

**"7. WHAT IS NOT COVERED**

- 7.1 *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*

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- (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."*

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A3.4 Condition 3.1 of the CSA reads:

3.1 BT agrees to:

- (a) provide the Communications Provider with the Service on the terms of this Contract;
- (b) exercise the reasonable skill and care of a competent communications provider in providing the Service and if required, in determining how best to provide the Service to a Site;
- (c) grant the Communications Provider a non-exclusive right to use the Service for the sole purpose of enabling the Communications Provider to provide the CP Service;
- (d) use reasonable endeavours to provide the Service by the Contractual Delivery Date or Customer Committed Date in accordance with the service levels set out in Schedule 4 but all dates are estimates and except as set out in the service guarantee provisions of Schedule 4B,C or D BT has no liability for failure to meet any date provided that BT has complied with its obligations to use reasonable endeavours to meet the aforementioned dates;
- (e) notify the Communications Provider of any CP Requirement Date (via CDD or CCD correspondence) and any Operational Effective Date.

A3.5 Condition 4.1 of the CSA reads

4.1 Late Provision

If BT fails to meet the commitment set out in paragraph 3.1 of this Schedule, then the Communications Provider shall be entitled to an amount calculated in accordance with the table below:

<i>Number of Working Days beyond Contractual Delivery Date or CP Requirement Date (whichever is the later)</i>	<i>Amount = Percentage of Connection charge for the circuit to be credited to the Communications Provider</i>
<i>1-10</i>	<i>5%</i>
<i>11-15</i>	<i>10%</i>
<i>16-20</i>	<i>15%</i>
<i>More than 20</i>	<i>20%</i>

A3.6 Condition 21 of the CSA reads:

## **21. NOTICES**

21.1 All notices given under this Contract must be in writing and may be delivered by hand, fax, e-mail or first class post to the following:

- (a) to the appropriate person for that matter indicated on the Customer Service Plan;

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- (b) *for all other matters, in the case of notices from the Communications Provider, to the Communications Provider's BT Customer Business Manager;*
- (c) *for all other matters, in the case of notices from BT, to the Communications Provider's registered office address or a fax number at its registered office or any alternative address or fax number or e-mail address which the Communications Provider notifies to BT*

*provided that any notice relating to contract termination, suspension or breach must be delivered by hand or first class post.*

21.2 *Subject to clause 21.1 above, a notice is duly served:*

- (a) if delivered by hand, at the time of delivery;*
- (b) if sent by first class post, three Working Days after the date of posting;*
- (c) if sent by fax, at the time of transmission; and*
- (d) if sent by email, at the time of transmission.*