

Confirmation Decision under section 96C of the Communications Act 2003 relating to Contravention of SMP Condition 7

Confirmation Decision issued to British
Telecommunications plc (“BT”) by the Office of
Communications (“Ofcom”)

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Section 1

Executive Summary

Finding that BT has failed to comply with quality of service requirement

- 1.1 This document explains Ofcom's reasons for issuing to British Telecommunications plc ("BT")¹ a confirmation decision under section 96C of the Communications Act 2003 (the Act) in respect of its compliance with quality of service requirements, relating to its provision of certain Ethernet services. These requirements are imposed under SMP Condition 7 and associated Directions as set out in the Business Connectivity Market Review statement published on 28 April 2016. The full text of the Confirmation Decision can be found at Annex 2.
- 1.2 Ethernet services are high speed data connection products which offer dedicated capacity between fixed locations. They are used extensively by large businesses, government organisations and by Communications Providers in providing fixed and mobile networks to consumers. Ethernet services are provided by BT via Openreach.
- 1.3 In the 2016 Business Connectivity Market Review (2016 BCMR), Ofcom found that Openreach's performance in the provision of Ethernet circuits had materially declined since 2011. As a result, Ofcom imposed six quality of service requirements to incentivise Openreach to improve their service. These requirements focussed on improving the speed of provisioning circuits, improving the certainty of delivery times and maintaining the timeliness of fault repairs. More detail on the quality of service requirements can be found in Section 2.
- 1.4 One of the quality of service requirements, known as the Upper Percentile Limit, stipulated that between 28 April 2016 – 31 March 2017 (known as the "**First Relevant Period**"), no more than 3% of relevant Ethernet orders completed by BT should be delivered in more than 159 working days. On 17 May 2017 Ofcom opened an investigation into BT's compliance with SMP Condition 7 and the Quality of Service Directions.
- 1.5 On 2 August 2017 Ofcom issued a Notification to BT under section 96A of the Act in which we found there were reasonable grounds for believing BT had breached SMP Condition 7 and the Quality of Service Directions. In particular, Openreach has provided Ofcom with data which shows that it delivered 3.18% of orders in more than 159 working days.
- 1.6 BT has acknowledged that it failed to comply with the Upper Percentile Limit requirement and admitted liability for breaching SMP Condition 7 and the Quality of Service Directions on 8 August 2017.

Consideration of a financial penalty

- 1.7 When Ofcom finds a breach of an SMP condition we may impose a financial penalty where we consider it appropriate and proportionate to do so.
- 1.8 The factors in favour of imposing a financial penalty in this case include:

¹ British Telecommunications plc ("BT"), whose registered company number is 1800000. BT's registered office is 81 Newgate Street, London, EC1A 7AJ.

- 1.8.1 The inherently serious nature of a failure to comply with an SMP condition.
- 1.8.2 The need to deter BT from future breaches of the quality of service requirements and other obligations imposed in the 2016 BCMR, as well as its wider regulatory requirements.
- 1.9 The factors against imposing a penalty in this case include:
 - 1.9.1 The very narrow margin by which BT failed to comply with the Upper Percentile Limit, according to the data provided by Openreach. 0.18% represents 78 orders, of a total population of 43,450 completed in the First Relevant Period.
 - 1.9.2 The steps Openreach stated it has taken to change its quality of service, together with evidence supporting the existence of an overall improvement in performance and a positive impact on customer experiences in the First Relevant Period.
- 1.10 In balancing these factors we have also considered Ofcom's overall objective in imposing the quality of service requirements, which was to incentivise BT, via its Openreach division, to improve its provision of Ethernet products.
- 1.11 In light of the overall improvement in BT's quality of service in the First Relevant Period and the narrow nature of the breach in this case, we have concluded that it is not appropriate and proportionate to impose a financial penalty.
- 1.12 While we have found that it is not appropriate and proportionate to impose a penalty in this case, we expect BT to comply fully with the quality of service requirements imposed through SMP Condition 7. Accordingly, and to ensure it continues to take appropriate steps to achieve compliance, Ofcom will give serious consideration to a financial penalty in response to any failure to comply with the quality of service requirements in future years.
- 1.13 Our assessment in this case should also not be seen as a precedent that narrow misses of the quality of service requirements (or other regulatory obligations imposed on BT) in the future will not result in a financial penalty.

Document structure

- 1.14 The remainder of this document is set out as follows;
 - 1.14.1 Section 2 provides some background to what Ethernet services are, how Openreach provides these services and Ofcom's regulation of them. It also explains the quality of service requirements as set out in the 2016 BCMR.
 - 1.14.2 Section 3 sets out evidence concerning Openreach's performance against the quality of service requirements, including its failure to meet the Upper Percentile Limit. The section provides a summary of Openreach's submission to Ofcom as well as a summary of Ofcom's conversations with Openreach customers.
 - 1.14.3 Section 4 sets out Ofcom's decision that BT has contravened SMP Condition 7. It also explains why Ofcom does not consider it appropriate to impose a penalty in this case.

Section 2

Regulation of Ethernet Services

Introduction

- 2.1 In this section we;
- 2.1.1 provide an overview of wholesale Ethernet services and Openreach's provisioning process for these services;
 - 2.1.2 explain the relevant parts of Ofcom's most recent Business Connectivity Market Review, which examines competition in the provision of leased lines, including wholesale Ethernet services, to businesses in the UK; and
 - 2.1.3 set out the relevant regulatory obligations imposed on BT as part of that review, including the SMP Services Condition and the quality of service requirements.

BT's Wholesale Ethernet Services

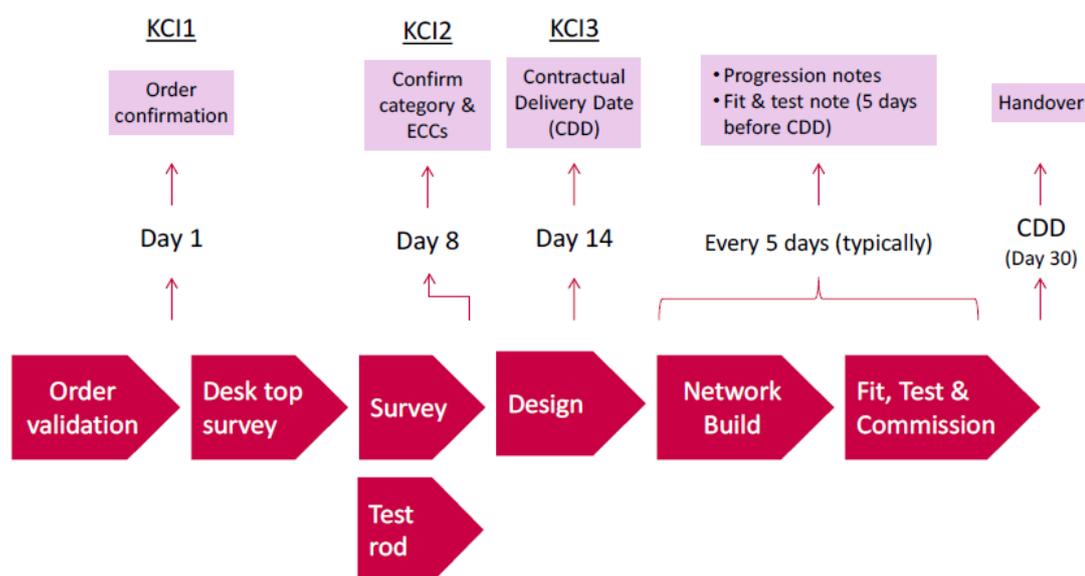
- 2.2 Ethernet services are high speed data connection products which offer dedicated capacity between fixed locations. These services are an important part of the ICT infrastructure of large businesses and Government organisations. They are also used extensively by Communications Providers as part of the networks they use to provide fixed and mobile broadband services to consumers. BT, via its Openreach division, is the largest supplier of wholesale Ethernet services in the UK.

Openreach's provisioning process

- 2.3 Openreach broadly uses four different categories to classify orders depending on the level of complexity.² Category 1 orders are relatively easy to fulfil as these involve making use of pre-existing infrastructure with limited construction or engineering work. In contrast, Category 2, 3 and 4 orders involve increasing levels of construction and engineering work. Often these jobs will also involve instances of traffic management (notifying, or requesting permission from, the Local Authority to close roads) and wayleave applications (agreeing rights of way with landowners). This means that these categories of orders can take longer to complete.
- 2.4 Figure 2.1 provides an overview of Openreach's Ethernet provisioning process and indicates its baseline timescales.

² Since 2015 Openreach has further sub-divided the four categories of orders (for example Category 2.1, 2.2, etc.) These subdivisions are not relevant for the purposes of this investigation and so we refer to Category 1,2,3 and 4 throughout.

Figure 2.1 – Openreach order provisioning process



Source: Ofcom based on Openreach presentation “Ethernet Education Openreach/Ofcom 16th June 2014”.

- 2.5 After initial validation, an order progresses to the planning stage where initial survey activities are carried out. This activity results in the classification of the order under one of the provision categories discussed above. The order then moves to the design stage to determine how the order will be fulfilled and at the same time Openreach will indicate to the customer when it expects to complete the order (this is known as a Contract Delivery Date or CDD). The design is then passed to Openreach’s engineering team and/or contractors to execute any build and finally the electronic equipment is installed, tested and commissioned.³

Business Connectivity Market Review 2016

- 2.6 On 28 April 2016 Ofcom concluded its review of the Business Connectivity Market (the 2016 BCMR).⁴ In this review, Ofcom found that BT had Significant Market Power (SMP) in the provision of wholesale Ethernet services throughout the UK, other than in Hull and the Central London Area.⁵
- 2.7 The SMP finding means that BT operates in the provision of Ethernet services without effective constraint from competition. The SMP conditions that Ofcom set in the 2016 BCMR are those that it considers are appropriate, based on the nature of the competition problems identified in the relevant markets.
- 2.8 One of the competition concerns identified in the 2016 BCMR was that, in the absence of appropriate ex ante regulation, there was a risk that poor quality of service offered by Openreach in the provision and repair of wholesale services would impact

³ Ofcom 2016 Business Connectivity Market Review statement, page 397

⁴ <https://www.ofcom.org.uk/consultations-and-statements/category-1/business-connectivity-market-review-2015>

⁵ Ofcom 2016 Business Connectivity Market Review statement, Figure 1.1

detrimentally on all downstream providers of leased lines, including BT's retail businesses, and would ultimately be to the detriment of consumers.⁶

Openreach's quality of service

- 2.9 In the 2016 BCMR Ofcom considered that Openreach's quality of service in providing wholesale Ethernet services was not acceptable.⁷ Ofcom found that, since the previous BCMR in 2013, *"Openreach's service performance in the provision of Ethernet services has deteriorated materially and [was] inadequate in several respects."*⁸
- 2.10 This deterioration in performance was a concern for Ofcom. As mentioned above Ethernet services are an important part of the UK's ICT infrastructure and improving the quality of telecoms services by setting more demanding targets for Openreach was set out as a priority in Ofcom's 2016/17 Annual Plan.⁹
- 2.11 In order to ensure that Openreach had appropriate incentives to improve its provision of Ethernet services Ofcom imposed an SMP Services Condition and Quality of Service Directions as part of the 2016 BCMR. These obligations came in to effect on 28 April 2016.

SMP Condition 7 and Quality of Service Directions

- 2.12 SMP Condition 7 states¹⁰ that the Dominant Provider (BT) must comply with all such quality of service requirements as Ofcom may from time to time direct in relation to network access provided by the Dominant Provider pursuant to Conditions 1 and 2 (as applicable).¹¹
- 2.13 Pursuant to SMP Condition 7, Ofcom gave BT Directions to comply with a set of quality of service requirements, including six minimum performance standards.¹² These requirements cover different aspects of Openreach's provisioning process and focus on areas Ofcom identified as needing improvement, such as reducing the time to provide an order and giving greater certainty around when an order will be provided.
- 2.14 A number of the requirements were put in place with a glide path, with the third year's requirements remaining in place for subsequent years until Ofcom is minded to review them.

⁶ *Ibid.* page 237

⁷ *Ibid.* page 7

⁸ *Ibid.* page 387

⁹ See <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2016/annual-plan-2016-17>

¹⁰ Ofcom 2016 Business Connectivity Market Review statement, Annex 35, page 29

¹¹ Conditions 1 and 2 require the Dominant Provider to provide network access on reasonable request and cover specific forms of network access.

¹² Ofcom 2016 Business Connectivity Market Review statement, Annex 35, Section 2 Directions for BT - Directions under section 49 of the Communications Act 2003 and SMP Services Conditions 1 and 7, given as a result of the analyses in: (i) the wholesale market for contemporary interface symmetric broadband origination in the Rest of the United Kingdom excluding the Hull Area; and (ii) the wholesale market for contemporary interface symmetric broadband origination in the London Periphery.

Upper Percentile Limit

- 2.15 The quality of service requirement relevant to this investigation is the 'Upper Percentile Limit', which is one of three 'Time to Provide' requirements aimed at improving the speed at which BT delivers customers' orders.
- 2.16 The Upper Percentile Limit requires Openreach to ensure the proportion of orders with very long lead times remains below a set percentage, as set out in table 2.1 below.

Table 2.1: Upper Percentile Limit¹³

	Performance over Year 1 (2016/17)	Performance over Year 2 (2017/18)	Performance over Year 3 (2018/19)
Upper Percentile Limit	No more than 3% of provisions delivered in more than 159 working days	No more than 3% of provisions delivered in more than 118 working days.	As Year 2

- 2.17 The calculation of the number of working days taken by Openreach to deliver orders for the purposes of applying the Upper Percentile Limit is subject to certain discounts and exclusions.¹⁴ These are set out below;
- 2.17.1 Working days attributable to 'Customer Caused Delay' are excluded. This is defined as delays which Openreach can reasonably attribute to a third party customer (or a customer of that third party customer).
- 2.17.2 In the First Relevant Period, any time accrued on an order before 1 May 2016 is subject to a reduction of 80%.¹⁵

Other quality of service requirements

- 2.18 The other minimum performance standards imposed on BT in the Quality of Service Directions were as follows:
- 2.18.1 **Complete by initial CDD:** this requires BT to ensure that a minimum proportion of orders are completed by the initial expected completion date which BT provides to customers, known as the initial CDD (or iCDD).
- 2.18.2 **Initial CDD Period:** this requires BT to comply with a maximum mean number of working days between when an order is validated to the initial CDD.
- 2.18.3 **Mean Time to Provide (MTTP):** this sets a maximum mean number of working days in which all orders should be provided.
- 2.18.4 **Lower Percentile Limit:** this requires BT to ensure that a set proportion of orders are delivered within a shorter timeframe than the MTTP requirement.

¹³ Ofcom 2016 Business Connectivity Market Review Statement, page 389, Table 13.3.

¹⁴ Ofcom 2016 Business Connectivity Market Review Statement, page 390.

¹⁵ This time is referred to as 'Elapsed Time to Provide' and is calculated after removing Customer Caused Delay.

- 2.18.5 **Fault Repair:** this requires BT to ensure that a set proportion of faults are repaired within five hours.
- 2.19 BT is required to publish its performance against the six quality of service requirements on a quarterly basis. The Quality of Service Directions also require BT to report to Ofcom on a monthly basis certain key performance indicators (KPIs).¹⁶ These KPIs relate to Openreach's performance against the quality of service requirements as well as some other related metrics.

¹⁶ Ofcom 2016 Business Connectivity Market Review Statement, Annex 35, page 163.

Section 3

Openreach's performance in 2016/17

- 3.1 In this section we set out BT's performance against the Upper Percentile Limit in the First Relevant Period and summarise Openreach's representations on its performance in relation to its quality of service. We then set out the feedback which we received from Openreach's customers on their experience of Openreach's provision of Ethernet services in this period.

Openreach's performance in relation to the Upper Percentile Limit

- 3.2 Openreach provided data on its performance against the Upper Percentile Limit in the First Relevant Period. This showed that:
- 3.2.1 In this period Openreach completed 43,450 orders for relevant Ethernet services.
 - 3.2.2 Openreach completed 1,381 orders in excess of 159 working days.¹⁷
- 3.3 To comply with the Upper Percentile Limit, Openreach was required to complete no more than 3% of relevant orders in more than 159 working days. Based on the data provided by Openreach, this amounts to a maximum of 1,303 orders. Openreach therefore failed to meet the target by a total of 78 orders, representing 0.18% of all completed orders.

Openreach's representations on its performance

- 3.4 Following Ofcom's decision to open an investigation into BT's compliance with the Upper Percentile Limit, Openreach made representations to Ofcom regarding its performance in 2016/17.¹⁸ In its representations, Openreach acknowledged that it has missed the Upper Percentile Limit requirement in the First Relevant Period but requested that Ofcom consider this in the "*wider context of the general and sustained improvement of Openreach's Ethernet service performance.*"¹⁹
- 3.5 To that end, Openreach provided information on the steps it has taken to improve performance and the impact of those steps in terms of quantitative and qualitative outcomes.

Steps taken by Openreach to improve quality of service

- 3.6 In its representations, Openreach identified a number of steps it has taken in order to improve its delivery of Ethernet services in 2016/17, some of which are summarised below. We have not specifically verified the information provided by Openreach, but have considered the changes it reported in the context of whether they have had an

¹⁷ After taking into account Customer Caused Delay and the 80% discount for Elapsed Time to Provide (see section 2 above).

¹⁸ Submission from Openreach dated 6 June 2017, "*Ofcom investigation into British Telecommunications plc concerning compliance with quality of service requirements relating to the provision of wholesale Ethernet services – Openreach representations*" ("BT submission").

¹⁹ *Ibid.* page 2

impact on the performance of Openreach and improved the experiences of Openreach's customers. Both of these are discussed later in this section.

- 3.6.1 **Organisation structure:** Openreach stated that its Business and Corporate Delivery (BCD) unit, which is responsible for Ethernet service delivery, has moved from a national to a regional operating model which enabled end to end ownership of orders by a single team with local knowledge and understanding. Openreach has also embedded the quality of service requirements into scorecards, performance against which is linked to managers' bonus payments. This has been introduced from CEO level throughout the management chain of Openreach.²⁰
- 3.6.2 **Labour resource:** Openreach stated it has increased its spending on the total labour cost of the BCD unit by [3x] between 2015/16 and 2016/17 including the recruitment of 104 new apprentice and trainee engineers, as well as the transferral of 58 engineers from other Openreach departments.²¹ Openreach also reported that BCD has changed its approach to contractor resource, moving from a sole-supplier to a multi-supplier model, and invested in contractor resource to support the planning of jobs. Openreach said these changes had improved flexibility, led to increased throughput and a corresponding reduction of the workstack.²²
- 3.6.3 **Process changes:** Openreach said it had improved its planning process, including by rolling out an enhanced survey which involves planners conducting a more detailed survey of a site, sometimes by walking the route if a circuit is particularly complex. Openreach stated that this allows issues to be identified earlier and has resulted in a reduction in the field failure rate (where an order cannot be continued).²³
- 3.6.4 **Tools and systems:** Openreach identified a number of new tools and systems which it had introduced to improve the delivery of its Ethernet orders. For example, a high pressure de-silting machine allows Openreach's own teams to clear blockages from ducts without waiting for a specialist team. Openreach has told us that in the area this machine has been used, cycle times for orders that require civils work have been reduced from 42 days to 2 days.²⁴
- 3.6.5 **Customer engagement:** Openreach has redeveloped the escalations process for customers which has resulted in improved resolution times.²⁵ Openreach also highlighted its integration of internal teams to streamline processes; direct contact with end customers to reduce the risk of not being able to access a site; and working with Openreach's biggest five customers to reduce the number of suspended orders in the workstack.²⁶

²⁰ *Ibid.* page 16

²¹ *Ibid.* page 17

²² *Ibid.* pages 17 – 18

²³ *Ibid.* page 20

²⁴ *Ibid.* page 20

²⁵ *Ibid.* page 20

²⁶ *Ibid.* page 21 – 22

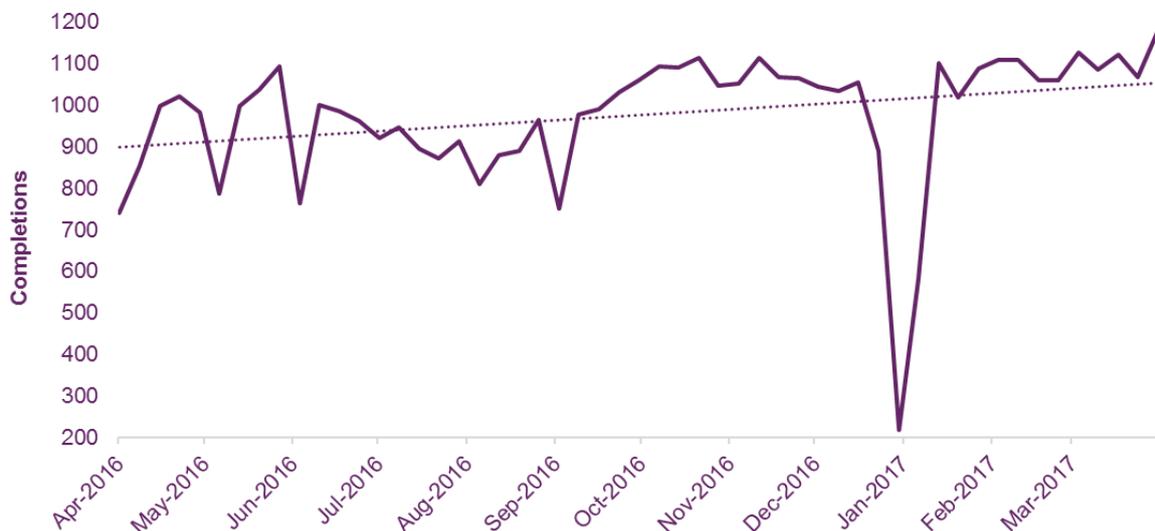
Improved performance

- 3.7 In its representations, Openreach provided evidence which it considered demonstrates improvements in its overall service delivery of Ethernet. The information shows:
- 3.7.1 improved throughput, with the number of circuits Openreach delivered rising by 24% during 2016/17;
 - 3.7.2 reductions in relation to the age and volume of the overall workstack, the tail workstack containing the oldest orders and the operational workstacks (such as planning, civil engineering and traffic management); and
 - 3.7.3 Openreach meeting five of the six quality of service minimum standards.

Increase in throughput capacity

- 3.8 Openreach identified throughput as a key metric that customers look at to determine service performance because it shows whether Openreach is keeping pace with rising demand. Openreach also noted that closing more circuits than those coming in is important to meeting the Upper Percentile Limit because it allows more operational resource to be focussed on clearing the historic tail workstack.²⁷
- 3.9 Openreach's data shows that it delivered an average of 849 circuits per week in Q4 2015/16, compared to an average of 1,055 per week in the same period of 2016/17, an increase of 24%.²⁸ The graph below at Figure 3.1 shows the number of circuits completed per month in the First Relevant Period.

Figure 3.1 Ethernet circuits completed per week



Source: BT's response to the 2nd s135 request

²⁷ *Ibid.* page 23

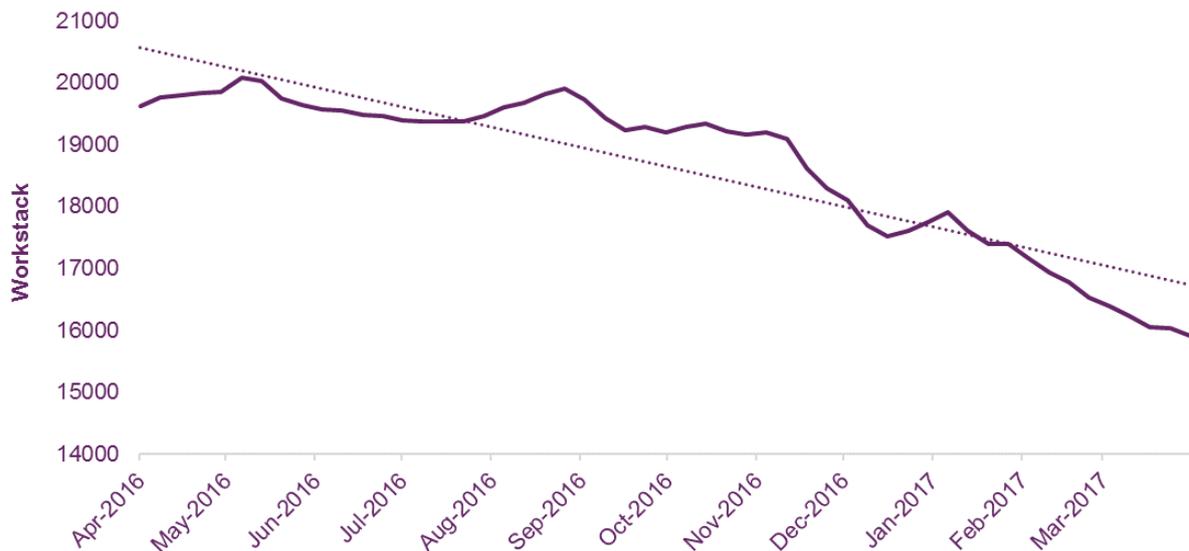
²⁸ *Ibid.* page 23

Reduction of the workstacks

3.10 Openreach's data shows that there have been reductions in workstacks which it says demonstrates Ethernet demand being addressed.²⁹ The reductions in general and specific workstacks are shown in the figures below.

3.11 First, as shown in Figure 3.2, the absolute number of jobs in the workstack has reduced from a peak of roughly 22,000 in May 2016 to roughly 16,000 in April 2017

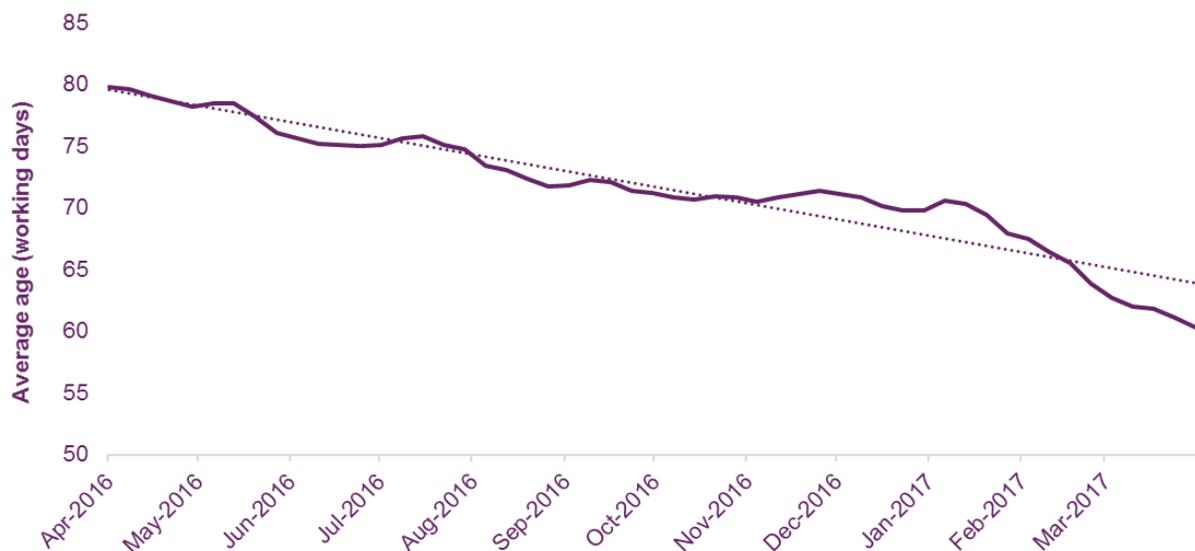
Figure 3.2: Ethernet provision workstack in 2016/17



Source: BT's response to the 2nd s135 request

3.12 Second, as shown in Figure 3.3, the average age of the workstack has been reduced from 80 working days (excluding Customer Caused Delay) in April 2016 to 59 working days in April 2017.

Figure 3.3: Average age of the Ethernet provision workstack 2016/17

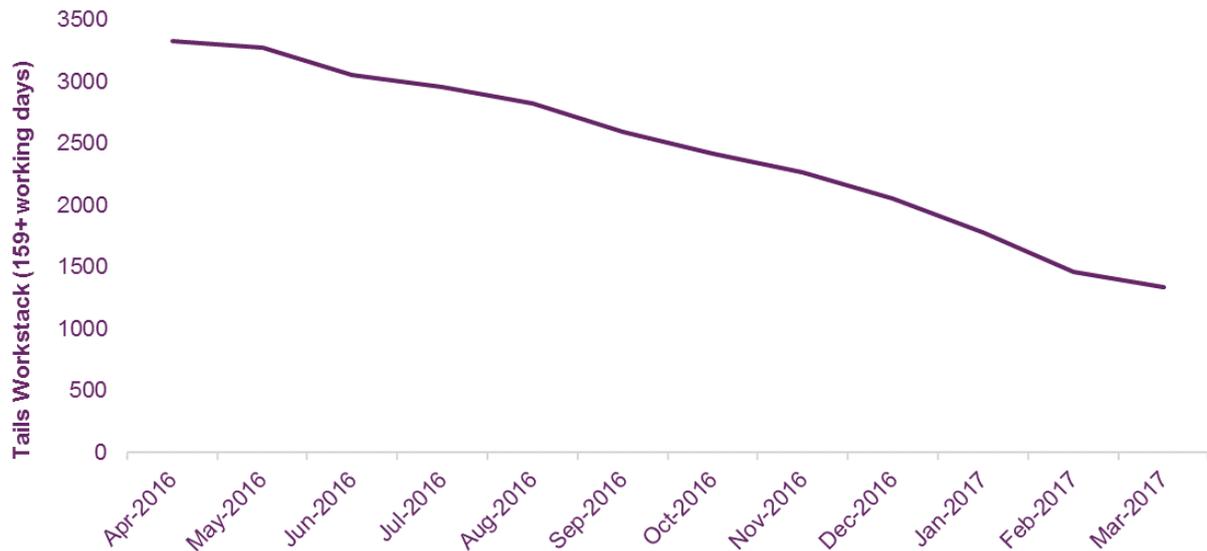


Source: BT's response to the 2nd s135 request

²⁹ *Ibid.* page 25

3.13 Third, as shown in Figure 3.4, the tails workstack (that is the number of orders in the workstack older than 159 working days) has more than halved from a high of 3,300 in March 2016 to 1,300 orders in April 2017.

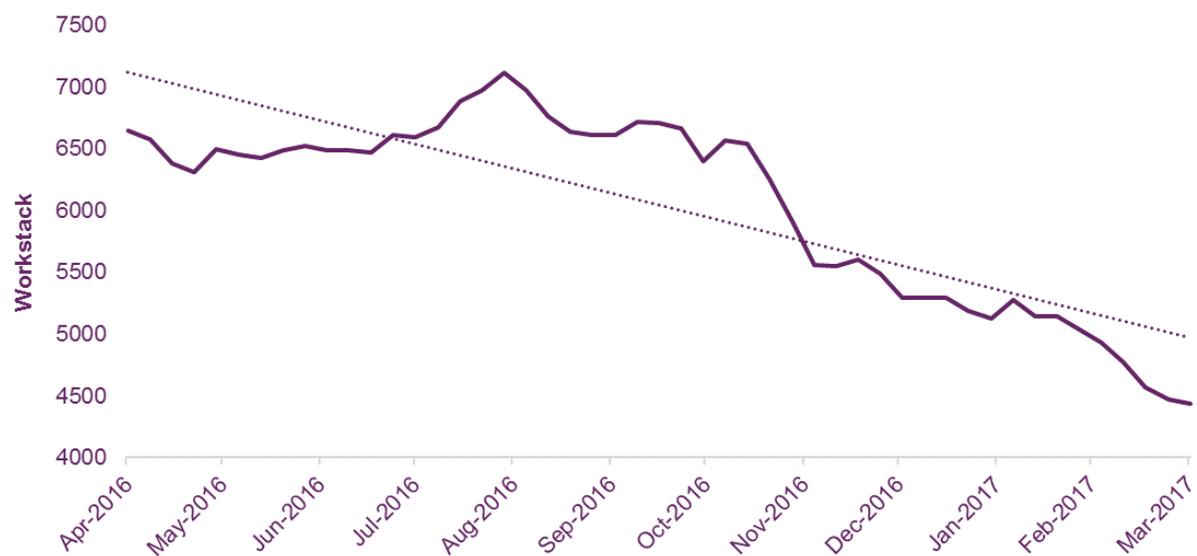
Figure 3.4: Tails workstack



Source: BT's response to the 2nd s135 request

3.14 Fourth, as shown in Figure 3.5, the planning workstack has been reduced from a peak of over 7,200 orders in August 2016 down to roughly 4,500 orders in March 2017.

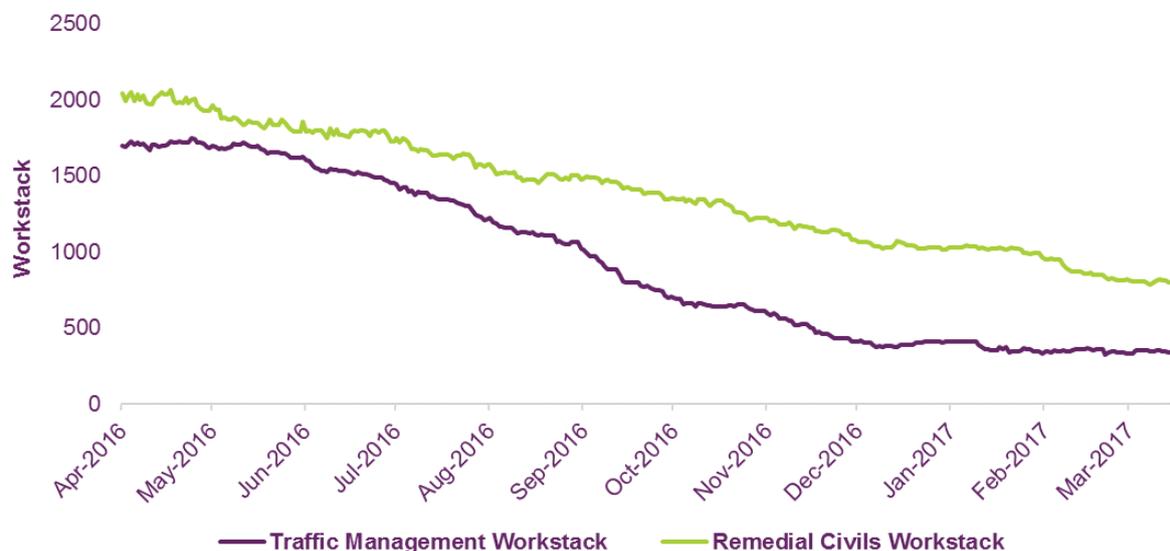
Figure 3.5: Ethernet Planning workstack



Source: BT's response to the 2nd s135 request

3.15 Fifth, as shown in Figure 3.6, there has been a 61% reduction in the civils workload and an 82% reduction in the traffic management workloads.

Figure 3.6: Civils and Traffic Management workloads



Source: BT's response to the 2nd s135 request

Performance against other quality of service standards

3.16 Openreach suggested that its service transformation can be seen in its performance against the other minimum performance standards imposed by Ofcom in the 2016 BCMR. The data provided by Openreach to Ofcom indicates that it met five of the six minimum performance standards set in the Quality of Service Directions, which Openreach attributes to the changes that have occurred within the business.³⁰ Ofcom has not examined BT's performance against these standards as part of this investigation, but there is no evidence to suggest that BT breached these requirements.

Customer feedback collected by Openreach

3.17 In its representations, Openreach argued that improvements in its service can be seen in the improved customer feedback it has received. Openreach submitted a number of positive verbatim comments from the qualitative customer feedback they sought, as well as providing Ofcom with the results of some quantitative feedback:³¹

3.17.1 In March 2017 Net Satisfaction with Openreach was weighted at 53.4%, compared to a score of -23% in April 2016;

3.17.2 When customers were asked whether Openreach do what they say they will, scores had improved from -48.6% in April 2016 to 11.4% in March 2017; and

³⁰ *Ibid.* page 32

³¹ *Ibid.* page 30. Openreach also provided the underlying data from these customer surveys to Ofcom.

- 3.17.3 When customers were asked in March 2017 if Openreach's performance was better, worse or the same than it had been previously, 41.2% stated 'better' while 48.5% stated 'the same'.³²
- 3.18 These scores show a positive trend across the First Relevant Period. However, it is worth noting that for the first two questions the sample size is limited and there are a number of variables across the respondents.³³

Customer feedback collected by Ofcom

- 3.19 As part of this investigation Ofcom contacted a number of Openreach's customers requesting an informal discussion about Openreach's performance in the First Relevant Period. Five customers agreed to a call with us; [X]
- 3.20 We received consistent feedback from the customers we spoke to which we have taken into account in our assessment. Overall we found that most of the customers were positive about Openreach's provision of Ethernet Services in the First Relevant Period and the changes Openreach had made to achieve this.
- 3.21 Most respondents discussed quantitative measures of improvement, including a decrease in their workstacks and a reduction in the number of their oldest orders. Some customers were also able to tell us about a drop in the MTTP for their circuits. Overall Ofcom's quality of service requirements were seen as successful drivers for these improvements, with one CP recognising in particular the Upper Percentile Limit as motivating the right behaviours. Escalations were noted as an area of improvement, with some customers reporting a fall in the number of escalations they were raising and most recognising an improvement in the way Openreach handles them.
- 3.22 The customers also highlighted a positive change in culture and attitude at Openreach, coinciding with a change in senior management. Every respondent we spoke to recognised a greater willingness and desire to complete Ethernet orders, a more flexible approach to working and better collaboration at a senior level.
- 3.23 Openreach's handling of orders which were subject to civils and traffic management issues was seen to have improved by some of the respondents, though most customers recognised there is still some way to go, especially with the quality of information provided.
- 3.24 One area of concern raised by all of the customers Ofcom spoke to was that the quality, frequency and detail of the updates provided by Openreach was poor, particularly for those orders which are subject to delays. As a result of this Openreach customers found it difficult to pass on relevant information to their downstream customers. One customer also considered that Openreach's management of wayleaves had been particularly poor.

³² Openreach's 2nd s135 submission. There were 68 responses from respondents at 20 separate companies. 7 answered 'worse', 33 answered 'the same' and 28 answered 'better'.

³³ A total of 68 surveys were completed from 2 December 2016 to 29 March 2017. 61 individuals from 20 separate companies took the survey during this period, with 7 individuals taking the survey twice. The respondents ranged in seniority from team members to CEOs and board members, as well as having a wide range of years of service; from 1-3 years to more than 10 years.

Section 4

Enforcement Action

Contravention of SMP Condition 7

BT failed to meet quality of service standards as required by SMP Condition 7

- 4.1 For the reasons set out in paragraphs 3.2 to 3.3 above, Ofcom has determined that BT has contravened SMP Condition 7, in respect of the Upper Percentile Limit requirement set out in the Quality of Service Directions, for the period 28 April 2016 – 31 March 2017.
- 4.2 The quality of service requirements are minimum service levels that BT is required to achieve. Accordingly, these are imposed as clear regulatory standards. Data provided to Ofcom by Openreach demonstrates that Openreach's provision of Ethernet services in the relevant period failed to meet the Upper Percentile Limit and we have therefore concluded that BT failed to comply with the relevant SMP condition.
- 4.3 In accordance with section 96A(5) Ofcom has considered whether it would be more appropriate to proceed under the Competition Act 1998 in respect of the matters to which this Confirmation Decision relates. Ofcom has concluded that action under the Competition Act 1998 would not be more appropriate.

Consideration of financial penalty

- 4.4 Where Ofcom finds a contravention of an SMP condition, there are a number of further enforcement actions that Ofcom may consider taking. This includes the imposition of a financial penalty, in accordance with section 96B of the Act.
- 4.5 Failure to comply with the requirements of an SMP Condition is inherently serious and it is therefore relevant for us to consider whether it would be appropriate to impose a financial penalty on BT in this case.
- 4.6 In determining whether to impose a penalty we must consider whether a penalty is appropriate and proportionate.³⁴ In doing so we have taken into account the very narrow nature of the breach of the Upper Percentile Limit in this case, as set out at paragraph 3.3 above.
- 4.7 We have also had regard to Ofcom's penalty guidelines which state that the central objective of imposing a penalty is deterrence. The level of any penalty must be sufficient to deter the business from contravening regulatory requirements, and to deter the wider industry from doing so.³⁵
- 4.8 In relation to the objective of deterrence, the Guidelines explain that a penalty should *"incentivise the management (which is ultimately responsible for the conduct and culture of the regulated body) to change the conduct of the regulated body as a whole"*

³⁴ Section 97 of the Act.

³⁵ See section 392(6) of the Act; Ofcom, Penalty guidelines – s.392 Communications Act 2003, page 1, paragraph 4

and bring it into compliance, achieving this, where necessary, by changing the conduct at different levels within the organisation.”³⁶

- 4.9 Accordingly, the primary objective of imposing a financial penalty in this case would be to incentivise BT to comply with the quality of service standards in future periods. In practice this means incentivising BT, via Openreach, to implement the necessary changes to its business practices so as to ensure improved overall performance, which would be reflected by better measurable outcomes and improved customer experiences. This is consistent with the objective of the quality of service requirements in the 2016 BCMR.
- 4.10 Given this objective, the achievement of the quality of service requirements is not necessarily an end in itself but part of an overall objective for Openreach to improve its performance. In this case, where Openreach has failed one of the standards – the Upper Percentile Limit – it is therefore important to take into account:
- 4.10.1 Steps taken by Openreach to improve performance;
 - 4.10.2 Objective evidence demonstrating a change in performance, including quantitative metrics of performance not directly addressed by the quality of service requirement (e.g. the age of the workstack) and, where relevant, performance against other quality of service requirements; and
 - 4.10.3 Feedback from customers, including where this indicates a demonstrable change in customer experience.

Steps taken by Openreach

- 4.11 The steps which Openreach reports it has taken to improve its performance in providing Ethernet services are discussed above at paragraph 3.6. Taken together, this evidence indicates that Openreach has taken a number of steps aimed at improving the quality of service associated with its delivery of Ethernet products. As such, whilst BT has narrowly missed the Upper Percentile Limit, it appears that overall the requirements imposed on BT in the 2016 BCMR have incentivised BT to implement changes to its business practices to deliver improved performance.

Evidence of improvement

- 4.12 As set out above from paragraph 3.7 to 3.17. Openreach has provided evidence of improvements in quantitative metrics which are associated with the delivery of relevant Ethernet services. This evidence indicates improvements have been made in a number of areas, including an increase in throughput, which represents Openreach’s underlying delivery capacity. The improvements are also exhibited by reductions in the workstack and, in particular, a reduction in age and volume of historic orders. The evidence provided by Openreach also indicates that it met five of its six quality of service requirements in the First Relevant Period.

Customer experience feedback

- 4.13 As set out above from paragraph 3.18 to 3.19, Openreach has provided evidence of customer feedback it collected through qualitative and quantitative surveys. The feedback Openreach has presented to Ofcom as part of this investigation indicates

³⁶ *Ibid.* page 1, paragraph 5.

that some customers' experiences have improved and that there is greater satisfaction with Openreach's performance now than before the First Relevant Period.

- 4.14 As set out above from paragraph 3.20 to 3.25, Ofcom has also conducted its own exercise to determine whether customer experiences have improved since the 2016 BCMR. The companies Ofcom spoke to represent more than 60% of all the Ethernet orders completed in the First Relevant Period. As such we believe the feedback from these conversations relevant for the purposes of this investigation.
- 4.15 The customers Ofcom spoke to noted improvements in Openreach's performance, which has resulted in better outcomes in the delivery of circuits, as well as fewer escalations. One area of improvement which was highlighted was a culture change that appears to have taken place within Openreach, resulting in a more flexible, collaborative organisation which is better able to meet the needs of its customers.
- 4.16 These customers also emphasised that there was still significant scope for improvement. In particular, customers expressed concerns about the quality, frequency and detail of updates they received from Openreach in relation to the progress of orders. This is particularly relevant for more complex orders which are likely to take longer and potentially experience delays.

Conclusion on financial penalty

- 4.17 As noted above the central objective of a financial penalty in this case would be to incentivise Openreach to implement the necessary changes to its business practices so as to ensure improved overall performance in the delivery of Ethernet services. For the reasons set out above, it seems that Openreach has made progress in implementing changes in order to comply with the quality of service requirements imposed in the 2016 BCMR and that these have objectively improved performance and positively impacted its customers' experience. As a result, we do not believe it is appropriate and proportionate to impose a financial penalty in this case.
- 4.18 In coming to this conclusion Ofcom has taken account of a number of relevant factors which are set out below;
- 4.18.1 **The seriousness of the contravention.** Breaching SMP conditions is inherently serious and Ofcom has reflected this in opening and conducting a thorough investigation into this matter. It is important to note in this case that BT failed to meet the requirement by 0.18%.
- 4.18.2 **The degree of harm caused by the contravention.** The 0.18% failure represents a population of roughly 80 orders, against a total population of 43,450 completed orders. In addition to the quantitative degree of harm, there appears to have been improvements in customer's experiences, which goes some way to mitigating the specific harm caused by the Upper Percentile Limit failure.
- 4.18.3 **Appropriate steps taken to prevent the contravention.** As set out in Section 3, Openreach has submitted evidence of steps it has taken to address the concerns identified in the 2016 BCMR. It appears that these steps have resulted in an improvement in performance and in some better outcomes for Openreach customers.
- 4.18.4 **The extent to which Openreach has cooperated with our investigation.** Openreach entered into an open dialogue with Ofcom about the quality of

service requirements from an early stage. This led to constructive conversations before and during the investigation which assisted our ability to conduct the investigation in a timely manner.

Future compliance

- 4.19 The quality of service requirements are an ongoing measure of performance and accordingly, BT's performance will be reviewed on an annual basis. While we have found that it is not appropriate and proportionate to impose a penalty in this case, Ofcom will give serious consideration to a financial penalty in response to any failure to comply with the requirements in future years. It is important to note that, given the contravention set out in this Confirmation Decision, any such failure may be treated as a repeated contravention.
- 4.20 As in this case, if Ofcom were to open an investigation into a future failure to meet one or more of the quality of service requirements, a number of factors will be taken into consideration. These may include the number and margin of any failures, the steps taken by Openreach to continuously improve performance (thereby avoiding or mitigating such failures) and the extent to which there has been further improvements in relation to performance and customer experience.
- 4.21 Our assessment in this case should not be seen as a precedent that narrow misses of the quality of service requirements (or other regulatory obligations imposed on BT) in the future will not result in a financial penalty.

Annex 1

Glossary of terms

2016 BCMR: Ofcom's 2016 Business Connectivity Market Review Statement.

<https://www.ofcom.org.uk/consultations-and-statements/category-1/business-connectivity-market-review-2015>

Accepted Order: an Order that has been validated and accepted by Openreach;

the Act: The Communications Act 2003;

BCD: the Business and Corporate Delivery unit, which is responsible for the delivery of Ethernet services within Openreach;

BT: British Telecommunications plc whose registered company number is 1800000, 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;

Confirmation Decision: the Confirmation Decision under section 96C of the Act at Annex 2.

Contractual Delivery Date (CDD): a date provided by Openreach to a Third Party Customer on which Openreach contracts for an Order to become a Completed Order;

Completed Order: an Accepted Order that has been provisioned and for which all related work has been carried out;

Circuit: a particular order for Ethernet services;

CP: Communications Provider;

Customer Caused Delay: a delay in an Accepted Order becoming a Completed Order which Openreach can reasonably attribute to being caused either by a Third Party Customer or a customer of that Third Party Customer (including an end user);

Elapsed Time to Provide: means the total number of Working Days from the date on which an Order became an Accepted Order to 1 May 2016, but excluding Working Days attributable to Customer Caused Delay;

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 which provide dedicated transmission capacity at a range of bandwidths between sites;

First Relevant Period: the period from 28 April 2016 – 31 March 2017;

iCDD: the first date provided by Openreach to a Third Party Customer on which Openreach contracts for an Order to become a Completed Order;

KCI (1,2 & 3): Keep Customer Informed milestones. Internal deadlines in Openreach's Ethernet provisioning process when important information should be provided to the customer;

KPIs: Key Performance Indicators;

MTTP: Mean Time to Provide;

Openreach: a BT Group business offering products and services that are linked to BT's nationwide local access network;

Order: means a request for the Relevant Ethernet Service, including a request for an upgrade on bandwidth of an existing Relevant Ethernet Service or a request for a change to the product variant of an existing Relevant Ethernet Service submitted to Openreach by a Third Party;

Notification: the Notification given to BT under section 96A of the Act on 2 August 2017;

Quality of Service Directions: The Directions issued by Ofcom to BT on 28 April 2016 under section 49 of the Act which require BT to comply with specific minimum quality of service standards relating to its provision of Ethernet services;

Relevant Ethernet Services: those Ethernet Services offered by Openreach to a Third Party under the product or service names of (i) Ethernet Access Direct, (ii) Ethernet Backhaul Direct or (iii) Cablelink;

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 Condition 7: The SMP Condition imposed on by Ofcom on BT on 28 April 2016 under section 45 of the Act which requires BT to comply with quality of service requirements relating to its provision of Ethernet services as directed by Ofcom;

Third Party Customer: a Third Party purchasing a Relevant Ethernet Service from Openreach;

Time to Provide: the total number of Working Days from the date on which an Order becomes an Accepted Order to the date when that Accepted Order becomes a Completed Order, excluding only Working Days attributable to Customer Caused Delay;

Traffic Management: issues relating to the closure of roads;

Wayleave: Written consent allowing Openreach to carry out work on privately owned land;

Working Day: any day other than Saturdays, Sundays, public holidays or bank holidays in the United Kingdom;

Workstack: a measure of the number of Accepted Orders on Openreach's systems;

Upper Percentile Limit: the requirement to ensure that, in the First Relevant Period, in no more than 3% of Completed Orders, the Time to Provide (calculated in accordance with paragraph 1.10 of Schedule 1 of the Quality of Service Directions) is more than 159 Working Days.

Annex 2

Confirmation Decision under Section 96C of the Communications Act 2003 relating to a contravention of SMP Condition 7

Section 96C of the Communications Act 2003

- A2.1 Section 96C of the Communications Act 2003 (the “Act”) allows the Office of Communications (“Ofcom”) to issue a Confirmation Decision confirming the imposition of requirements on a person where that person has been given a notification under section 96A of the Act, Ofcom has allowed that person an opportunity to make representations about the matters notified, and the period allowed for the making of representations has expired. Ofcom may not give a Confirmation Decision to a person unless, having considered any representations, it is satisfied that the person has, in one or more of the respects notified, been in contravention of a condition specified in a notification under section 96A.
- A2.2 A Confirmation Decision:
- a) must be given to the person without delay;
 - b) must include the reasons for the decisions;
 - c) may require immediate action by the person to comply with the requirements of a kind mentioned in section 96A(2)(d) of the Act,¹⁴³ or may specify a period within which the person must comply with those requirements; and
 - d) may require the person to pay:
 - i) the penalty specified in the notification issued under section 96A of the Act, or
 - ii) such lesser penalty as Ofcom consider appropriate in light of the person’s representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, and may specify the period within which the penalty is to be paid.

SMP Conditions and Directions

- A2.3 Section 45(1) of the Act gives Ofcom the power to set conditions, including SMP services conditions, binding on the person to whom they are applied.
- A2.4 In the 2016 BCMR Statement, Ofcom imposed SMP conditions on BT pursuant to Ofcom’s Notification of 28 April 2016, issued under section 45 of the Act.

SMP Condition 7

- A2.5 In the 2016 BCMR Statement, SMP Condition 7 was imposed on 28 April 2016 and came into force on the same date. SMP Condition 7 requires that:

“The Dominant Provider [BT] must comply with all such quality of service requirements as Ofcom may from time to time direct in relation to network access provided by the Dominant Provider pursuant to Conditions 1 and 2 (as applicable).”³⁷

Quality of Service Directions

- A2.6 Section 49 of the Act gives Ofcom the power to make Directions for the purposes of a Section 45 Condition.
- A2.7 On 28 April 2016, pursuant to section 49 of the Act and SMP Conditions 1 and 7, Ofcom gave BT Directions requiring it to comply with certain minimum quality of service standards relating to its provision of Ethernet services (the “Quality of Service Directions”).³⁸
- A2.8 One of these minimum performance standards, referred to as the ‘Upper Percentile Limit’, required BT to ensure that no more than 3% of orders for relevant Ethernet services completed by BT in the period from 28 April 2016 to 31 March 2017 were provided in more than 159 working days.³⁹

Subject of this Confirmation Decision

- A2.9 This Confirmation Decision is addressed to British Telecommunications plc (“BT”), whose registered company number is 1800000. BT’s registered office is 81 Newgate Street, London EC1A 7AJ.

Notification given by Ofcom under section 96A

- A2.10 On 2 August 2017, Ofcom gave a notification under section 96A of the Act to BT. Ofcom determined that there were reasonable grounds for believing that BT had contravened SMP Condition 7 as more than 3% of orders for relevant Ethernet services completed by BT in the period from 28 April 2016 to 31 March 2017 were provided in more than 159 working days, in breach of the Upper Percentile Limit.
- A2.11 The section 96A notification allowed BT the opportunity to make representations to Ofcom about the matters set out in that notification.

Confirmation Decision

- A2.12 The period allowed for making representations has now expired. On 8 August 2017, BT confirmed to Ofcom that it would not make any written or oral representations about the matters notified and accepted liability for the contravention by admitting it contravened SMP Condition 7 and the Quality of Service Directions in respect of the First Relevant Period.
- A2.13 Accordingly, Ofcom is satisfied that BT has, in the respects notified in the section 96A Notification, contravened SMP Condition 7. Ofcom has decided to give BT a

³⁷ See the 2016 BCMR Statement, Annex 35, Schedule 1, page 29.

³⁸ See the 2016 BCMR Statement, Annex 35, Section 2, page 163: Directions for BT issued under section 49 of the Act.

³⁹ See the 2016 BCMR Statement, Annex 35, Section 2, Schedule 1, paragraph 1.8, page 168. In calculating the number of working days taken to provide an order for these purposes days attributable to Customer Caused Delays are excluded and a discount is applied to orders accepted by BT before 1 May 2016, in accordance with in paragraph 1.10 of Schedule 1 to the Quality of Service Directions.

Confirmation Decision in accordance with section 96C of the Act. The reasons are set out in the explanatory statement to which this Confirmation Decision is annexed.

Interpretation

- A2.14 Words or expressions used in this Confirmation Decision have the same meaning as in the 2016 BCMR Statement, the Quality of Service Directions or the Act except as otherwise stated in this Confirmation Decision.

GaUCHO Rasmussen

Director of Enforcement and Investigations

as decision maker for Ofcom

10 August 2017