



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

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Statement

Issue date: 8 January 2016

About this document

This document sets out Ofcom's Statement resolving a regulatory dispute between BT and Vodafone in relation to allegations that BT 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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Statement concerning a dispute between Vodafone and BT relating to BT's use of "Deemed Consent" and non-payment of SLG payments for Ethernet services

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 Provisional Conclusions: Document, issued on 6 November 2015, setting out for comment the main elements of our reasoning and assessment in relation to the matters in dispute.

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

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

Sky: Sky UK Ltd.

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/>, re-imposed by Ofcom in the 2008 and 2013 BCMR Statements.

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.

Un-suspended Order: the status of an order when an order's suspension is subsequently lifted 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 "Statement") sets out Ofcom's final determination for resolving a dispute between British Telecommunications plc ("BT") and Vodafone Limited ("Vodafone") (together, the "Parties") in relation to allegations concerning BT's use of 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") Statement¹ and 2013 BCMR Statement² respectively. Both these Statements determined that BT has Significant Market Power ("SMP") in the provision of Ethernet services and imposed SMP Conditions on BT. The SMP Conditions required 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 issued a Statement and Directions regarding BT's service level guarantees for services including Ethernet provision (the "SLG Direction").³ The SLG Direction 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 the setting of a Contractual Delivery Date ("CDD") beyond the 57th day and to request the consent of the relevant CP for any extension of a CDD beyond the 57th day. The Direction also required BT to make compensatory payments in the event of late provision of its services. Ofcom decided to re-impose the SLG Direction in the 2008 and 2013 BCMR Statements.

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

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

³ See <http://stakeholders.ofcom.org.uk/binaries/consultations/slq/statement/statement.pdf>.

- 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 parameters 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").
- 1.6 For the majority of cases, the CSA stipulates that the 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.⁴
- 1.9 On 8 September 2015, we accepted the Dispute for resolution. In light of the Parties' submissions, we set the scope of the Dispute as follows:
 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.*

⁴ Paragraph 7, Vodafone's Dispute Submission.

Ofcom's provisional conclusions of the matters in dispute

- 1.10 In line with Ofcom's *Dispute Resolution Guidelines*,⁵ on 6 November 2015 we issued our Provisional Conclusions on this dispute for comment.
- 1.11 We received three responses to our Provisional Conclusions and have taken these responses into account in reaching our final conclusions in this Dispute.

Ofcom's final decisions on the matters in dispute

- 1.12 We have assessed the following seven categories of behaviour allegedly undertaken by BT :
- 1.12.1 Category 1: No notice given of BT's intent to deem consent for a change of CDD;
- 1.12.2 Category 2: Insufficient level of reasoning provided by BT;
- 1.12.3 Category 3: Reliance on reasons not listed in the CSA for the application of Deemed Consent;
- 1.12.4 Category 4: New CDD date set under Deemed Consent incorporating additional delays that did not amount to circumstances permitting the application of Deemed Consent;
- 1.12.5 Category 5: Notice of Deemed Consent not provided in writing;
- 1.12.6 Category 6: Retrospective application of Deemed Consent to change the CDD; and
- 1.12.7 Category 7: Extension of the CDD of un-suspended orders for a period longer than the initial suspension period.
- 1.13 In resolving this Dispute we have not analysed specific orders or reached a view on whether BT has indeed engaged in the specific behaviour described under each category. Rather, we consider whether the types of alleged behaviour listed above could or would have been consistent with BT's obligations under the CSA and BT's SMP obligations. Having considered the arguments of the Parties and undertaken our assessment of each of these categories we have reached the conclusions broadly summarised⁶ in Table 1 below:

⁵ *Dispute Resolution Guidelines*, 7 June 2011. See: <http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>.

⁶ Our conclusions in Section 5 explain where the decision can be subject to specific circumstances within a given category of behaviour.

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

Category	In accordance with the CSA?	BT's obligations to provide services as soon as reasonably practicable and on fair and reasonable terms, and on such terms as Ofcom may from time to time direct	BT's obligations to not depart from published Reference Offer
1. No notice given of the intention to deem consent for a change of CDD.	Would not be in accordance with the terms of the CSA	Could be in breach of obligations	Would be in breach of obligations
2. Insufficient level of reasoning provided by BT.	Could be in accordance with the terms of the CSA	Could be in breach of obligations	Could be in accordance with obligations
3. Reliance on reasons not listed in the CSA for the application of Deemed Consent.	Would not be in accordance with the terms of the CSA	Could be in breach of obligations	Would be in breach of obligations
4. New CDD date set under Deemed Consent incorporating additional delays that did not amount to circumstances permitting the application of Deemed Consent.	Would not be in accordance with the terms of the CSA	Could be in breach of obligations	Would be in breach of obligations
5. Notice of Deemed Consent not provided in writing.	Email notification (including via eCo) would be in accordance with the terms of the CSA	Email notification (including via eCo) would be in accordance with obligations	Email notification (including via eCo) would be in accordance with obligations
6. Retrospective application of Deemed Consent to change the CDD.	Where BT did not set the new CDD as soon as reasonably practicable: would not be in accordance with the terms of the CSA	Where BT did not set the new CDD as soon as reasonably practicable: could be in breach of obligations	Where BT did not set the new CDD as soon as reasonably practicable: would be in breach of obligations
7. Extension of the CDD of un-suspended orders for a period longer than the initial suspension period.	Where BT did not set the new CDD as soon as reasonably practicable: would not be in accordance with the terms of the CSA	Where BT did not set the new CDD as soon as reasonably practicable: could be in breach of obligations	Where BT did not set the new CDD as soon as reasonably practicable: would be in breach of obligations

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

- 1.15 In relation to remedies for the other Categories, we are exercising our powers under section 190(1)(a) to set out the rights and obligations of the parties to the dispute. Specifically:
- in relation to Categories 1, 3, 4, 6 and 7 where we declare (i) that the practice would constitute a breach of BT's SMP obligations; and (ii) the practice would breach BT's obligations under the CSA;
 - in relation to Category 2, where we declare that the practice could constitute a breach of BT's SMP obligations.
- 1.16 BT must now address any remaining issues with Vodafone in accordance with our determination. BT must also observe Ofcom's determination in relation to any equivalent issues with other CPs and when applying Deemed Consent for future orders.
- 1.17 The issues raised in this dispute have also prompted Ofcom to open a separate own-initiative investigation into the circumstances under which BT used Deemed Consent to extend the delivery timeframes for its Ethernet services during the period between 1 September 2012 and 31 December 2014. The investigation will examine whether there are reasonable grounds to consider that BT has failed to comply with the relevant SMP obligations. The investigation was opened on 6 November 2015, we are currently gathering information from BT to inform our initial analysis⁷.

Structure of the remainder of this document

- 1.18 The remainder of this document is structured as follows:
- 1.18.1 Section 2 provides an introduction and background to the Dispute;
 - 1.18.2 Section 3 presents our conclusions on the Analytical Framework;
 - 1.18.3 Section 4 repeats the analysis underpinning the reasoning and assessment set out in our Provisional Conclusions in relation to the seven categories of practice under dispute;
 - 1.18.4 Section 5 addresses the responses to the Provisional Conclusions set out in Section 4 and set out our final conclusions;
 - 1.18.5 Annex 1 contains our determination resolving the dispute;
 - 1.18.6 Annex 2 contains the wording of the relevant clauses of the CSA; and
 - 1.18.7 Annex 3 contains a previous version of Deemed Consent codes provided by BT and referred to in our Provisional Conclusions.

⁷ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01170/

Section 2

Introduction and background

Regulatory requirements on BT

- 2.1 On 8 December 2008 and 28 March 2013, Ofcom published its 2008 BCMR Statement⁸ and 2013 BCMR Statement⁹ respectively. Both these Statements determined that BT has SMP in the provision of Ethernet services and imposed regulatory obligations on BT via SMP Conditions.¹⁰
- 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 (the "SLG Direction").¹¹ In relation 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

⁸ See <http://stakeholders.ofcom.org.uk/consultations/bcmr08/>.

⁹ See <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/>.

¹⁰ 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.

¹¹ See <http://stakeholders.ofcom.org.uk/binaries/consultations/slg/statement/statement.pdf>.

Openreach was "*not providing service on fair and reasonable terms*".¹² The new arrangements put in place by the 2008 SLG Direction were intended to give Openreach "*an appropriate financial incentive to maintain and provision service at an efficient level*".¹³ The SLG Direction concerned matters to which Condition HH1.2 related¹⁴ and required BT to amend the terms and conditions which govern the supply of Ethernet services.

2.6 In the 2008 and 2013 BCMR Statements Ofcom decided to re-impose the 2008 SLG Direction.¹⁵ 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.¹⁶

2.7 The SLG Direction requires in particular¹⁷:

"a) The definition of "Contractual Delivery Date" as set out in the Dominant Provider's terms and conditions shall be amended to require BT to provide reasons to justify a Contractual Delivery Date which is set beyond the 57th day and that any extension of the Contractual Delivery Date beyond the 57th shall be made subject to the consent of the Third Party concerned whose consent shall not be unreasonably withheld;

...

h) BT shall monitor its performance against the service guarantees for fault repair and compensate Third Parties proactively should it fail to satisfy the service guarantees. Compensation payments shall be made on a monthly basis. For the avoidance of doubt, compensation shall be payable without the need for a Third Party to make a claim."

2.8 In the remainder of this document we will be referring to our 2008 and 2013 SLG Directions as the "SLG Direction". We will also refer to the obligations set out in the previous paragraph as Condition (a) of the SLG Direction and Condition (h) of the SLG Direction respectively. Note that in respect of Condition (h), the requirement on BT to monitor performance and to compensate proactively concerns fault repair and not provision of Ethernet services.¹⁸

¹² Paragraph 1.7 and 2.6 of the 2008 SLG Direction.

¹³ Paragraph 3.59 of the 2008 SLG Direction.

¹⁴ See Recital (c) to Annex 3 of the SLG Direction.

¹⁵ See Annex 8, Schedule 2, to 2013 BCMR Statement.

¹⁶ See paragraphs 12.236 and 12.237 of the 2013 BCMR Statement.

¹⁷ This text is taken from the SLG Direction as re-imposed in 2013. This is in substance similar to the corresponding text as re-imposed in 2008.

¹⁸ Condition (h) of the SLG Direction in Ofcom's Statement and Directions of 20 March 2008 included both 'provision' and 'fault repairs'. 'Provision' was not included in the subsequent 2008 and 2013 SLG Directions.

BT's Contractual Obligations¹⁹

- 2.9 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 an SLA which outlines certain quality of service parameters for the provision of Ethernet services by BT. These parameters 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.
- 2.10 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.
- 2.11 In March 2009, BT added a 'Deemed Consent' provision at Paragraph 2.3 of Schedule 4C(i) of the CSA (see Annex 2) 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"*.²⁰
- 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 Ethernet Backhaul Direct Service Order, TDM Access Order or Ethernet Access Direct Service order
- (....)

¹⁹ 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 2.

²⁰ Paragraph 10, BT's letter to Ofcom of 25 September 2015.

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.

- 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 2.

Provisioning of Ethernet services

- 2.18 BT provided Ofcom with an outline of the Ethernet provisioning journey.²¹ 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.²²
- 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.²³ The categories used by BT are described in Table 2 below:

²¹ Annex II to BT's letter to Ofcom of 25 September 2015.

²² Page 1 and 2, Annex II, BT's letter to Ofcom of 25 September 2015.

²³ 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. ²⁴
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 ²⁵ right up to the termination point.
3	There is no existing fibre from the exchange to the customer site. A new spine ²⁶ 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 2.11 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*".²⁷
- 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.²⁸

²⁴ 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.

²⁵ A node acts as a point of aggregation within a network.

²⁶ A fibre spine connects common points in a network.

²⁷ Page 4, BT's 8 October 2015 response to Ofcom's s191 information request.

²⁸ 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:²⁹

- 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;³⁰
- 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.

Deemed Consent Codes and their meanings

- 2.23 BT explained that it uses "nearly 30 different categories" of Deemed Consent codes ("DC codes"),³¹ 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.³² The DC codes that BT provided us in October in response to our information request are listed in Annex 3. These are the codes we relied on when reaching our Provisional Conclusions [3<]
- 2.24 On 23 November 2015, BT provided a replacement Deemed Consent table which they informed us had been regularly provided to CPs and was more suitable for use

²⁹ Page 4 and 5, BT's 8 October 2015 response to Ofcom's s191 information request.

³⁰ The appeals process, set out in BT's industry processes document *Deemed Consent* (June 2012, Version 2.0, provided as part BT's 8 October 2015 response to Ofcom's s191 information request). The document describes itself as to be "used by planners and Job Controllers as a single reference for discussing applications" for instances where the CP believes that BT has applied Deemed Consent incorrectly. It states that "all challenges must be made within 5 working days of the notification that deemed consent has been applied".

³¹ Page 1, Annex II, BT's letter to Ofcom of 25 September 2015.

³² Page 2 and 3, Annex II, BT's letter to Ofcom of 25 September 2015.

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than the table it had originally provided.³³ The codes presented in this additional table are listed in Table 3 below. We rely on the replacement table for the purpose of reaching our final conclusions.

Table 3: Deemed Consent codes provided by BT on 23 November 2016

Clause	Deemed Consent Code	Description
(2.3ii)	DC21	Order is waiting customer acceptance of ECC [excess construction charges]
(2.3ii)	DC22	There is a need for infrastructure build
(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	Customer site not ready for installation
(7.1b)	DC7B	The Communications Provider is in breach of any part of the contract, or Openreach suspends the Service or any part of it in accordance with the contract
(7.1c)	DC7C	Customer Site Access Delay/Customer Down time required
(7.1d)	DC7D	The Communications Provider and Openreach agree a different timescale for delivery of the service and a new CDD is agreed.
(7.1e)	DC7E	Delayed awaiting Customer information
(7.1f)	DC7F	Customer Wayleave
(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 Communications Provider.
(7.1c)	DC7J	No access after failing to reach the 3 named contacts
(7.1c)	DC7K	No access after an appointment has been made
(7.1c)	DC7L	No specific location access after appointment made
(7.1c)	DC7M	Customer appointment outside the 48 hour period
(7.1c)	DC7N	Order suspended at Customer's request
(7.1c)	DC7O	Delays on Driver Circuit impacting on this circuit
(7.1c)	DC7P	Weekend or bank holiday access is requested by customer
(7.1c)	DC7Q	Customer Network freeze periods in operation
(7.1c)	DC7R	Customer downtime is required to complete provision work
(7.1c)	DC7S	Risk assessment/Method Statements to be agreed by customer

Source: BT 23 November 2015 letter to Ofcom.

Issues in dispute

Submissions from Vodafone

³³ Vodafone confirmed that it had previously had sight of this table and told us that the table did not change the position set out in its response to our Provisional Conclusions (Email from Vodafone to Ofcom on 7 December 2015).

- 2.25 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.
- 2.26 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"*³⁴ 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.³⁵
- 2.27 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"*.³⁶
- 2.28 Vodafone argued that it *"cannot be fair and reasonable to 'deem consent' in circumstances that are to any extent within BT's control"*.³⁷
- 2.29 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.³⁸
- 2.30 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 access records for September 2012 and that it wrote to Vodafone on 29 October 2015 in relation to the orders disputed for that month.³⁹
- 2.31 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 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 [§<.]⁴⁰ For the remaining orders BT and Vodafone remain in dispute.⁴¹
- 2.32 Vodafone argued that its analysis *"shows that BT has engaged in sustained and systematic breaches of its contractual and regulatory requirements"*.⁴² In regards to the specific orders in dispute, Vodafone considered that *"BT's application of "deemed*

³⁴ Paragraph 3a, Vodafone's letter to Ofcom of 22 September 2015.

³⁵ Paragraph 5, Vodafone's Dispute Submission.

³⁶ Paragraph 4, Vodafone's Dispute Submission.

³⁷ Paragraph 3c, Vodafone's letter to Ofcom of 22 September 2015.

³⁸ Paragraph 6, Vodafone's Dispute Submission.

³⁹ [§<.]

⁴⁰ [§<.]

⁴¹ Vodafone categories the Ethernet orders in dispute as: (1) The 'Specific Orders Dispute', which relates to orders in September 2012, March 2013 and September 2013 and (2) the 'Appropriate Proportion Dispute', which relates to the appropriate level of SLG payments to be applied for the remaining months in the Relevant Period (see Paragraph 39, Vodafone's Dispute Submission).

⁴² Paragraph 10, Vodafone's Dispute Submission.

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".⁴³

- 2.33 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:
- 2.33.1 *"Vodafone has – at considerable expense – investigated and audited BT's use of "deemed consent" for a representative sample of months";⁴⁴*
- 2.33.2 *"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";⁴⁵* and
- 2.33.3 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.⁴⁶
- 2.34 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 3.26.⁴⁷
- 2.35 Vodafone stated that for the 34 circuits for September 2012 it is owed £[<] plus interest,⁴⁸ 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.⁴⁹ Vodafone also submitted that its analysis in bringing the Dispute incurred significant costs and significant resources.⁵⁰
- 2.36 The remedies Vodafone requested are outlined in paragraphs 4.83 and 4.84, in Section 4.

Submissions from BT

- 2.37 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:

⁴³ Paragraph 38, Vodafone's Dispute Submission.

⁴⁴ Paragraph 20, Vodafone's Dispute Submission.

⁴⁵ Paragraph 39, Vodafone's Dispute Submission.

⁴⁶ Paragraph 40, Vodafone's Dispute Submission.

⁴⁷ Vodafone's categories are outlined in the table at paragraph 62 of its Dispute Submission.

⁴⁸ Paragraph 73, Vodafone's Dispute Submission.

⁴⁹ Paragraph 64, Vodafone's Dispute Submission.

⁵⁰ Paragraph 18(d), Vodafone's Dispute Submission.

- 2.37.1 BT submitted that the issues in dispute are contractual in nature⁵¹. BT further submits that *"Vodafone has not substantiated any of the claims made about BT's compliance with applicable regulatory conditions"*.⁵²
- 2.37.2 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.⁵³
- 2.37.3 Further, BT argued 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..."*⁵⁴ 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"*.⁵⁵
- 2.38 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:
- 2.38.1 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"*.⁵⁶
- 2.38.2 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 introduce a further step into an already complex delivery process, leading to further delay to the detriment of end users.⁵⁷
- 2.38.3 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"*.⁵⁸
- 2.38.4 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.

⁵¹ Paragraphs 1, 5, 14 and 17, BT's letter to Ofcom of 26 August 2015.

⁵² Paragraph 10, BT's letter to Ofcom of 26 August 2015.

⁵³ Paragraph 4, 13 and 14, BT's letter to Ofcom of 26 August 2015.

⁵⁴ Paragraph 25, BT's letter to Ofcom of 26 August 2015.

⁵⁵ Paragraph 26, BT's letter to Ofcom of 26 August 2015.

⁵⁶ Paragraph 8, BT's letter to Ofcom of 25 September 2015.

⁵⁷ Paragraph 10, BT's letter to Ofcom of 25 September 2015.

⁵⁸ Paragraph 84, BT's letter to Ofcom of 25 September 2015.

- 2.38.5 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.⁵⁹
- 2.38.6 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"*.⁶⁰ 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.
- 2.38.7 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*".⁶¹ 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.⁶² 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*".⁶³
- 2.38.8 BT's arguments regarding remedies and Ofcom's view in regards to these are also detailed in Sections 3 and 4 of this document.

Legal framework for the consideration of disputes

- 2.39 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.
- 2.40 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

⁵⁹ Paragraphs 80 to 86, BT's letter to Ofcom 25 September 2015.

⁶⁰ Paragraph 31, BT's letter to Ofcom of 25 September 2015.

⁶¹ Paragraph 2, BT's letter to Ofcom of 25 September 2015.

⁶² Paragraph 18, BT's letter to Ofcom of 25 September 2015.

⁶³ Paragraph 52, BT letter to Ofcom of 25 September 2015.

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.

- 2.41 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)).
- 2.42 A determination made by Ofcom to resolve a dispute binds all the parties to that dispute (section 190(8)).
- 2.43 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.⁶⁴

Accepting the Dispute for resolution

- 2.44 An enquiry phase meeting ("EPM") between the Parties and Ofcom was held on 2 September 2015.
- 2.45 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.
- 2.46 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.

⁶⁴ Directive 2002/21/EC of 7 March 2002.

Accordingly, we opened the Dispute and on 8 September 2015 we informed the Parties of our decision.

Scope of the Dispute

- 2.47 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.
- 2.48 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.*
- 2.49 This scope was published on the Competition and Consumer Enforcement Bulletin on 9 September 2015.⁶⁵

Interested parties

- 2.50 TalkTalk and Sky registered their interest in the outcome of the Dispute.

Provisional Conclusions

- 2.51 On 6 November 2015 we issued our Provisional Conclusions for resolution of the Dispute. We gave the Parties (and any interested parties) 10 working days to comment.
- 2.52 We received responses to our Provisional Conclusions from BT, Vodafone and TalkTalk.

⁶⁵ See http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01165/.

- 2.53 Vodafone advised that it was largely supportive of Ofcom's Provisional Conclusions and Ofcom's legal and factual reasoning. However, Vodafone raised some concerns with respect to certain individual elements of our analysis.⁶⁶
- 2.54 TalkTalk was also supportive of Ofcom's Provisional Conclusions but raised concerns that Openreach's use of deemed consent to avoid SLG payments has a discriminatory effect in favour of BT's downstream operations and that even "*if BT is required by Ofcom to make up the shortfall in service level guarantees (as an outcome of a dispute), this will never compensate its external customers in full because BT would not normally be required to pay interest to the amount equal to the cost of capital of the external customer*".⁶⁷
- 2.55 BT said that it "*fundamentally disagrees with Ofcom's analysis and conclusions in relation to the finding that breaches of contract amount in this case to SMP breach*".⁶⁸
- 2.56 We review and address the responses to our Provisional Conclusions and reach final conclusions in relation to our Analytical Framework, Ofcom's powers in determining this Dispute as well as the relationship between BT's contractual obligations, the SMP conditions and Ofcom's SLG Direction in Section 3. We review and address the responses to our Provisional Conclusions in relation to the seven alleged categories of behaviour in Section 5.

Information relied upon in resolving the Dispute

- 2.57 These final conclusions draw on information provided by the Parties. This includes:
- Vodafone's Dispute Submission of 14 August 2015, representations of 22 September 2015 and 20 November 2015 and email of 7 December 2015;
 - BT's representations of 26 August 2015, 25 September 2015 and 23 November 2015; and
 - BT's response of 8 October 2015 to Ofcom's section 191 ("s191") Notice information request of 24 September 2015.
- 2.58 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.

⁶⁶ Covering letter to Vodafone's response, 20 November 2015.

⁶⁷ Page 2, TalkTalk's response of 20 November 2015.

⁶⁸ Paragraph 10, BT's response of 23 November 2015.

Section 3

Analytical framework

Introduction

3.1 In this Section we first set out the Provisional Conclusions which we issued for consultation on 6 November 2015 relating to: our powers in determining this Dispute; the relationship between BT's contractual obligations, the SMP conditions and Ofcom's SLG Direction; and our proposed Analytical Framework for this dispute. We then set out the Parties' responses to our Provisional Conclusions and our final conclusions on these matters.

Ofcom's Provisional Conclusions

3.2 In this Section we repeat the arguments we received from the Parties preceding our Provisional Conclusions and our Provisional Conclusions on these matters.

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

Submissions received by the Parties prior to Ofcom's Provisional Conclusions

- 3.3 Vodafone submitted that the Dispute relates to various aspects of compliance with the CSA and BT's SMP conditions. Vodafone considered that BT's application of Deemed Consent and failure to pay SLGs in each case was 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.⁶⁹
- 3.4 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.⁷⁰
- 3.5 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 1.9). 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.
- 3.6 BT argued in response that its SMP obligations were not engaged in this Dispute.⁷¹ 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*

⁶⁹ Paragraph 17 and 18, Vodafone's Dispute Submission.

⁷⁰ Paragraph 33, Vodafone's Dispute Submission.

⁷¹ See for example BT's letter 26 August 2015.

contractual breaches".⁷² 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.⁷³ BT argued that if Vodafone's position was 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 regulatory exercise – as well as to investigate and make findings of facts in relation to the alleged breaches.⁷⁴

- 3.7 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.⁷⁵ 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.⁷⁶
- 3.8 Referring to the Supreme Court's ruling in *BT v Telefonica (2014)*,⁷⁷ BT said that there was 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 were far better suited to resolution of these issues.⁷⁸
- 3.9 BT had 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.⁷⁹
- 3.10 BT added that there were ongoing discussions in industry to deliver changes to the Deemed Consent mechanism and that this was 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*".⁸⁰
- 3.11 BT also argued that in the May 2015 BCMR consultation,⁸¹ 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

⁷² Paragraph 5, BT's letter to Ofcom of 26 August 2015.

⁷³ Page 11, BT's letter to Ofcom of 25 September 2015.

⁷⁴ Paragraph 29, BT's letter to Ofcom of 25 September 2015.

⁷⁵ Paragraph 30, BT's letter to Ofcom of 25 September 2015.

⁷⁶ Page 11, BT's letter to Ofcom of 25 September 2015.

⁷⁷ https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0204_Judgment.pdf.

⁷⁸ Page 12, BT's letter to Ofcom of 25 September 2015.

⁷⁹ Page 14, BT's letter to Ofcom of 25 September 2015.

⁸⁰ Paragraph 14, BT's letter of 26 August 2015.

⁸¹ Paragraph 13.118, http://stakeholders.ofcom.org.uk/binaries/consultations/bcmr-2015/summary/BCMR_Sections.pdf.

process. BT argued that Ofcom should decline to determine issues relating to the specific rules for Deemed Consent in the context of a dispute.⁸²

Ofcom's provisional view

- 3.12 We agreed with BT that disagreements about the operation of the CSA raise contractual issues between the parties to this agreement. However, for the reasons set out in paragraphs below, we said that 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. Our view was that action by BT which is not in accordance with its contractual obligations is also capable of being in breach of this regulatory obligation.⁸³
- 3.13 We said that 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. We said that 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 it appropriate to declare the Parties' rights and obligations under these contractual provisions.
- 3.14 We disagreed 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). We explained our view that 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.
- 3.15 In addition, Ofcom considered 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 proposed to include this aspect as an element of our analysis.
- 3.16 We accepted, 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 agreed with BT that in this case not every contractual breach would automatically equate to a breach of the SMP conditions. In approaching this Dispute, we 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 proposed to take 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.

⁸² Page 16, BT's letter to Ofcom of 25 September 2015.

⁸³ 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.

- 3.17 Specifically, we said that 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.⁸⁴
- 3.18 We said that 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.⁸⁵
- 3.19 We proposed that 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 should also take into account the SLG Direction issued by Ofcom under section 49 of the 2003 Act. As set out in paragraph 2.5 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.
- 3.20 We also considered 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 did 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. We said that 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.
- 3.21 We noted 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. Our decision was that no such alternative means existed to resolve the Dispute promptly and satisfactorily.
- 3.22 We also noted BT's reference to our comments in the May 2015 BCMR consultation document⁸⁶. We emphasised, however, that the forward looking assessment we undertake for the purposes of our current BCMR is different from the framework that

⁸⁴ See <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/> paragraphs 12.339, 12.340 and 12.349. See also Table 8.11 of <http://stakeholders.ofcom.org.uk/consultations/bcmr08/>.

⁸⁵ See paragraphs 12.272, 12.273 and 12.284 to 12.286 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/>.

⁸⁶ <http://stakeholders.ofcom.org.uk/consultations/bcmr-2015/>.

we apply when resolving disputes in relation to BT's adherence to its existing regulatory obligations.

Analytical Framework

3.23 We set out our proposed analytical framework for the assessment of the Dispute, which was structured around three questions:

3.23.1 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?

3.23.2 Second; are there any reasons to consider that:

- (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?

3.23.3 Third; in light of our answer to the above, was 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

3.24 As set out paragraph 2.34, 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.

3.25 We said we believed that in determining this Dispute, it was appropriate to focus on the categories of practices set out by Vodafone, rather than assessing the individual orders disputed by it. We said this was consistent with our overall approach to this Dispute, as set out paragraph 2.48, which aims at assessing the regulatory issues that arose. In addition, we said that we did not believe it was practicable, in the statutory timeframe available, to assess and reach a determination for all individual orders that had been detailed by Vodafone. In line with this approach, we did not propose to assess whether BT has engaged in the practices at issue in each individual order disputed by Vodafone. Our analysis was instead focussed on the type of practice concerned, should this have been applied by BT to any individual order during the Relevant Period.

- 3.26 We set out that Vodafone had grouped the examples of where it believed BT had 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.
- 3.27 We said that these categories formed a starting point on which to base our analysis. However, we noted that each of Categories (i)-(iii) above raised a number of issues. We separated these out to create a total of seven categories warranting distinct consideration by us (and for clarity, we 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 were:
- 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: Reliance on reasons not listed 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.
- 3.28 We noted 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 assessed each category of alleged behaviour individually.

Responses to Ofcom's Provisional Conclusions and Ofcom's final view

3.29 In this Section we summarise the comments we received from the Parties in response to our Provisional Conclusions set out above. We then present our final conclusions on these matters. The Parties' arguments and our final decisions in relation to the individual categories of practice are presented separately in Section 5 of this document.

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

Vodafone's arguments

3.30 In general, Vodafone supported the approach taken by Ofcom.⁸⁷ Vodafone submitted that Ofcom's decision offers an opportunity to clearly indicate the way in which deemed consent should be applied going forward.⁸⁸ Vodafone agreed with the analytical framework set out by Ofcom, saying that "*it is appropriate for Ofcom to consider compliance with both the CSA and the SMP Conditions*".⁸⁹

3.31 Vodafone said that Ofcom's assessment of BT's compliance with SMP conditions may require Ofcom to determine whether or not BT has complied with the terms of its reference offer.⁹⁰ Vodafone did not oppose Ofcom's approach of assessing BT's compliance with the SMP Conditions regardless of whether or not there was compliance with the CSA.⁹¹

3.32 In relation to specific categories of behaviour being considered in the dispute: level of detail provided by BT when applying Deemed Consent (Category 2); and the requirement for BT to provide notification in writing (Category 5) (both discussed further in our conclusions below), Vodafone argued that "*Ofcom should reconsider its general approach to interpreting the CSA*"⁹² and submitted that Ofcom has misinterpreted the CSA.⁹³ In particular, Vodafone argued that consideration of the CSA should not be made in a vacuum and instead should consider regulatory obligations and Ofcom's policy objectives.⁹⁴ Vodafone submitted that the CSA is the reference offer setting out the terms and conditions on which BT offers services in compliance with the SMP Conditions. Therefore, the specific provisions of the CSA should be read in light of the SMP conditions.⁹⁵ Vodafone raised concerns that failure to adopt this approach could result in a "*mismatch between BT's contractual and its regulatory obligations*".⁹⁶

⁸⁷ Paragraph 1, Vodafone's response of 20 November 2015.

⁸⁸ Paragraph 2, Vodafone's response of 20 November 2015.

⁸⁹ Paragraph 6, Vodafone's response of 20 November 2015.

⁹⁰ Paragraph 6a, Vodafone's response of 20 November 2015.

⁹¹ Paragraph 6b, Vodafone's response of 20 November 2015.

⁹² Paragraph 7, Vodafone's response of 20 November 2015.

⁹³ Paragraph 12a, Vodafone's response of 20 November 2015.

⁹⁴ Paragraphs 8 and 9, Vodafone's response of 20 November 2015.

⁹⁵ Paragraph 9, Vodafone's response of 20 November 2015.

⁹⁶ Paragraph 9, Vodafone's response of 20 November 2015.

BT's arguments

- 3.33 BT argued that the Provisional Conclusions failed to recognise that there are contractual mechanisms to remedy contractual breaches: it stated that "*Ofcom has not referred to any previous cases where a breach of contract, for which there are existing contractual remedies, amounted to a failure to provide services on the terms of the Reference Offer. Treating breaches of contract as regulatory breaches undermines parties' certainty and relegates the importance of the contract, and industry discussions to determine what the contract should provide for. Such an action by Ofcom goes beyond what is necessary and proportionate*".⁹⁷
- 3.34 BT submitted that Ofcom's provisional view "*seems to imply that every time BT would recognise it has to pay SLG, BT would also acknowledge that it has breached the SMP obligations. Such an interpretation cannot be correct*".⁹⁸ BT also argued that Ofcom had not provided adequate reasoning supporting the allegation of breach of Conditions HH1.2 and 1.2: BT believes that the aim of these Conditions was for BT to provide its services on fair and reasonable terms in order to ensure competition in the relevant markets and in the related downstream markets, not to address a lack of transparency.⁹⁹ BT added that "*In its dispute submission Vodafone has not demonstrated that the alleged conducts had any impact on downstream competition (in particular where DC is applied for customer related reasons or where there are good reasons that justify the application of DC). Likewise, in the PCs, Ofcom has not properly established how the seven categories of conduct would undermine competition in the manner that the SMP obligations fundamentally aim to address*".¹⁰⁰
- 3.35 BT argued that the Provisional Conclusions contained only superficial reasoning and lacked proper assessment of any of the alleged deviations from the terms of the Reference Offer (which should take into account all the circumstances of a case and its materiality): it stated that "*Ofcom's main justification for the finding of the SMP breaches relies on the supposed lack of transparency in the service delivery associated with a number of categories of alleged behaviour. Yet transparency is an issue of fact and Ofcom's analysis does not contain any analysis of the facts and circumstances surrounding the alleged behaviours. In BT's view, when assessing whether a conduct may be in breach of regulation, Ofcom has to take into account all the circumstances surrounding an alleged behaviour, the materiality of any deviation from the terms of the Reference Offer and of its impact (as referred to by Ofcom in the PCs at paragraph 3.13). It is not possible to conclude a behaviour amounts to a SMP breach in principle without having conducted such an analysis*".¹⁰¹
- 3.36 BT stated that in its view, "*the finding of an SMP infringement requires an analysis that goes beyond the finding of contractual breach. An adequate and proportionate assessment by Ofcom would result in a clearly different outcome than what is currently set out in the PCs*".¹⁰²
- 3.37 BT argued that Ofcom's application of the SLG Direction in relation to categories 1, 2, 3 and 4 was not appropriate or reasonable. With regard to the SLG Direction

⁹⁷ Paragraph 12, BT's response of 23 November 2015.

⁹⁸ Paragraphs 20 and 21, BT's response of 23 November 2015.

⁹⁹ Paragraph 15, BT's response of 23 November 2015.

¹⁰⁰ Paragraph 15, BT's response of 23 November 2015.

¹⁰¹ Paragraph 13, BT's response of 23 November 2015.

¹⁰² Paragraph 3, BT's response of 23 November 2015.

Condition (h),¹⁰³ which requires BT to monitor its performance against the service guarantees and pro-actively compensate CPs, BT argued that it *"has mechanisms in place to ensure that CPs can appeal within five days of the notification of DC by the job controller and ensure that BT pro-actively makes SLG payments in cases foreseen under the CSA"*. It also argued that: *"CPs are also able to question / challenge SLG payment levels directly with BT. Both the DC and SLG challenge processes are straightforward to use and typically lead to swift resolution of the matters raised. Requiring anything beyond what is already in place would be disproportionate"*.¹⁰⁴

- 3.38 BT also said that it understood from the reference at paragraph 4.95 of the Provisional Conclusions that Ofcom considers BT could be in breach of its obligations under Condition HH1.2 when not complying with its obligations under the SLG Direction. It also said that it reserved its position to make further comments on the application of the SLG Direction if Ofcom were to consider BT has also infringed its obligation to make proactive payments under the SLG Direction.¹⁰⁵
- 3.39 BT argued that in the circumstances of the dispute, if any of the alleged conduct was considered capable of breaching regulation, *"the materiality threshold required to conclude that BT has breached its SMP obligations is not reached"*.¹⁰⁶ BT said that the following points supported this argument:
- 3.39.1 BT found that it had breached the Deemed Consent provisions in only a small proportion of the orders to which Deemed Consent was applied in the three months analysed by Vodafone;
 - 3.39.2 when it did not apply Deemed Consent in line with the CSA, this was likely due to manual errors and was not based on systematic behaviour;
 - 3.39.3 given the complexity of Ethernet service delivery, human error will sometimes occur; and
 - 3.39.4 where BT found that it made errors, it had made SLG payments to Vodafone.
- 3.40 In relation to Ofcom's analysis of BT's compliance with the terms of the CSA, BT argued that Ofcom *"has failed to adequately capture the specific circumstances that are relevant to a proper assessment"* in relation to Categories 2, 6 and 7. BT said that *"Ofcom has failed to adequately account for the complexity that is inherent in the delivery of Ethernet services, where circuit delivery is often bespoke at an individual circuit level, and where delivery relies on action being taken by, and detailed interaction occurring between BT, CPs and their parties. These factors give rise to very specific circumstances at an order level that need to be properly understood and taken account of in order to assess whether DC was managed in compliance with BT's contractual obligations"*.¹⁰⁷

¹⁰³ See page 265, <http://stakeholders.ofcom.org.uk/binaries/consultations/business-connectivity/statement/annexes8-17.pdf>.

¹⁰⁴ Paragraph 17, BT's response of 23 November 2015.

¹⁰⁵ Paragraph 17, BT's response of 23 November 2015.

¹⁰⁶ Paragraph 14, BT's response of 23 November 2015.

¹⁰⁷ Paragraph 39, BT's response of 23 November 2015.

Ofcom's decision regarding the application of SMP Conditions to this case and Ofcom's dispute resolution powers

- 3.41 In relation to BT's arguments about whether contractual breaches can also amount to SMP breaches, we refer to our Provisional Conclusions (see paragraphs 3.12 to 3.15 above). We remain of the view that action by BT which is not in accordance with its contractual obligations is also capable of being in breach of its regulatory obligations.
- 3.42 We acknowledge that it is important for the contract to act as the primary means of governing the relationship between the parties. As a general point, where the contract provides an effective means for addressing and rectifying breaches by BT this may mean that no question of a breach of regulatory obligations arises where the issue has been resolved according to that mechanism. However, we consider that the existence of the contract does not preclude the possibility of considering whether services are being provided in accordance with BT's SMP obligations.
- 3.43 In our conclusions in Section 5 we distinguish between the two types of SMP obligation relevant to this dispute:
- 3.43.1 Conditions HH5.9 and 6.9 requiring that BT shall not depart from the relevant Reference Offer either directly or indirectly (see paragraph 2.2 above).
- 3.43.2 Conditions HH1.2 and 1.2 requiring (amongst other things) that BT's provision of network access shall be on fair and reasonable terms (see paragraphs 2.3-2.4 above).
- 3.44 Regarding Conditions HH5.9 and HH6.9, where the contract provides an effective means for addressing and rectifying breaches by BT and the issue has been resolved according to that mechanism, there may be no breach of these regulatory obligations. In such circumstances, there may have been no departure from the relevant Reference Offer either directly or indirectly. However, where there is a departure from the relevant Reference Offer either directly or indirectly, the wording of Conditions HH5.9 and 6.9 is clear that a breach of the regulatory obligation would have occurred (see also paragraph 3.54 below).
- 3.45 Regarding Conditions HH1.2 and 1.2, where the contract includes a mechanism for addressing contractual breaches by BT, questions may still arise in relation to whether that mechanism is effective, both in principle and in practice, in ensuring that supply is being provided to CPs in accordance with those SMP obligations.
- 3.46 We also accept, in this regard, that a contractual remedy may bring an SMP breach to an end, or remedy the consequences of an SMP breach. Whether this is the case, however, will depend on whether the contractual remedy has been implemented effectively and has put the CP concerned in the position they would have been in but for BT's practice.
- 3.47 In this context we observe that the Dispute concerns practices for which no contractual remedy has been applied.
- 3.48 We also accept that the existence of a contractual mechanism for resolving a dispute involving contractual rights and obligations may, depending on the circumstances, mean that it is not appropriate to handle that dispute. As set out in paragraphs 2.45 and 2.46 above, however, we have concluded that such alternative means would not meet the requirements of section 186(3) of the Act in relation to the present dispute.

- 3.49 In relation to Conditions HH1.2 and 1.2 we accept BT's argument set out in paragraph 3.34 above in that not every breach of BT's contractual obligations will necessarily amount to an SMP breach. It is for this reason that we have assessed the two issues separately and we have considered the existence of potential SMP breaches in light of the objectives pursued by the relevant SMP Conditions (see also paragraphs 3.16 to 3.18 above).
- 3.50 We also accept BT's argument that a final assessment of whether there has been a contractual and/or SMP breach would require, in certain situations, an assessment of the factual matrix of BT's behaviour in relation to individual orders including the specific circumstances and complexity concerning the provisioning of an order. We have made specific provision for this in reaching our conclusions in Section 5.
- 3.51 In so far as BT's arguments in relation to Conditions HH1.2 and 1.2 are concerned (see paragraph 3.34 above), we note that the SMP conditions at issue prohibit certain types of behaviour, including in relation to the terms under which BT provides access to its services. We do not agree with BT's submission that a determination that an SMP breach may have occurred requires a finding that such practice has had an actual impact on competition. We ensured that we complied with our statutory duties when we imposed Conditions HH1.2 and 1.2 in the 2008 and 2013 BCMR Statements. In these we set out in detail our consideration of our general duties under section 3 of the Act, including furthering the interests of citizens and consumers, where appropriate by promoting competition and our consideration of the Community requirements in section 4 of the Act. Accordingly, we consider it sufficient to assess whether BT has engaged in a practice which means it has failed to supply on fair and reasonable terms, by reference to the potential of such practice to undermine the objectives of Conditions HH1.2 and 1.2.
- 3.52 We nonetheless consider that, in establishing whether BT has breached its obligations under Conditions HH1.2 and 1.2 by providing its services on terms that are not "fair and reasonable", regard may need to be had to other factual circumstances. We consider that the following factors could be relevant, depending on the circumstances:
- 3.52.1 whether there is evidence of a systematic failure, i.e. a failure by BT to put the right mechanisms and processes in place to ensure compliance with its regulatory obligations; and/or
 - 3.52.2 the frequency of the practice; and/or
 - 3.52.3 whether the practice reflects a deliberate attempt to undermine the objectives pursued by the relevant SMP Conditions; and/or
 - 3.52.4 the potential impact of the practice on CPs.
- 3.53 In Section 5, we point to these parameters as factors that might need to be taken into account in order to determine whether there would be a breach of the relevant SMP Conditions in relation to the practices in dispute.
- 3.54 We do not, however, consider that assessment of the above factors (paragraphs 3.49.1 to 3.49.4) would be required in order to establish the existence of a potential breach of Conditions HH5.9 and 6.9. The wording of these provisions is clear and prohibits a departure from BT's Reference Offer. This is consistent with the aims of these Conditions as set out in paragraph 3.14 above.

- 3.55 In respect of BT's argument regarding the SLG Direction, we note that the requirement is for BT to amend its contract in relation to the provision of the relevant services to provide that:
- Condition (a): BT should be required to provide reasons to justify a CDD which is set beyond the 57th day and any extension of the CDD beyond the 57th shall be made subject to the consent of the CP concerned; and
 - Condition (h): BT shall proactively pay compensation of a given amount on a monthly basis for fault repair, but not late provision (see wording at paragraph 2.7 above) and in contrast with the contractual provisions of the CSA.
- 3.56 We accept that the requirements of the SLG Direction are to amend the contract as described, and as argued by BT, departure from the requirements of the SLG Direction in relation to an individual order may not, in its own right, amount to a breach of these obligations. However, the SLG Direction must be implemented in practice, and it is not sufficient simply to amend the wording of the contract. Where the contractual terms under which BT provides its services can be construed, and are in fact consistently being construed, in a way that does not give effect to the requirements of the SLG Direction, BT would be in breach of its obligations under that Direction. This could be the case where the practice at issue has been frequent throughout the Relevant Period, or systematic. Our determination in Section 5 of this document reflects this position.
- 3.57 We clarify that we consider that in the situations set out in the previous paragraph, BT could be in breach of Condition (a) of the SLG Direction. We have not determined separately whether there has been a breach of BT's obligation to make proactive compensatory payments to CPs in that Condition (h) of the SLG Direction only refers to fault repair, and not provision.
- 3.58 We note in particular that the SLG Direction requires BT to obtain consent for an extension of the CDD beyond the 57th day. Pursuant to the terms of the SLG Direction, this would require communication of consent by the CP to BT prior to an extension being made. We understand that the concept of deemed consent was introduced in order to deal with particular operational circumstances where active provision of consent by the CP would not enable effective provisioning. It is in the context that CPs give their consent, via the terms of the CSA, for this mechanism to be relied on in certain circumstances. However, we consider that it is inherent to the concept of consent that the CP is provided with an intelligible explanation of the circumstances under which an extension is made and that Deemed Consent is limited to the situations agreed to by the CP concerned under the terms of the CSA. The CP should be put in a position where it is able to challenge the use of Deemed Consent in relation to a particular order. We take these points into account in Section 5 to the extent that they are relevant to our analysis of individual categories.
- 3.59 We note the argument made by Vodafone in paragraph 3.32 above. In light of our conclusions in relation to Step 2 of our analysis for Categories 2 and 5, we do not consider necessary to address this issue in detail. We explain this further in Section 5.

Focus of Analysis

Vodafone's arguments

3.60 Vodafone said that it had asked Ofcom to conclude on individual circuits in dispute. It considered that in the case of examples from September 2012, this would have "offered an efficient resolution of the dispute". However, Vodafone acknowledged that Ofcom's approach "is a pragmatic one which should provide a clear baseline on which the parties can resolve factual disputes" and the Provisional Conclusions "reflect the limitations of time available to Ofcom to resolve the Dispute".¹⁰⁸

BT's arguments

3.61 BT made a number of arguments in relation to our choice of approach which are set out in paragraphs 3.33 to 3.40 above.

Ofcom's decision in relation to the focus of the analysis

3.62 For the same reasons as in the Provisional Conclusions, set out in paragraphs 3.24 to 3.28 above, we have decided to maintain our approach of focussing on the categories of practices set out by Vodafone, rather than assessing the individual orders disputed by it. We have, however, placed more emphasis in our determination on the need to have regard to the circumstances surrounding BT's implementation of these practices to individual orders (see also paragraphs 3.50, 3.52 and 3.53 above).

Analytical framework

3.63 In light of the Parties' responses to our Provisional Conclusions and our conclusions set out above, we have decided to assess each of the seven categories listed in paragraph 3.26, by going through the following steps.

3.64 In **Step 1** we consider for each of the seven categories whether, had BT engaged in that type of behavior, this could be in breach of the terms of the CSA. We set out the some of the circumstances that would need to be taken into account in making this assessment.

¹⁰⁸ Paragraph 3, Vodafone's response of 20 November 2015.

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?	
<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.	Could the application of Deemed Consent without notice be in breach of the CSA? If so, under which conditions?
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 is required when providing “reasons to justify”?: <ul style="list-style-type: none"> • what purpose must provision of “reasons to justify” meet? • is communication of the relevant DC code sufficient? • can the same DC code be applied more than once?
3. Reliance on reasons not listed in the CSA for the application of Deemed Consent.	Could use of Deemed Consent for reasons other than the ones listed in Paragraph 2.3 of schedule 4C(i) the CSA be in breach of the CSA? If so, under which conditions?
4. New CDD date set under Deemed Consent incorporating additional delays that did not amount to circumstances permitting the application of Deemed Consent.	Could setting the CDD in this way be in breach of the requirements of the CSA? If so, under which conditions?
5. Notice of Deemed Consent not provided in writing.	Could notification of Deemed Consent by means other than in writing be in breach of the CSA? If so, under which conditions?
6. Retrospective application of Deemed Consent to change the CDD.	Under what circumstances, if any, could such retrospective application be in breach of the requirements of the CSA?
7. Extension of the CDD of un-suspended orders for a period longer than the initial suspension period.	Could extending the CDD in this way be in breach of the requirements of the CSA?

3.65 Under **Step 2** we assess whether there are any reasons to consider that the behaviour under each category could be in breach of the relevant SMP obligation (see paragraphs 2.1 to 2.5), and under what conditions. Step two comprises two alternative questions, depending on the outcome to our assessment under Step 1 (Steps 2a and 2b).

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

- 3.66 Step 2a applies to those categories for which we provisionally concluded that BT's practice could be in breach of the CSA. For these categories, we consider whether BT's practice could also be:
- 3.66.1 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
 - 3.66.2 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).
- 3.67 In making this assessment in relation to Condition HH1.2 or Condition 1.2, we consider in particular whether BT's behaviour could depart from the requirements of the CSA such that it would undermine the purposes of these Conditions. We set out, in particular, the parameters that would need to be considered in making this assessment.
- 3.68 Step 2b applies to those categories of practices for which we conclude that BT could 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 could nonetheless have been in breach of Condition HH1.2 or Condition 1.2.

Step 2a. Where we conclude that use of Deemed Consent by BT could be in breach of the CSA, are there any reasons to consider that the practice could also have been in breach of:

- (i) BT's SMP obligations set out in Condition HH5.9 or Condition 6.9,***
- (ii) BT's SMP obligations set out in Condition HH1.2 or Condition 1.2, including BT's SMP obligations under the SLG Direction?***

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

- 3.69 In **Step 3**, we consider whether it is appropriate to determine any remedy in light of our analysis under Steps 1 and 2. The Parties' arguments in relation to this Step are set out from paragraph 5.101 below.

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

Ofcom's provisional conclusions on individual categories

Introduction

- 4.1 This Section repeats the analysis and provisional conclusions for each of the seven categories, on which we consulted in November 2015. The submissions we received in response to our Provisional Conclusions are addressed in Section 5, where we also set out our final conclusions on the matters in dispute.

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*".¹⁰⁹

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]¹¹⁰
- 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*".¹¹¹

Ofcom's provisional 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 3.63 to 3.65, we 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.

¹⁰⁹ Paragraph 62, page 21 of Vodafone's Dispute Submission.

¹¹⁰ Paragraph 68, BT's letter to Ofcom of 25 September 2015.

¹¹¹ Page 14, BT's 8 October 2015 response to Ofcom's s191 information request.

- 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*.¹¹² Our provisional view was 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.
- 4.7 We noted that the Parties appear to dispute whether or not notice had been given by BT in some circumstances.¹¹³ We said that for the purposes of our analysis, and consistent with our overall approach, we did not consider 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"*.¹¹⁴ We considered 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 We said that 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 concluded 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 paragraph 2.7).

¹¹² See Annex 3 to this document.

¹¹³ 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.

¹¹⁴ Paragraph 10, BT's letter to Ofcom of 25 September 2015.

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 A3.1 in Annex 3) 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 argued that a "*mere reference to the fact that a circumstance allowing "deemed consent" has arisen does not automatically imply that the extension is justified*".¹¹⁵
- 4.12 Vodafone pointed in particular to BT's use of the DC22 code (relating to the need for infrastructure build - see Table A3.1 in Annex 3), 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,¹¹⁶ 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.¹¹⁷

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*".¹¹⁸
- 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*".¹¹⁹ BT further submits that "...there may be

¹¹⁵ Paragraph 62, page 22, Vodafone's Dispute Submission.

¹¹⁶ Paragraph 62, page 22, Vodafone's Dispute Submission.

¹¹⁷ Paragraph 62, page 23, Vodafone's Dispute Submission.

¹¹⁸ Paragraph 59, BT's letter to Ofcom of 25 September 2015.

¹¹⁹ Page 16, BT's 8 October 2015 response to Ofcom's 191 information request.

occasions where the DC code is repeated, but it would be for a new event, not for a reason that has already been resolved".¹²⁰

Ofcom's provisional 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*".
- 4.18 Our provisional view was 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 was 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 considered 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 noted 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.¹²¹ We said that 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. We also said that reference to BT's "category 2" also appeared to meet the CSA requirement that BT should provide "reasons to justify" its reliance on Deemed Consent. For these reasons, our provisional view was 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 separately argued that terms

¹²⁰ *Ibid.*

¹²¹ 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/ethernetservices/downloads/ethernet_portfolio_training_pack.pdf.

permitting BT to deem consent in circumstances where a CP would have otherwise reasonably withheld consent, cannot be fair and reasonable.¹²²

- 4.22 Our provisional view was 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 was that BT would have been in breach of its obligation to provide its services on fair and reasonable terms.
- 4.23 We considered 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 circumstances¹²³:
- 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 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 was 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 considered 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 disagreed 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 acknowledged 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 noted 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

¹²² Page 2, Vodafone's letter to Ofcom of 22 September 2015.

¹²³ As based on the Codes in Table A3.1 of Annex 3, provided by BT in its 8 October 2015 response to Ofcom's s191 information request.

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*request to change the CDD, including names and telephone numbers of contacts that they have called and whether the contact was made successfully".*¹²⁴

- 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.¹²⁵
- 4.27 Our provisional view was 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 considered 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.

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.¹²⁶

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*".¹²⁷ Vodafone argued that it was not valid for BT to deem consent to move the CDD [§<]¹²⁸
- 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*"¹²⁹ 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*".¹³⁰

Ofcom's provisional view

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

¹²⁴ Page 4, BT's 8 October 2015 response to Ofcom's 191 information.

¹²⁵ Page 4, BT's 8 October 2015 response to Ofcom's 191 information.

¹²⁶ Paragraph 62, page 23, Vodafone Dispute Submission.

¹²⁷ Paragraph 66, BT's letter to Ofcom of 25 September 2015.

¹²⁸ [§<]

¹²⁹ Paragraph 3, BT's letter to Ofcom 25 September 2015.

¹³⁰ Page 16, BT's 8 October 2015 response to Ofcom's s191 information request.

- 4.31 Our provisional view was 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 concluded 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. We said that 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 noted 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 3.63 to 3.69 above), we did not consider whether the practice described in this Category was indeed followed by BT in the individual cases disputed by Vodafone.

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 was that BT would have been in breach of its SMP obligations. Specifically, Ofcom considered 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 was therefore that reliance on reasons not listed in the CSA to apply Deemed Consent would have been in breach of the above SMP Conditions. We also said that 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 2.7).

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

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of Deemed Consent as set out in Schedule 4c(i) of the CSA.¹³¹ Vodafone pointed 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'.¹³²

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,¹³³ while Vodafone argued that:

[redacted]¹³⁴

- 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*".¹³⁵

Ofcom's provisional view

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

- 4.39 Our provisional view was 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 was that such practice would therefore not be in accordance with the terms of the CSA.
- 4.40 We also noted 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 was that the clear wording of this provision requires that the new CDD is set by BT as soon as reasonably practicable. We noted 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 was 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 was, 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.

¹³¹ Paragraph 62, Page 23 of Vodafone's Dispute Submission.

¹³² Paragraph 62, Page 23 of Vodafone's Dispute Submission.

¹³³ Paragraph 65, BT's letter to Ofcom of 25 September 2015.

¹³⁴ [redacted]

¹³⁵ Page 15, 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:

- 4.43 Our provisional view regarding Category 4 was 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 as soon as reasonably practicable, reflects BT's SMP obligation to provide its services within this timeframe. We stated that 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 considered 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 We therefore provisionally concluded 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. We also said that where, after deeming consent in this manner, BT extended the CDD beyond the 57th day, BT would 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*".¹³⁶
- 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*".¹³⁷
- 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*".¹³⁸
- 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.¹³⁹

¹³⁶ Paragraph 62, page 24, Vodafone's Dispute Submission.

¹³⁷ Paragraph 62, page 23, Vodafone's Dispute Submission.

¹³⁸ Paragraph 62, page 24, Vodafone's Dispute Submission.

¹³⁹ Paragraph 62, page 23 and 24, Vodafone's Dispute Submission.

BT's arguments

- 4.50 BT explained 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"*".¹⁴⁰
- 4.51 BT argued 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.¹⁴¹ BT also noted that a telephone call which is followed up in writing would be a valid notification for the purposes of Deemed Consent.¹⁴²
- 4.52 In response to our s191 information request BT stated 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*".¹⁴³

Ofcom's provisional view

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

- 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;

¹⁴⁰ Paragraph 69, BT's letter of 25 September 2015.

¹⁴¹ Paragraph 69, BT's letter of 25 September 2015.

¹⁴² Paragraph 70, BT's letter of 25 September 2015.

¹⁴³ Page 15, BT's 8 October 2015 response to Ofcom's s191 information request.

(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 considered that it is clear from the wording of Condition 21 that notice must be given in writing. Therefore, we provisionally concluded 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 accepted, we considered that notice by telephone which is subsequently followed up by written confirmation would satisfy the contractual notification requirements. However, we noted 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 understood 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 disagreed with Vodafone's argument stating that the notice requirements are clearly satisfied by email notification through the eCo system.
- 4.57 Our provisional view was that if emails were sent to a designated Vodafone email address, then this satisfied the requirements of the CSA. We considered this to be the case whether the email was sent through the eCo system or through any other system.

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 was 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. We also said that 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 CDD

Vodafone's arguments

- 4.59 Vodafone asserted 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 crystallise."¹⁴⁴

- 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*".¹⁴⁵
- 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*".¹⁴⁶

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*".¹⁴⁷ 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*".¹⁴⁸
- 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*".¹⁴⁹
- 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*".¹⁵⁰ 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.¹⁵¹ In BT's view, on the basis that it could not have

¹⁴⁴ Paragraph 62, page 24 and 25, Vodafone's Dispute Submission.

¹⁴⁵ Paragraph 62, page 25, Vodafone's Dispute Submission.

¹⁴⁶ Paragraph 62, page 25, Vodafone's Dispute submission.

¹⁴⁷ Paragraph 73, BT's letter to Ofcom of 25 September 2015.

¹⁴⁸ Paragraph 74, BT's letter to Ofcom of 25 September 2015.

¹⁴⁹ Page 14, BT's 8 October 2015 response to Ofcom's s191 information request.

¹⁵⁰ Page 14, BT's 8 October 2015 response to Ofcom's s191 information request.

¹⁵¹ Page 14, BT's 8 October 2015 response to Ofcom's s191 information request.

reasonably foreseen the delay, it could only have applied Deemed Consent after the delay had occurred.

Ofcom's provisional 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 accepted BT's argument that notice could not be given before BT itself became aware of the delay. By way of example, we noted 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 said that we appreciate it would not have been possible for BT to provide notice to Vodafone before the CDD.
- 4.68 Therefore, we agreed 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 said that 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 concluded that notification by BT of its intent to deem consent on a date after the CDD¹⁵² would not meet the CSA's requirements.
- 4.70 Separate from the above, we accepted 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. We said that 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.
- 4.71 Accordingly, we provisionally concluded 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';

¹⁵² I.e. the CDD in place at the time immediately before Deemed Consent is applied.

- 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 accepted 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 believed that BT's practice would not have been in breach of its SMP obligations. We 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 was, 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 considered 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*".¹⁵³

BT's arguments

- 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*".¹⁵⁴
- 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.

¹⁵³ Paragraph 62, pages 25 and 26, Vodafone's Dispute Submission.

¹⁵⁴ Paragraph 76, BT's letter to Ofcom of 25 September 2015.

BT contends that it has not extended CDDs by a disproportionate amount of time for any of the orders in dispute.¹⁵⁵

- 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.¹⁵⁶ 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*".¹⁵⁷

Ofcom's provisional view

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

- 4.79 Ofcom noted that the CSA does not include specific provisions regarding the processing of un-suspension requests. However, as discussed in paragraph 4.41 above, we considered 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 considered 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 was 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 concluded 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?

- 4.82 Our provisional view was 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.

¹⁵⁵ Paragraphs 77 and 78, BT's letter to Ofcom of 25 September 2015.

¹⁵⁶ Page 15, BT's 8 October response to Ofcom s191 information request.

¹⁵⁷ Page 15, BT's 8 October response to Ofcom s191 information request.

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

4.83 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.

4.84 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.¹⁵⁸

BT's view on remedies

4.85 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.

4.86 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)*"¹⁵⁹.

4.87 BT also argued that 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.

¹⁵⁸ Paragraph 26, Vodafone's Dispute Submission.

¹⁵⁹ Paragraph 37, BT's letter to Ofcom of 25 September 2015.

BT said that it had in place a mechanism to ensure that it paid SLGs proactively when required under the contract.¹⁶⁰

Ofcom's provisional view

- 4.88 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:
- 4.88.1 to make a declaration setting out the rights and obligations of the parties to the dispute;
 - 4.88.2 to give a direction fixing the terms of conditions of transactions between the parties to the dispute;
 - 4.88.3 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
 - 4.88.4 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.
- 4.89 Ofcom 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. We said that, 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 was that this would be the most appropriate means of resolving this dispute.
- 4.90 We stated that our declaration under section 190(2)(a) would be different depending on whether we conclude that a given category of practice would be:
- 4.90.1 inconsistent with BT's contractual obligations, as well as the SMP conditions; or
 - 4.90.2 inconsistent with the SMP conditions only.
- 4.91 For categories of practices falling under 4.90.1, we proposed 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.
- 4.92 In addition, in relation to the Categories falling under 4.90.1, we proposed to declare the Parties' rights and obligations under the CSA. We said that these obligations would include, without being limited to, BT's obligation to provide compensation, in

¹⁶⁰ These processes consist in the filtering of monthly reports on all Ethernet provision and fault completions.

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.¹⁶¹ 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.

- 4.93 We noted in this respect that BT's obligations under the CSA include the obligation to make proactive compensatory payments¹⁶². We explained that 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. We said that 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.
- 4.94 For categories of practices falling under 4.90.2, we said that we were 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.
- 4.95 We agreed 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 conditions¹⁶³, 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 was therefore that we are unable to make a declaration to that effect.
- 4.96 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.¹⁶⁴ The question of costs will be considered in accordance with our guidance¹⁶⁵ after a formal request has been submitted.

¹⁶¹ 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).

¹⁶² 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/ethernetservices/contracts/contracts.do>.

¹⁶³ See paragraph 4.85, http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01116/.

¹⁶⁴ Paragraph 88, Vodafone's Dispute submission.

¹⁶⁵ <http://stakeholders.ofcom.org.uk/consultations/payment-costs/>.

Section 5

Parties' responses, analysis and Ofcom's conclusions on individual categories

5.1 In this Section we review and address the responses to our Provisional Conclusions for each of the seven specific categories of practices we identified and reach our final decisions on these categories.

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

Step 1: Could the practice have been in breach of the CSA?

Vodafone's arguments

5.2 Vodafone agreed with Ofcom's Provisional Conclusions. Vodafone considered that the factors listed by Ofcom pointing to behaviour that may be a breach of SMP Conditions are also relevant to the interpretation of the CSA, but that these do not change Ofcom's Provisional Conclusions.¹⁶⁶

BT's arguments

5.3 BT agreed that a failure to notify is a breach of contract (which triggers the payment of SLG).

Ofcom's decision

5.4 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*. We have seen no further evidence or representations that would lead us to change our view that BT would not have acted in accordance with this term in cases where it deemed Vodafone's consent without notifying it of its intention to do so. We note that BT agreed with this conclusion.

5.5 We note that the Parties appear to dispute whether or not notice had been given by BT in some of the individual orders in dispute. As noted in our Provisional Conclusions, for the purposes of our analysis, and consistent with our overall approach, we have not investigated whether notification was actually given in these individual cases. However, we consider that where the CP has been made aware that (a) BT intended to deem consent and (b) the reasons for it are clearly communicated, this may be sufficient to meet the requirement to provide notice. Further to our Provisional Conclusions we consider that, in the event of dispute, the nature of the Deemed Consent provision places the obligation on BT to be able to demonstrate to Vodafone that notice was provided. Where BT cannot establish that notice was provided in relation to a particular order then the relevant SLG payment would need to be made.

¹⁶⁶ Paragraphs 13-15, Vodafone's response of 20 November 2015.

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

BT's arguments

- 5.6 While BT agreed that failure to notify is a breach of contract which triggers payment of SLG, it argued that Ofcom's analysis did not provide any evidence or justification as to why in the circumstances of the present case, BT's failure to give notice would amount to a breach of regulation. BT said that *"the reasons Ofcom provides are general assertions which set out the rationale for notice to be given, and BT has agreed to adhere to these notice requirements under the terms of the contract... by making a direct link between the breach of contract (due to lack of notification) and the SMP breach, Ofcom seems to imply that every time BT would recognise it has to pay SLG, BT would also acknowledge it has breach the SMP obligations"*.¹⁶⁷
- 5.7 BT also argued that in many circumstances the CP is already aware of the delay due to dialogue between the CP and BT and/or because the delay is caused by the CP itself and that the issue of managing customer expectations and allowing the CP to appeal the use of Deemed Consent do not apply in such circumstances.¹⁶⁸
- 5.8 BT accordingly submitted that in such circumstances the CP and end user *"must logically know that BT could not complete the order"*¹⁶⁹ and therefore Ofcom's concerns about the need for transparency fall away *"since the CP evidently knew what the delay related to"*.¹⁷⁰ In BT's view, *"even if there were an SMP obligation to provide transparency as opposed to a contractual obligation, which BT disputes in relation to the notification to the CP, BT believes that that objective has not been undermined to an extent that the SMP obligation has been breached"*.¹⁷¹

Ofcom's decision

Conditions HH1.2 and 1.2

- 5.9 As set out in our Provisional Conclusions (see paragraph 4.8 above), the provisions of the CSA regarding the delivery of Ethernet services within specified timeframes contribute materially towards ensuring that BT complies with its SMP obligation to provide its services on fair and reasonable terms and as soon as reasonably practicable.
- 5.10 A fundamental aspect of BT's compliance with its SMP obligation is that the CP concerned should be informed of any extensions to these timeframes. Contrary to BT's submission, we consider that the ability of a CP to manage a delay in the provision of its own services or to challenge an extension of the delivery date for BT's services is an important element of what this SMP Condition sought to achieve. Failure to notify the CP of BT's intent to deem consent therefore risks reducing the effectiveness of BT's obligation to provide its services on fair and reasonable terms. This is also the position underlying the SLG Direction which requires that BT provides

¹⁶⁷ Paragraphs 21 and 22, BT's response of 23 November 2015.

¹⁶⁸ Paragraph 22, BT's response of 23 November 2015.

¹⁶⁹ Paragraph 22, BT's response of 23 November 2015.

¹⁷⁰ Paragraph 22, BT's response of 23 November 2015.

¹⁷¹ Paragraph 23, BT response of 23 November 2015.

reasons, and obtains prior consent for, any extensions to the delivery timelines stipulated in the Direction.

- 5.11 For these reasons, our view is that the practice described under this Category could constitute a breach of BT's obligations under Conditions HH1.2 and 1.2. In order to reach a final determination on breach of these SMP Conditions, we consider the factors set out in paragraph 3.52 of our Analytical Framework would need to be assessed.
- 5.12 We also refer to paragraphs 3.42 to 3.44 of our Analytical Framework in relation to BT's arguments about the existence of the contractual mechanism for SLG payments and the interrelation of this with BT's regulatory obligations. We note in particular that this Dispute concerns orders for which no such payments were made.
- 5.13 Where BT extended a CDD beyond the 57th day without validly deeming consent under the terms of the CSA, this raises the question of whether BT has correctly implemented Condition (a) of the SLG Direction. This is because such extensions would not have been made in accordance with the terms that Vodafone has agreed to in its contract with BT. BT would therefore not have obtained Vodafone's consent, within the meaning of the SLG Direction. By consequence, where BT's practice has been frequent or systematic (see paragraph 3.52 of our Analytical Framework), this could amount to a breach of the SLG Direction.

Conditions HH5.9 and 6.9

- 5.14 Departure by BT from the requirement of the CSA to notify CPs of its intention to deem consent also undermines the certainty that publication of its Reference Offer aims to achieve about the terms under which it will provide its services. For this reason, the practice described under this Category would be in breach of BT's obligations under Conditions HH5.9 and 6.9.
- 5.15 BT's arguments suggest that transparency can be provided 'in many circumstances' by 'constant dialogue' between BT and the CP and that 'in many instances' this is especially true because reasons for a delay are related to CP action (or inaction). The implication of this is that, in these circumstances, reasons for extending a CDD are already transparent regardless of whether or not a specific notification has been provided by BT.
- 5.16 We agree with BT to the extent that it argues that the facts in relation to of BT's practice concerning an individual order may need to be looked at in order to assess whether there has been a "notification". Where the CP has been made aware that (a) BT intended to deem consent and (b) the reasons for it are clearly communicated, we agree that this may be sufficient to meet the SMP obligations placed upon BT. In departing from BT's agreed mechanism for providing notification, the onus would be on BT to demonstrate that (a) and (b) had occurred and the CP should not be put in the position of having to piece together information provided by different means.

Category 2: Insufficient level of reasoning given by BT

Step 1: Could the practice have been in breach of the CSA?

Vodafone's arguments

- 5.17 Vodafone disagreed that Ofcom can find a breach of SMP Conditions but not a failure by BT to comply with the CSA.¹⁷² Whilst Vodafone considered that Ofcom's Provisional Conclusions at paragraph 4.18 above are a correct reading of the CSA, it also considers this supports Vodafone's view that it points to breach of that reference offer by BT.¹⁷³
- 5.18 Vodafone argued that sufficient detail must be provided for the CP to make an informed decision about whether to grant consent, and that there is no basis on which the level of reasoning to be provided when consent is being deemed should be any less than when express consent is being sought.¹⁷⁴
- 5.19 Vodafone additionally submitted that the 'reasons to justify' that BT has to provide are not in relation to application by BT of Deemed Consent, but are instead in respect of justifying a need to extend a CDD.¹⁷⁵ Vodafone argued that the circumstances listed at Paragraph 2.3 of the CSA are not reasons to justify an extension of the CDD as they:
- 5.19.1 Have no relevance to (or, at least, are wholly inadequate reasons for) seeking express consent;
 - 5.19.2 Cannot automatically justify an extension of a CDD, as the mere fact of a reason listed in Paragraph 2.3 does not always justify a CDD extension. A CP could, for example, reasonably withhold consent if the degree of work required could reasonably be performed without extending the CDD. Vodafone submits that a reason to justify "*must at the very least explain why the particular reason in Paragraph 2.3 justifies [...] an extension of the CDD*".¹⁷⁶
- 5.20 Further, Vodafone considered that Ofcom's interpretation of the CSA should have greater regard to policy factors and the broader regulatory context, many factors of which were considered in Ofcom's provisional assessment of BT's compliance with its SMP Conditions.¹⁷⁷
- 5.21 On this point, Vodafone referred to Ofcom's Provisional Conclusions that:
- 5.21.1 In most instances, a DC code alone does not provide sufficient transparency (Vodafone referred to Ofcom's provisional view at paragraph 4.24);¹⁷⁸ and

¹⁷² Paragraph 16, Vodafone's response of 20 November 2015.

¹⁷³ Paragraph 17, Vodafone's response of 20 November 2015.

¹⁷⁴ Paragraphs 17a and 17b, Vodafone's response of 20 November 2015.

¹⁷⁵ Paragraph 18, Vodafone's response of 20 November 2015.

¹⁷⁶ Paragraphs 18a and 18b, Vodafone's response of 20 November 2015.

¹⁷⁷ Paragraph 20, Vodafone's response of 20 November 2015.

¹⁷⁸ Paragraph 20a, Vodafone's response of 20 November 2015.

- 5.21.2 More detailed information was readily available to BT and could have been communicated to CPs at relatively low cost (Vodafone refers to Ofcom's provisional view at paragraph 4.25).¹⁷⁹
- 5.22 Vodafone also referred to "*other policy and regulatory factors*" that Ofcom should have regard to:
- 5.22.1 BT had explained that Deemed Consent was a mechanism to minimise the additional time required by obtaining deemed consent, not to minimise the amount of information provided to CPs;¹⁸⁰
- 5.22.2 The SLG Direction does not contemplate BT deeming consent but instead obtaining consent, suggesting that BT cannot provide reasons so imprecise that no reasonable CP would grant express consent on that basis;¹⁸¹ and
- 5.22.3 There is significant adverse impact on CPs of providing limited information (Vodafone refers to impacts on CP resources, reduced ability to manage end users and reduced confidence of industry).¹⁸²
- 5.23 Vodafone emphasised its view that it "*is not seeking for BT to draft detailed notes [...] in a minute level of detail*" but should receive the information Vodafone believes is readily available to BT within existing order notes.¹⁸³
- 5.24 According to Vodafone, Ofcom's treating of the SMP conditions and the CSA as separate exercises has led to an undesirable result whereby BT has been found to comply with the CSA but not with the SMP Conditions. With reference to Ofcom's Provisional Conclusions on SMP Conditions at paragraph 4.24, Vodafone submitted that the CSA should be interpreted such that 'reasons to justify' must "*offer sufficient transparency for the CP to understand the specific circumstances that cause the delay and the likely impact on timescales*".¹⁸⁴

BT's arguments

- 5.25 BT agreed with Ofcom's Provisional Conclusions that by providing a DC Code or citing "category 2" as part of the notification of an intention to deem consent, BT was acting in accordance with the requirement under the CSA to "provide reasons to justify" and that the same conclusion would apply in circumstances where BT has applied the same code more than once.¹⁸⁵
- 5.26 BT also said that it would be "*appropriate and consistent for Ofcom to find that, in circumstances where BT had not provided a DC code or circuit category type, but had instead provided a clear written explanation of the reason for the change in CDD which falls within the list of the categories where DC can be applied, this would be in*

¹⁷⁹ Paragraph 20b, Vodafone's response of 20 November 2015.

¹⁸⁰ Paragraph 21a, Vodafone's response of 20 November 2015.

¹⁸¹ Paragraph 21b, Vodafone's response of 20 November 2015.

¹⁸² Paragraph 21c, Vodafone's response of 20 November 2015.

¹⁸³ Paragraph 22, Vodafone's response of 20 November 2015.

¹⁸⁴ Paragraph 23, Vodafone's response of 20 November 2015.

¹⁸⁵ Paragraph 40, BT's response of 23 November 2015.

accordance with BT's obligations under the CSA" and requested that Ofcom confirm this.¹⁸⁶

Ofcom's decision

- 5.27 Under Paragraph 2.3 of the CSA, BT is required to "provide reasons to justify" an extension of the CDD whether it obtains or deems the CP's consent to this extension. Our view is that the CSA is sufficiently clear in listing reasons under which BT may deem consent, such that, in providing a DC Code corresponding to these reasons as part of the notification of an intention to deem consent, BT may be acting in accordance with this requirement (see paragraphs 4.17 and 4.18 above). Whether or not this offers sufficient transparency in accordance with BT's regulatory obligations is considered under our assessment in step 2 of our analysis. Our view is that BT could be in compliance with this requirement in cases where it made reference to "category 2",¹⁸⁷ for the reasons set out in our Provisional Conclusions (see paragraph 4.19). The same conclusion could apply in circumstances where BT has applied the same Code more than once. We note in addition however that BT must provide reasons to justify each extension. We consider this means that each extension must be justified on a separate basis. If the same code is applied more than once, it would be open to the CP to challenge BT as to whether the second (or subsequent) use of a code is valid as a distinct justification.
- 5.28 We agree with BT that where BT had not provided a DC code or circuit category type, but had instead provided a clear written explanation of the reason for an extension which falls within the list of the categories where Deemed Consent can be applied, this would be in accordance with BT's obligations under the CSA. We also find, by extension of our Provisional Conclusions, that where BT has departed from the normal mechanism for providing reasons the onus would be on BT to demonstrate that the reasons had been communicated clearly to the CP.

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

Vodafone's arguments

- 5.29 Vodafone stated that it generally agrees with Ofcom's Provisional Conclusions. However, Vodafone submitted that the information provided by BT should provide sufficient transparency for the CP to understand both the cause of the delay and the likely impact on timescales. Vodafone argued that the Deemed Consent code DC27 (concerning asbestos contamination) and Codes related to CP action or inaction do not meet this standard. Vodafone said that merely providing those DC Codes only gives transparency as to the cause of the delay in the very broad sense and that, in any case, they provide no information as to the likely impact on the timescales.

BT's arguments

- 5.30 BT said that "*it had not sent Ofcom the most clear list of DC codes shared and discussed with CPs (including Vodafone) on a regular basis in its Section 191*

¹⁸⁶ Paragraph 41, BT's response of 23 November 2015.

¹⁸⁷ 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.

response"¹⁸⁸ and provided an alternative table (see Table 3 in Section 2). BT argued that this table shows that "*all DC codes come with a clear, discrete description that provide reasons to justify date movement, thereby offering sufficient transparency to the CP*"¹⁸⁹ and in referring to the range of DC7 codes for 'access', that "*BT has developed additional codes to help CPs better understand the nature of the access issue that affects a particular order*".¹⁹⁰ BT said that it trusted that the additional information it provided would lead Ofcom to review its provisional conclusions for the DC Codes DC7C, DC7J-S, DC21 and DC22.

- 5.31 As with its arguments in relation to the CSA (Paragraph 5.26 above), BT argued that "*it would be consistent and appropriate if Ofcom were to confirm that BT would not be in breach of any of the SMP obligations which Ofcom considers applies in circumstances where a DC code or circuit type was not provided, but where a description of the delay reason was provided to the CP. Such a scenario would provide sufficient transparency to the CP*".¹⁹¹

Ofcom's decision

Conditions HH1.2 and 1.2

- 5.32 Deemed Consent provides BT with a potentially wide-ranging means of delaying provision of services. We maintain a view 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 how this may affect timescales; where applicable, manage the extension of the CDD with its customer; and challenge BT's use of Deemed Consent. We consider this to be an important aspect of BT's SMP obligation to provide its services on fair and reasonable terms and as soon as reasonably practicable (see paragraph 4.22).
- 5.33 We have reviewed our Provisional Conclusions in light of the revised information provided by BT and the Parties submissions, including the list of DC codes provided to us by BT after we issued the Provisional Conclusions which included revised descriptions.
- 5.34 We note that whether codes offer sufficient transparency for the CP to be able to understand the circumstances for a delay and the likely impact on timescales can vary according to the code used and the individual circumstances surrounding that order (notably the information provided by BT up to and including the point of issuing the code – see paragraph 5.16 above).
- 5.35 Codes broadly fall into two types: those concerning CP action or inaction, and codes concerning instances outside of a CP's control.
- 5.36 For DC codes which relate to CP action or inaction, we believe that:
- 5.36.1 the code alone offers sufficient transparency to comply with BT's SMP obligations provided the CP is or could reasonably be expected to know

¹⁸⁸ Paragraph 26, BT's response of 23 November 2015.

¹⁸⁹ Paragraph 26, BT's response of 23 November 2015.

¹⁹⁰ Paragraph 26, BT's response of 23 November 2015.

¹⁹¹ Paragraph 28, BT's response of 23 November 2015.

what action is required (or what action was taken by it to delay delivery) and the likely impact this would have on timeframes; and

- 5.36.2 where the CP did not know and could not reasonably have been expected to know what action is required (or what action was taken by it to delay delivery), we agree with Vodafone that the DC Code alone offers insufficient transparency to comply with BT's SMP obligations.
- 5.37 Although we note that the list of DC codes provided to us by BT after we issued the Provisional Conclusions includes revised descriptions¹⁹², we believe that for codes not relating to CP action or inaction, these do not appear to offer sufficient transparency for the CP to understand the reasons for the delay in relation to that order and how this may affect timescales. The CP would need to be in possession of other information. For example, code DC27 refers to "asbestos being identified". This does provide some information for the CP but we do not consider that by itself it is likely to provide the CP with sufficient information to be able to understand the reasons for the delay in relation to that order and to assess the potential extent of the delay. The provision of the code alone is not likely to put the CP in a position where it is able to challenge the use of Deemed Consent by BT and provides limited information with which it can manage its own customer.
- 5.38 That situation will be compounded in circumstances where BT uses the same DC code on more than one occasion in relation to the same order without providing additional information. In that context it should also be noted that we consider each extension should be justified on a distinct basis.
- 5.39 As we said in our Provisional Conclusions, despite the complexities involved in the provisioning of Ethernet services, we believe that the evidence we have seen suggests that more detailed information was held by BT and that this could have been communicated to CPs (see paragraphs 4.25 to 4.27).
- 5.40 Our conclusion is that, in light of the above, BT could have been in breach of its SMP obligation under Condition HH1.2 or 1.2 to provide its services on fair and reasonable terms where it deemed consent without providing Vodafone any information beyond the applicable DC Code or "category 2" reference.
- 5.41 However, in order to assess whether an SMP breach has in fact occurred, regard would have to be had to the relevant factors set out in paragraph 3.49 of our Analytical Framework. Our view is also that consideration must be given to the facts in relation to BT's practice concerning an individual order that may occur in addition to the mechanism of providing the DC code alone, but the onus would be on BT to demonstrate that such practice ensured that sufficient information had been communicated to the CP for that CP to understand the reasons for the delay and how this may affect timescales; where applicable, manage the extension of the CDD with its customer; and challenge BT's reliance on Deemed Consent.

¹⁹² We note that in the revised table provided by BT, there are no cases where the same description is provided for multiple codes and only one code which refers to multiple circumstances.

- 5.42 We note that the SLG Direction also requires BT to provide reasons to justify a CDD which is set beyond the 57th day. It is Ofcom's view that this requirement should be interpreted in light of what we have set out above about the level of information that BT is required to communicate. Where BT delivers its services without providing sufficient information, according to the above, BT may not have correctly implemented Condition a) of the SLG Direction. This is because such extensions would not have obtained Vodafone's consent in an effective manner. Therefore where BT's practice has been frequent or systematic (see paragraph 3.52 of our Analytical Framework), this could amount to a breach of the SLG Direction.
- 5.43 We also note that we agree with BT that where BT had not provided a DC code or circuit category type, but had instead provided sufficient explanation of the reason for the change in CDD, this could be in accordance with BT's SMP obligations, subject to consideration of the facts in relation to BT's practice concerning that order (see paragraph 5.41 above).

Conditions HH5.9 and 6.9

- 5.44 In providing a DC code (or "category 2" reference), we consider that BT could have acted in accordance with its obligations under Condition HH5.9 or 6.9 because it would not have been departing from the terms set out in the Reference Offer.

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

Step 1: Could the practice have been in breach of the CSA?

Vodafone's arguments

- 5.45 Vodafone agreed that the list at Paragraph 2.3 of the CSA is an exhaustive list of the circumstances under which consent may be deemed.¹⁹³ However, Vodafone requested that Ofcom concludes on whether two specific scenarios fall within this scope and/or are compliant with SMP obligations:
- 5.45.1 Revisions to the CDD to reflect correction of errors made by BT when setting the initial CDD; and
- 5.45.2 Management of wayleaves that lie within BT's responsibility.¹⁹⁴

Ofcom's decision

- 5.46 Neither of the Parties raised concerns regarding our provisional view that Paragraph 2.3 of Schedule 4C(i) of the CSA sets out an exhaustive list of the circumstances under which consent may be deemed and that BT would not have acted in accordance with the terms of the CSA where it used reasons which are not provided for in that clause (see also paragraph 4.31 above). We continue to believe that this is the correct interpretation of the CSA and have therefore retained this conclusion.

¹⁹³ Paragraph 25, Vodafone's response of 20 November 2015.

¹⁹⁴ Paragraphs 26a and 26b, Vodafone's response of 20 November 2015.

- 5.47 As set out in our Provisional Conclusions, this would, for example, be the case where BT relied on "internal errors" on its part (see paragraph 4.31), in that these are not listed in Paragraph 2.3 of Schedule 4C(i) of the CSA.
- 5.48 We consider that, in the event of dispute, the nature of the Deemed Consent provision places the obligation on BT to be able to demonstrate to Vodafone that it used reasons to justify an extension falling within the terms of the CSA. Where BT that cannot be established in relation to a particular order then the relevant SLG payment would need to be made
- 5.49 In relation to Vodafone's point as to whether BT is entitled to rely on delays relating to wayleaves that are BT's responsibility (see paragraph 5.45.2), we believe that this depends on the nature of the cause of the delay in obtaining the wayleave and whether this is captured by one of the reasons set out in Paragraph 2.3 of the CSA (e.g. one of the circumstances set out in clause 7.1).

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

BT's arguments

- 5.50 BT said that the fact that Deemed Consent is used frequently is a consequence of the complexity involved in Ethernet service provision and that, in a high proportion of cases, delay is caused by customers. BT argued that the "*fact that Ofcom considers that the DC mechanism should only be used in 'exceptional circumstances' has to be reconsidered having these elements of fact in mind and cannot be used as a parameter to assess compliance with the SMP conditions*".¹⁹⁵
- 5.51 BT believes that the behaviour considered in Category 3 does not necessarily affect transparency and should not be considered as an SMP breach: "*In many instances there are constant dialogues between BT and the CP before and after BT's engineer customer visit, and therefore, in these instances, the CP is well aware of the circumstances surrounding the application of DC. As such the CP would generally know why DC is applied and be in a position to spot any human error in the way in which DC has been notified to it at the time of the notification.....the current system of DC requires human intervention and occasionally errors occur. Whilst such errors can trigger the payment of SLGs, they do not mean that BT has infringed regulation*".¹⁹⁶

Ofcom's decision

- 5.52 Having concluded that, under the CSA, the list of reasons for which consent can be deemed by BT is exhaustive (see paragraph 5.46), our consideration under this step is whether the use of deemed consent for reasons that are not listed in the CSA could also have been a breach of BT's SMP obligations.

Conditions HH1.2 and 1.2

- 5.53 We understand that use of Deemed Consent was introduced by BT to cover circumstances outside of BT's reasonable control (see paragraph 2.11) which cause

¹⁹⁵ Paragraph 30, BT's response of 23 November 2015.

¹⁹⁶ Paragraph 31, BT's response of 23 November 2015.

a delay, and is aimed at "*minimising the additional time that would otherwise be injected into the provisioning process by obtaining explicit consent*".¹⁹⁷ We emphasize, however, that compliance with the SLAs for the delivery of BT's Ethernet services is an important aspect of BT's compliance with its obligation to provide its services on fair and reasonable terms and as soon as reasonably practicable. A fundamental element of this is that BT should obtain the CP's consent to any extensions of these timelines. This was also the underlying assumption of the SLG Direction.

- 5.54 In light of this, a CP's consent should only be deemed in clearly demarcated circumstances to which that CP has agreed in its SLA with BT. Contrary to BT's submissions, we consider that this is a relevant consideration in our analysis of whether use of Deemed Consent in situations other than the ones listed in the CSA could amount to a breach of the SMP Conditions. The fact that the Deemed Consent mechanism has been used intensively has no bearing for our conclusion.
- 5.55 For these reasons, we conclude that BT could have been in breach of its obligations under Conditions HH1.2 and 1.2 where it deemed Vodafone's consent, without relying on any of the reasons set out in the CSA. In order to determine whether there was a breach of these Conditions, the relevant factors set out in paragraph 3.52 of our Analytical Framework would need to be assessed.
- 5.56 Where BT extended a CDD beyond the 57th day without validly deeming consent under the terms of the CSA, it could also be in breach of the requirements of Condition (a) of the SLG Direction. This is because such extension would not have been made in accordance with the terms that Vodafone has agreed to in its contract with BT. BT would therefore not have obtained Vodafone's consent, within the meaning of the SLG Direction. Therefore, where BT's practice has been frequent or systematic (see paragraph 3.52 of our Analytical Framework), this could amount to a breach of the SLG Direction.
- 5.57 To the extent that any "human errors" have been rectified in a way that has ensured that the CP concerned has been given a valid reason for a CDD extension, there would be no practice of relevance under this Category, although the onus would be on BT to demonstrate that this had occurred.

Conditions HH5.9 and 6.9

- 5.58 Adherence to the terms of the CSA, including in relation to the conditions under which BT can rely on Deemed Consent, 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. For this reason, we conclude that the practice described under this Category would also be in breach of these Conditions.

¹⁹⁷ Paragraph 10, BT's letter to Ofcom of 25 September 2015.

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

Step 1: Could the practice have been in breach of the CSA?

Ofcom's decision

- 5.59 Neither of the Parties raised concerns regarding our provisional view, under step 1 of Category 4, 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. For the same reasons as set out in our provisional conclusions (see paragraphs 4.39 to 4.41), we maintain this view.
- 5.60 We consider that, in the event of dispute, the nature of the Deemed Consent provision places the obligation on BT to be able to demonstrate to Vodafone that the relevant delays fell within circumstances listed at clauses 2.3 and 7 of Schedule 4C(i). Where that cannot be established by BT in relation to a particular order then the relevant SLG payment would need to be made.

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

BT's arguments

- 5.61 For the same reasons as with Category 3, BT believes that the behaviour considered in Category 4 does not necessarily affect transparency and should not be considered as an SMP breach (see paragraphs 5.50 and 5.51 above).

Ofcom's decision

- 5.62 For the reasons set out in paragraphs 4.43 to 4.45, we have decided to maintain our view that BT would have been in breach of its SMP obligations under Conditions HH5.9 and 6.9, and could have been in breach of Conditions HH1.2 and 1.2 (subject to the framework discussed at paragraph 3.52 above) in cases where it set a new CDD which incorporated delays that did not amount to circumstances permitting the application of Deemed Consent.
- 5.63 Where BT extended a CDD beyond the 57th day without validly deeming consent under the terms of the CSA, it could also be in breach of the requirements of Condition a) of the SLG Direction. This is because such extension would not have been made in accordance with the terms that Vodafone has agreed to in its contract with BT. BT would therefore not have obtained Vodafone's consent, within the meaning of the SLG Direction. Therefore, where BT's practice has been frequent or systematic (see paragraph 3.52 of our Analytical Framework), this could amount to a breach of the SLG Direction.

Category 5: Notice of Deemed Consent not provided in writing

Step 1: Could the practice have been in breach of the CSA?

Vodafone's arguments

5.64 Vodafone agreed with Ofcom's provisional conclusion that notice should be given in writing as set out at paragraph 4.54 above, but contends that email notifications were not sent to Vodafone.¹⁹⁸

Ofcom's decision

5.65 As set out in paragraphs 4.53 and 4.54, it is clear from the wording of Condition 21 that notice of BT's intention to deem consent must be given in writing. Neither Party raised concerns with our provisional view that if emails were sent to a designated Vodafone email address, then this satisfied the requirements of the CSA. However, Vodafone argued that the eCo system updates in dispute did not result in an email being sent to it.

5.66 In this regard, we retain our earlier view that if an email was sent to a designated Vodafone email address, then this satisfied the requirements of the CSA whether the email was sent through the eCo system or through any other system. Any orders for which BT did not provide notice to Vodafone by hand, fax, e-mail or first class post were not in accordance with the CSA, including orders where the eCo system failed to send an email as described by Vodafone.

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

Vodafone's arguments

5.67 Vodafone considered that Ofcom's provisional views at paragraph 4.58 were not properly reasoned, with the basis of the conclusions not being self-evident. In Vodafone's view, "*the only conclusion consistent with Ofcom's approach to interpreting SMP Conditions elsewhere in the provisional conclusions, is that if BT has failed to comply with the CSA, then it must have failed to comply with the relevant SMP Conditions*".¹⁹⁹

5.68 Vodafone considered that Ofcom should make a declaration "*that the burden of proof lies on BT to establish that, as a matter of fact, it has complied with this requirement.*" Vodafone said that such approach is necessary to protect the intention of the obligation that BT make proactive SLG payments.²⁰⁰

Ofcom's decision

5.69 As outlined in paragraph 3.65, where we have found that behaviour would not have been in accordance with the CSA, our next step is to separately consider whether or not such behaviour would be consistent with BT's SMP conditions. In this case we believe that notification in writing (which we consider includes email notifications sent

¹⁹⁸ Paragraphs 27 and 28, Vodafone's response of 20 November 2015.

¹⁹⁹ Paragraph 30, Vodafone's response of 20 November 2015.

²⁰⁰ Paragraph 29, Vodafone's response of 20 November 2015.

through the eCo system) offers a clear method for communicating notification of BT's intent to deem consent. We therefore consider that BT will have acted in accordance with its SMP obligations when sending e-mail notifications through the eCo system.

- 5.70 Vodafone has also raised the issue of BT's obligations in circumstances where no notice has been provided in writing (via eCo or otherwise). We consider that where a notification is not provided in writing BT will have failed to provide effective notice pursuant to the CSA. In that situation the same analysis applies as for Category 1, where no notification was provided (see paragraphs 5.9 to 5.11 and 5.14 to 5.15). We have therefore altered our conclusion on this issue from the position set out in the Provisional Conclusions at 4.58. As explained under our analysis of Category 1, it is possible that the facts in relation to a specific order may need to be considered in order to assess whether any alternative means used provided effective communication. In departing from BT's agreed mechanism for providing notification, the onus would be on BT to demonstrate that BT's notification had been clearly communicated.

Category 6: Retrospective application of Deemed Consent to change the CDD

Step 1: Could the practice have been in breach of the CSA?

Vodafone's arguments

- 5.71 Vodafone broadly supported Ofcom's provisional conclusion and in Vodafone's view, Ofcom correctly distinguishes between an obligation on BT to notify of its intention to deem consent as soon as reasonably practicable (and which cannot happen after the original CDD), and an obligation on BT to notify with a new CDD which may in exceptional circumstances be after the date of the pre-existing CDD.²⁰¹
- 5.72 Within these parameters, Vodafone nonetheless raised concerns about the specific timing of notifications, specifically that BT could still notify Vodafone of Deemed Consent "*well after the cause of the delay*", which Vodafone considered a breach of the CSA by virtue of BT not notifying as soon as practicable.²⁰² Vodafone considered that this view is supported by both the wording of the CSA and the SMP Conditions, as well as the policy intention of the SLG Direction.²⁰³

BT's arguments

- 5.73 BT believes "*that it would be unreasonable to expect in every case that BT informs the CP on the day of the CDD. The obligation is to notify as soon as reasonably practicable, and this may be after the day of the CDD depending on the specific circumstances of the order*".²⁰⁴ In particular, BT referred to circumstances that are the responsibility of the CP and gave the examples of a BT engineer not being able to gain site access and the CP changing the design of the 'driver circuit'.
- 5.74 BT also said that the speed of the notification process can be affected by the time of day when the engineering delay is encountered and the level of priority work taking place by the engineering control and job control teams. BT said that it is possible that

²⁰¹ Paragraphs 31a and 31b, Vodafone's response of 20 November 2015.

²⁰² Paragraph 32, Vodafone's response of 20 November 2015.

²⁰³ Paragraph 33, Vodafone's response of 20 November 2015.

²⁰⁴ Paragraph 42, BT's response of 23 November 2015.

*"where the engineering activity is taking place towards the end of the day, and the engineering control is experiencing a high level of work in progress, that the update is not passed to the job control teams until past their normal working hours. Given this context, it is unreasonable to assume that all updates associated with delays encountered on the day of the CDD will be provided to the CP on the same day, or that a failure to provide an update on the day of the CDD automatically breaches the contractual obligation to provide services as soon as reasonably practicable".*²⁰⁵

- 5.75 BT also argued that where a delay is encountered at the end of the provisioning process which is due to the CP not completing activities, the CP will be aware of this and would not require information from BT in order to provide an interim update to their customer ahead of BT providing further updates, adding that *"In this context, Ofcom should find that including a reasonable amount of time associated with the main delay in circumstances where the customer caused delay is encountered at the end of the provision process is compliant with BT's obligations under the CSA, even if the updated DC is not provided on the same day of the CDD"*.²⁰⁶
- 5.76 BT suggested that Ofcom expand its conclusions to explicitly reference *"access and power and other circumstances where delay due to customer reasons are encountered at the end of the delivery process, and lead to re-work needing to be undertaken"*.²⁰⁷

Ofcom's decision

- 5.77 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*. We agree with Vodafone's observation that where BT has not notified Vodafone of its intent to Deem Consent as soon as reasonably practicable, this would not have been in accordance with the CSA.
- 5.78 In our Provisional Conclusions we drew a distinction between notifying of the intent to use Deemed Consent, and notification of the new CDD. Our provisional view was that the CSA requires that both must be notified as soon as reasonably practicable and that 'as soon as reasonably practicable' could involve different timescales for each.
- 5.79 Our Provisional Conclusion was that notification by BT of its intention to deem consent on the day of the original CDD would have been in accordance with the terms of the CSA, where this was justified in light of the circumstances of the delay (see paragraphs 4.67 and 4.68). We have seen no arguments that would cause us to reassess this position.
- 5.80 In our Provisional Conclusions we had taken the view that notification by BT of its intent to deem consent on a date after the CDD would not meet the CSA's requirements (see paragraph 4.69). Having considered BT's submissions, however, our final view is that delays in notifying BT's intention to deem consent could in certain circumstances be consistent with the requirements of the CSA. Our view is that this would be the case in very specific circumstances, e.g. where the earliest that an engineer could notify a Job Controller of an event delaying provision was at the

²⁰⁵ Paragraph 45, BT's response of 23 November 2015.

²⁰⁶ Paragraph 46, BT's response of 23 November 2015.

²⁰⁷ Paragraph 47, BT's response of 23 November 2015.

end of a working day, at a point where a Job Controller may not be available to conclude its assessment and then contact a CP with an intent to deem consent on that same day. In such limited circumstances, notifying the CP on the next working day (albeit without any unreasonable delay) could be consistent with the CSA's requirements. We note, however, that these circumstances submitted by BT would appear to be exceptional, rather than typical.

- 5.81 In respect of notifying a CP of a new CDD, we agree with BT that where this accurately reflects a delay in the process of setting the new CDD as a result of matters outside of BT's reasonable control, that delay would be captured by the CSA requirement to notify a CP of a new CDD date 'as soon as reasonably practicable' (see also paragraph 4.70). This could, for example, be the case where BT needs to rely on third parties to advise of the length of delays.
- 5.82 We note that, contrary to BT's submissions, delays to notify Vodafone of its intention to deem consent and/or the new CDD which are due to BT's own resource limitations (e.g. because the relevant job control team has too many orders to deal with on the day) would not meet the requirements of the CSA.
- 5.83 In summary, we conclude that:
- 5.83.1 Notification by BT of its intention to deem consent and/or the new CDD date that was not 'as soon as reasonably practicable' would be in breach of the CSA;
 - 5.83.2 notification by BT of its intention to deem consent on the date of the original CDD could have been in accordance with the terms of the CSA, where in light of the circumstances that led to the CDD extension this would have been as soon as reasonably practicable. For example, in situations where, on the day of the original CDD, BT's engineer was not able to gain site access or power was unavailable;
 - 5.83.3 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', save for when justified by the circumstances that caused the delay; and
 - 5.83.4 notification of the revised CDD on a date after that of the CDD would have been in accordance with the CSA, where the time taken to advise the CP of the new CDD accurately reflects delays in BT setting the new CDD caused by reasons outside of BT's reasonable control (e.g. third-party delays).

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

Vodafone's arguments

5.84 Vodafone supported Ofcom's findings, but noted that paragraph 4.73 of the Provisional Conclusions does not find that BT has not notified CPs as soon as reasonably practicable and should therefore make a declaration to this effect.²⁰⁸

BT's arguments

5.85 BT argued that where the delay is for reasons that were the responsibility of the CP, the CP should reasonably be expected to know that the service could not be delivered on the CDD. Therefore, in such cases, transparency would not have been undermined where BT had not immediately formally gone back to the CP with reasons for the delay.²⁰⁹ BT provided examples of a number of circumstances in which it believed that this argument would apply, including no power at site, advice from CP or BT on installation date that a Site Specific Risk Assessment and Method Statement is needed, and access requirements or other installation details changing on the day of installation.²¹⁰

5.86 BT said that it is unreasonable to assume all updates associated with delays encountered on the day of the CDD will be provided on the same day and referred to its arguments regarding interpreting the CSA to allow reasonable time (see paragraph 5.75 above).²¹¹

Ofcom's decision

5.87 As discussed above, having considered BT's submissions we accept that under the CSA notification of intent on the date of (or the day after) the CDD could have been in accordance with the CSA under certain circumstances (see paragraph 5.83). Where this is the case, we now believe that BT's practice would not have been in breach of its SMP obligations. We have reached the same 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.

5.88 However, where the delay was not caused by the CP or its customer and/or where Vodafone was not already aware of the delay, we retain our view that failure by BT to notify its intention to deem consent until after the date of the CDD would undermine the objectives of BT's SMP obligations. For the same reasons as set out in our paragraphs 5.9 and 5.10 above, we therefore conclude that such practice could be in breach of the SMP conditions HH1.2 and 1.2 (subject to factors discussed at paragraph 3.49 of our Analytical Framework above), and for the reasons set out in paragraph 5.14 above, would be in breach of BT's obligations under Conditions HH5.9 and 6.9.

5.89 Where BT delivers its services without validly deeming consent in accordance with the terms agreed in the CSA, it could also be in breach of its obligations under

²⁰⁸ Paragraph 34, Vodafone's response of 20 November 2015.

²⁰⁹ Paragraph 34, BT's response of 23 November 2015.

²¹⁰ Paragraph 35, BT's response of 23 November 2015.

²¹¹ Paragraph 36, BT's response of 23 November 2015.

Condition (a) of the SLG Direction. This is because such extension would not have been made in accordance with the terms that Vodafone has agreed to in its contract with BT. BT would therefore not have obtained Vodafone's consent, within the meaning of the SLG Direction. Therefore, where BT's practice has been frequent or systematic (see paragraph 3.52 of our Analytical Framework), this could amount to a breach of the SLG Direction.

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

Step 1: Could the practice have been in breach of the CSA?

Vodafone's arguments

5.90 Vodafone supported Ofcom's Provisional Conclusions and considered them to be "*the logical outcome of a review of the terms of the CSA*".²¹²

BT's arguments

5.91 BT agreed that it should provide reasons to justify an extension of the CDD and to set any subsequent CDD for as soon as reasonably practicable.²¹³ However, BT also argued that, given that the CP is in control of when an order is suspended and when it is brought out of suspend, it would be inappropriate for Ofcom to reach conclusions concerning contractual breaches in relation to un-suspended requests without taking into account factors including the prevailing level of work on going within the job control handling the un-suspend request, and the level of complexity associated with the request itself.²¹⁴

Ofcom's decision

5.92 Our view remains 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 conclude that where BT has not met these requirements, it would not have acted in accordance with the terms of the CSA.

5.93 As set out in our Provisional Conclusions (see paragraph 4.80), a CDD which incorporated days over and above the length of a suspension order could have been in accordance with the requirements for the new CDD to be set 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. This could, for example, be the case where the fibre capacity previously available has been exhausted during the period of suspension. We also agree with BT that factors such as the prevailing level of work within the job control handling the 'un-suspend' request, and the level of complexity associated with the request itself, might appropriately impact the delivery time-frame after an order has been unsuspended and would therefore be relevant in assessing whether the new CDD

²¹² Paragraphs 35-37, Vodafone's response of 20 November 2015.

²¹³ Paragraph 48, BT's response of 23 November 2015.

²¹⁴ Paragraphs 49 and 50, BT's response of 23 November 2015.

has been set for as soon as reasonably practicable, in accordance with the terms of the CSA.

- 5.94 Further to our Provisional Conclusions, we consider that, in the event of dispute, the nature of the Deemed Consent provision places the obligation on BT to be able to demonstrate to Vodafone that the new CDD was set for as soon as reasonably practicable. Where that cannot be established by BT in relation to a particular order then the relevant SLG payment would need to be made.

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

Vodafone's arguments

- 5.95 Vodafone agreed with Ofcom's Provisional Conclusions and considered that where BT would have breached the CSA, it would also have breached the SMP Conditions.²¹⁵

BT's arguments

- 5.96 BT explained that an un-suspend order, which is typically received without notice, requires it to reassess the time required to deliver the order in light of any new factors that may have arisen during the course of circuit suspension. BT said that conditions might have changed, such as fibres no longer being available, which cause longer delays. BT argued that, in such circumstances, it is reasonable that such delays and any resulting additional assessment work are accounted for.²¹⁶
- 5.97 BT also argued that it is appropriate for it to be allowed a reasonable time to process the administrative tasks involved with an un-suspend request and that "*where the job control teams are dealing with high levels of work on behalf of CPs, it may not be possible to deal with the un-suspend request instantaneously*".²¹⁷

Ofcom's decision

- 5.98 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 service within this timeframe (Conditions HH1.2 and 1.2). In cases where BT does not set a revised CDD date for an un-suspended order for as soon as reasonably practicable BT would therefore be in breach of its SMP obligation. We refer to paragraph 5.93 as to the factors that would be relevant in determining whether a new CDD has been set for as soon as reasonably practicable.
- 5.99 Where BT extended a CDD beyond the 57th day without validly deeming consent under the terms of the CSA, it could also be in breach of the requirements of Condition (a) of the SLG Direction. This is because such extension would not have been made in accordance with the terms that Vodafone has agreed to in its contract with BT. BT would therefore not have obtained Vodafone's consent, within the meaning of the SLG Direction. By consequence, where BT's practice has been

²¹⁵ Paragraph 38, Vodafone's response of 20 November 2015.

²¹⁶ Paragraph 38, BT's response of 23 November 2015.

²¹⁷ Paragraph 38, BT's response of 23 November 2015.

frequent or systematic (see paragraph 3.52 of our Analytical Framework), this would amount to a breach of Ofcom's Direction.

- 5.100 Adherence to the terms of the CSA, including in relation to the conditions under which BT can rely on Deemed Consent, 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. For this reason, we conclude that the practice described under this Category would be in breach of these Conditions where determined to not have been provided as soon as reasonably practicable.

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 arguments

- 5.101 Vodafone's request for remedies made in its Dispute Submission is discussed at paragraph 4.83 above.
- 5.102 In its response to the Provisional Conclusions, Vodafone has also argued that Ofcom should make a declaration "*about how BT is to comply with the obligation to make proactive payments, so that the process of deeming consent [...] does not wholly undermine that obligation*".²¹⁸ Vodafone also argued that Ofcom should make a declaration that "*addresses how the Appropriate Proportion Dispute²¹⁹ is to be determined*".²²⁰ Specifically, Vodafone asked Ofcom to declare that:
- 5.102.1 BT is required to provide all evidence reasonably required by Vodafone to demonstrate that the requirements for deeming consent have been satisfied in each instance;
- 5.102.2 Vodafone is entitled to have its SLG payments determined on the basis of a "smeared" approach unless the parties agree otherwise.
- 5.103 Vodafone has provided a proposed declaration that it considers "*provides clear guidance and minimises the scope for further delays in promptly resolving the dispute*".²²¹

BT's arguments

- 5.104 BT's view on remedies is discussed in paragraphs 4.85-4.87 above. BT made no new arguments in its response to the Provisional Conclusions.

Ofcom's decision

- 5.105 As set out in paragraph 2.41 above, Ofcom's powers when making a determination to solve a dispute are set out in section 190 of the Act. These powers include the power

²¹⁸ Paragraph 41, Vodafone's response of 20 November 2015.

²¹⁹ For an explanation of 'Appropriate Proportion Dispute', see paragraph 2.32 above.

²²⁰ Paragraph 41, Vodafone's response of 20 November 2015.

²²¹ Paragraph 39, Vodafone's response of 20 November 2015.

to make a declaration setting out the rights and obligations of the parties to the dispute (section 190(2)(a) of the Act).

5.106 Ofcom has accepted this dispute as a dispute falling within the scope of section 185 (1A), i.e. as relating to entitlements to network accesses that BT is required to provide under section 45 of the 2003 Act (see paragraphs 2.45 to 2.46 above). Our focus is therefore on potential breaches by BT of its regulatory obligations.

5.107 Specifically, we have decided to make a declaration pursuant to 190(2)(a) in relation to categories of practice which could, in accordance with our conclusions in this Section, be in breach of the relevant SMP conditions. As set out in our Provisional Conclusions, we consider that exercising our powers under this section is the most appropriate means for resolving this dispute. We note that none of the Parties raised any concerns in this respect.

5.108 As proposed out in our Provisional Conclusions, our declaration under section 190(2)(a) distinguishes between practices which could, according to our conclusions under Steps 1 and 2, be in breach of BT’s contractual and SMP obligations; and, practices that could be in breach of BT’s SMP obligations only.

5.109 In summary, our final conclusions concerning these are summarised²²² in the table below (which repeats Table 1 in Section 1 above):

Deemed Consent: High level summary of Final Conclusions by Category

Category	In accordance with the CSA	BT’s obligations to provide services as soon as reasonably practicable and on fair and reasonable terms, and on such terms as Ofcom may from time to time direct	BT’s obligations to not depart from published Reference Offer
1. No notice given of the intention to deem consent for a change of CDD.	Would not be in accordance with the terms of the CSA	Could be in breach of obligations	Would be in breach of obligations
2. Insufficient level of reasoning provided by BT.	Could be in accordance with the terms of the CSA	Could be in breach of obligations	Could be in accordance with obligations
3. Reliance on reasons not listed in the CSA for the application of Deemed Consent.	Would not be in accordance with the terms of the CSA	Could be in breach of obligations	Would be in breach of obligations

²²² Our conclusions in Section 5 explain where the decision can be subject to specific circumstances within a given category of behaviour.

<p>4. New CDD date set under Deemed Consent incorporating additional delays that did not amount to circumstances permitting the application of Deemed Consent.</p>	<p>Would not be in accordance with the terms of the CSA</p>	<p>Could be in breach of obligations</p>	<p>Would be in breach of obligations</p>
<p>5. Notice of Deemed Consent not provided in writing.</p>	<p>Email notification (including via eCo) would be in accordance with the terms of the CSA</p>	<p>Email notification (including via eCo) would be in accordance with obligations</p>	<p>Email notification (including via eCo) would be in accordance with obligations</p>
<p>6. Retrospective application of Deemed Consent to change the CDD.</p>	<p>Where BT did not set the new CDD as soon as reasonably practicable: would not be in accordance with the terms of the CSA</p>	<p>Where BT did not set the new CDD as soon as reasonably practicable: Could be in breach of obligations</p>	<p>Where BT did not set the new CDD as soon as reasonably practicable: Would be in breach of obligations</p>
<p>7. Extension of the CDD of un-suspended orders for a period longer than the initial suspension period.</p>	<p>Where BT did not set the new CDD as soon as reasonably practicable: would not be in accordance with the terms of the CSA</p>	<p>Where BT did not set the new CDD as soon as reasonably practicable: Could be in breach of obligations</p>	<p>Where BT did not set the new CDD as soon as reasonably practicable: Would be in breach of obligations</p>

5.110 We note that BT's obligations under the CSA include the obligation to make SLG payments, including on a proactive basis. In line with our declaration, BT should therefore ensure that proactive compensatory payments are made in relation to these individual orders for which BT engaged in the relevant practice(s).

5.111 We note Vodafone's request that Ofcom makes a specific declaration to the effect that BT must provide SLG payments for the whole Relevant Period on the basis of the agreed proportion of orders. Vodafone specifically relies in this regard on BT's obligations under its contract and the SLG Direction to make proactive compensatory payments should it fail to satisfy its SLAs. Contrary to Vodafone's submissions, however, we do not consider that this obligation should be interpreted as requiring what is sought by Vodafone. BT's contractual obligation is to make proactive payments in cases where it has not complied with its SLAs. Although BT may choose to extrapolate payments across the Relevant Period in circumstances where the cost of carrying out an assessment of individual orders is unreasonably high, we do not consider appropriate to declare that this is the only way in which BT could comply with its contractual obligations.

5.112 We also do not consider it relevant to declare that BT is under an obligation to make proactive compensatory payments under the SLG Direction. In respect of Condition (h) of the SLG Direction applicable to the Relevant Period, BT's regulatory obligation

was to monitor and make proactive payments in respect of fault repair only (see wording of the SLG Direction at paragraph 2.7 above).

- 5.113 We note Vodafone's submission that Ofcom should require BT to provide all evidence reasonably required by Vodafone to demonstrate that the requirements for deeming consent have been satisfied in each instance. BT should engage constructively with Vodafone in order to resolve the matters in dispute in accordance with our declaration, and we have set out specific provisions in our final Determination at Annex 1.
- 5.114 For the reasons set out in our Provisional Conclusions (see paragraph 4.95 above) we also maintain our position that our powers under section 190(2)(d) of the 2003 Act do not include a power to award damages or liquidated damages. We are not therefore making a declaration requiring BT to make specific SLG payments.
- 5.115 As also set out in our Provisional Conclusions, we will consider the question of costs and expenses incurred in connection with referring this dispute to Ofcom at a later date.²²³
- 5.116 Having considered the Parties' submissions and in light of our conclusions in this Section, we are therefore making the declaration set out at Annex 1.

²²³ Consideration would be made in line with Ofcom's guidelines *Payment of costs and expenses in regulatory disputes*, September 2013:
<http://stakeholders.ofcom.org.uk/binaries/consultations/payment-costs/statement/guidance.pdf>

Annex 1

Ofcom's Determination

Determination to resolve the dispute between BT and VODAFONE

Determination under sections 188 and 190 of the Act for resolving a dispute between BT and Vodafone concerning BT's use of Deemed Consent and non-payment of SLG payments for Ethernet services.

WHEREAS

- A. Section 188(2) of the Act provides that, where Ofcom has decided pursuant to section 186(2) that it is appropriate for them to handle a dispute, Ofcom must consider the dispute and make a determination for resolving it.
- B. The determination that Ofcom make for resolving the dispute must be notified to the parties in accordance with section 188(7), together with a full statement of their reasons for it. Ofcom must publish so much of their determination as (having regard, in particular, to the need to preserve commercial confidentiality) they consider appropriate. Section 188(8) provides that Ofcom must publish this information in such manner as they consider appropriate for bringing it to the attention, to the extent they consider appropriate, of members of the public.
- C. Section 190 of the Act sets out the scope of Ofcom's powers in resolving a dispute which may, in accordance with section 190(2) of the Act, include:
 - (i) making a declaration setting out the rights and obligations of the parties to the dispute;
 - (ii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
 - (iii) giving a direction imposing an obligation to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
 - (iv) giving 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.
- D. On 8 December 2008 and 28 March 2013, Ofcom published the 2008 Business Connectivity Market Review Statement ("BCMR") and 2013 BCMR Statement respectively. Both these Statements determined that BT has SMP in the provision of Ethernet services and imposed SMP Conditions on BT. They include obligations on BT to:
 - (i) provide its services on fair and reasonable terms and conditions, as soon as reasonably practicable, and on such terms and conditions as Ofcom may

from time to time direct 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); and

- (ii) provide Network Access at the charges, terms and conditions in the relevant Reference Offer and that it shall not depart therefrom either directly or indirectly in accordance with 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).
- E. On 20 March 2008 Ofcom issued a Statement and Directions regarding BT's service level guarantees for services including Ethernet provision (the "SLG Direction"). The SLG Direction 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 the setting of a Contractual Delivery Date ("CDD") beyond the 57th day and to request the consent of the relevant CP for any extension of a CDD beyond the 57th day. The Direction also required BT to make compensatory payments in the event of late provision of its services. Ofcom decided to re-impose the SLG Direction in the 2008 and 2013 BCMR Statements.
- F. BT's Connectivity Services Agreement ("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.
- G. The CSA includes a Service Level Agreement ("SLA") which outlines certain quality of service parameters for the provision of Ethernet services by BT. These parameters 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 ("SLG") payments to the affected CP.
- H. For the majority of cases, the CSA stipulates that the 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.
- I. 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.
- J. The Dispute was referred to Ofcom by Vodafone against BT. Vodafone alleged that BT has misused Deemed Consent during 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.
- K. On 8 September 2015, the Dispute was accepted for resolution. The scope of the Dispute is to determine
- (i) *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).*

(ii) 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.

- L. A fuller explanation of the background to the dispute and Ofcom's reasons for making this determination is set out in the explanatory statement accompanying this determination.

A1.2 NOW, THEREFORE, OFCOM MAKES THE FOLLOWING DETERMINATION FOR RESOLVING THE DISPUTE:

A1.3 Declaration of rights and obligations, etc.

A1.4 1. Ofcom make this declaration pursuant to section 190(2)(a) of the Act.

2. For Affected Orders, subject to taking into account of the circumstances surrounding the provision of such orders and BT's communications with Vodafone, it is declared that if:

- (i) BT engaged in one or more of the practices listed in letters (a), (c), (d), (e) and (f) of paragraph 3, BT would be in breach of its obligations under the Conditions HH5.9 and 6.9 for each order affected;
- (ii) BT engaged in one or more of the practices listed in paragraph 3, BT could be in breach of its obligations under Conditions HH1.2 or 1.2, by failing to provide its services on fair and reasonable terms;
- (iii) BT engaged in one or more of the practices listed in paragraph 3 to extend the CDD beyond the 57th day, BT could be in breach of its obligations under the SLG Direction.

3. The practices referred to in paragraph 2 are the following:

- (a) failure to notify Vodafone of its intention to deem Vodafone's consent to extend a CDD;

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- (b) provision by BT of an insufficient level of information to Vodafone regarding the reasons to justify deeming Vodafone's consent to extend a CDD;
- (c) reliance by BT on reasons not listed in Paragraph 2.3 of the CSA for deeming Vodafone's consent to extend a CDD;
- (d) extension by BT of a CDD for a period that incorporated delays which did not derive from circumstances listed in Paragraph 2.3 of the CSA for the application of Deemed Consent;
- (e) notification by BT of its intention to rely on Deemed Consent and/or of a revised CDD at a time that was not as soon as reasonably practicable;
- (f) failure to set a revised CDD date for an Un-suspended Order as soon as reasonably practicable.

4. BT must provide to Vodafone information reasonably required by Vodafone to establish whether BT engaged in a practice listed in paragraph 3 in relation to the Affected Orders.

Binding nature and effective date

- 5. This Determination is binding on BT and Vodafone in accordance with section 190(8) of the 2003 Act.
- 6. This Determination shall take effect on the day it is published.

Interpretation

- 7. For the purpose of interpreting this Determination—
 - a) except as otherwise defined in this Determination, words or expressions used in this Determination (and in the recitals hereto) shall have the same meaning as they have in the 2003 Act;
 - b) headings and titles shall be disregarded; and
 - c) the Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.
- 8. In this Determination—
 - a) **2003 Act:** The Communications Act 2003.
 - b) **2008 BCMR Statement:** Ofcom's 2008 Business Connectivity Market Review Statement.
 - c) **2013 BCMR Statement:** Ofcom's 2013 Business Connectivity Market Review Statement.
 - d) **Affected Orders:** Orders for the provision of Ethernet services by BT to Vodafone during the Relevant Period where the CDD was extended by BT beyond the time set out in Paragraph 2.3 (c) of Schedule 4C(i) of the CSA without Vodafone's express consent to the extension.

- e) **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.
- f) **CDD:** Contractual Delivery Date.
- g) **CP:** Communications Provider.
- h) **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.
- i) **Deemed Consent:** A contractual process, set out in Paragraph 2.3 of Schedule 4(C)(i) of the CSA, that allows Openreach to extend the CDD beyond the timeframes set out therein, in certain defined circumstances.
- j) **The Dispute:** this regulatory dispute between BT and Vodafone, in relation to allegations that BT has misused Deemed Consent, opened on 8 September 2015.
- k) **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.
- l) **Openreach:** A BT group business offering CPs products and services that are linked to BT's nationwide local access network.
- m) **The Parties:** Vodafone and BT.
- n) **The Relevant Period:** 1 September 2012 to 31 January 2014.
- o) **Un-suspended Order:** the status of an order when an order's suspension is subsequently lifted at the request of the CP.
- p) **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.
- q) **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.
- r) **SLG Direction:** Ofcom's 2008 Statement 'Service level guarantees: incentivising performance', <http://stakeholders.ofcom.org.uk/consultations/slq/statement/>.
- s) **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.

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



Geoffrey Myers
Director of Competition Economics

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

08 January 2016

Annex 2

Wording of relevant CSA clauses

A2.1 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) 30th Working Day for the Ethernet Backhaul Direct Service Order, TDM Access Service Order or Ethernet Access Direct Service Order, or*
 - (b) 90th Working Day for the Bulk Transport Link Service Order or*
 - (c) 30th 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"*
A2.2 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."*

A2.3 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*

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- (f) *through no fault of its own, BT is unable to obtain any necessary permissions or consents required in connection with the performance of a particular service level; or*
- (g) *the failure is due to a Force Majeure event; or*
- (h) *the failure is due to a planned outage on the Legacy Platform or Emergency Service interruption; or*
- (i) *the failure is due to an inaccurate Order being submitted by the Communications Provider and the Communications Provider has been informed by the end of the next Working Day ; or*
- (j) *if the fault is not reported in accordance with the fault reporting provisions of Schedule 2 (paragraph 4) and the Communications Provider has been informed by the end of the next Working Day; or*
- (k) *if the fault is due to a failure in the public internet."*

A2.4 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.*

A2.5 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>

A2.6 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;*
- (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.*

Annex 3

Deemed Consent codes provided by BT on 8 October 2015

Table A.3.1:

Clause	Deemed Consent Code	Description ²²⁴	[X]
(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,	

²²⁴ [X]

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		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 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	

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

		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.