

Quality of Service and Deemed Consent



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Quality of Service (QoS), perhaps even more so than cost, is a key component of an access product for an access seeker. Whilst cost is undoubtedly important, cost is at least predictable for an access seeker and an access seeker can, if they have deep enough pockets, choose to defray some of the wholesale cost themselves rather than passing it all on to the customer. QoS on the other hand is far less predictable and is often highly visible to the customer in terms of delays in installation or repair or otherwise.

Where product delivery is delayed because of poor quality of service from an access provider, this not only has direct financial and resource implications for the access seeker but can also result in reputational damage with their end customer and can reduce the likelihood of switching. That QoS is more and more a defining factor can be seen from the fact that it, rather than price, has been one of the key arguments around Openreach in the UK. In addition, recently in *Orange Polska v Commission* (Case T-486/11), in which Shepherd & Wedderburn acted for ECTA as an intervener, the General Court upheld the Commission's findings that Orange Polska's non price behaviours were abusive and had prevented or at least delayed competition on the broadband markets. The rustle was the upholding of the significant fine imposed by the Commission.

The question of how to incentivise Quality of Service however is a thorny one. Regulators accept that the fulfilment journey for a product can be extremely complicated and that there are a number of parties involved; the access seeker, the access provider, the property owner or occupier, local councils, and roads and traffic authorities just to name a few. Trying to develop a quality of service process that strikes a balance between the access seeker and the access provider is therefore fraught with difficulty as the recent debates about "deemed consent" in the UK illustrate.

What is Deemed Consent?

BT's Connectivity Service Agreement contains a provision in which BT commits to providing reasons to justify and obtaining the CP's prior written consent (which can't be unreasonably withheld or delayed) to extend the Committed Delivery Date (CDD) beyond various specified timeframes for various products, provided always that BT will notify the CP as soon as reasonably practicable where it intends to deem consent and what the subsequent CDD is as soon as reasonably practicable.

The relevant provision also provides that BT may deem consent in circumstances under clause 7 of the agreement (basically covering circumstances where the CP or the CP's end user is at fault or the CP has agreed a different CDD with BT) or where there is a need for infrastructure build or there is a cable or exchange breakdown or notice is required under the Traffic Management Act or Transport (Scotland) Act; or there is a manhole or footway box that is contaminated with or by a substance which requires special treatment eg petrol; asbestos has been identified; or security clearance is required but not yet agreed; or main frame compression or extension is required.

When originally introduced, deemed consent was seen as a mechanism that would help to speed up delivery dates by allowing BT to deem consent to a change to the CDD in circumstances where it was essential but



without requiring the toing and froing between BT and the access seeker that would be required if BT had to request consent in all circumstances.

Business Connectivity Market Review Consultation Process

In the Business Connectivity Market Review (BCMR) consultation document issued in May 2015, Ofcom discussed the use of Deemed Consent by BT and stated that “between 2011 and 2014, 71% of all ‘provide and regrade’ orders for Ethernet products completed by Openreach were subject to at least one deemed consent change to their CDD.”¹ They also said that “the current provision SLA/SLG regime is at risk of being circumvented by the uncontrolled use of deemed consent and does not assist in giving customers certainty over their delivery date. We concluded therefore that the current package of remedies and other commercial and reputational factors are inadequate to incentivise Openreach to deliver acceptable levels of quality of service for Ethernet provisioning.”²

Whilst we await Ofcom’s next steps on the BCMR, it is clear that there are likely to be significant limitations applied to the use of deemed consent by BT.

Dispute between Vodafone and BT

In September 2015, Ofcom accepted a dispute from Vodafone about BT’s use of Deemed Consent. They argued that rather than being used in exceptional circumstances BT was using Deemed Consent in circumstances in which it was never intended and claimed this was a way of BT avoiding paying out Service Level Guarantees.

Rather than examining every order, Ofcom considered various categories of circumstances where deemed consent was used by BT and examined whether it was in accordance with the contractual provisions set out in the Connectivity Services Agreement (CSA). It then went on to examine two subpoints.

If the use was in accordance with the Agreement, was there any other reason to consider that the practice was: (i) in breach of BT’s SMP obligations to provide Network Access at the charges, terms and conditions in the relevant Reference Offer and not to depart from them either directly or indirectly; and (ii) to provide Network Access in accordance with paragraph HH1.1 as soon as reasonably practicable and 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.

In January 2016 it released its final decision. In that decision it found that of the seven different categories of practice it considered, only one practice was in

accordance with the terms of the CSA and one could be depending if email notification was given. Six of the practices could be in breach of BT’s obligations to provide service as soon as reasonably practicable and on fair and reasonable terms and on such terms as Ofcom may from time to time direct. Of those six, three practices would be in breach of the obligation not to depart from the published reference offer and another two could be in breach of this obligation. Ofcom directed BT to address any remaining issues with Vodafone in accordance with Ofcom’s determination by providing Vodafone with any information reasonably required by Vodafone to establish whether BT engaged in a practice in breach of the SMP conditions in relation to the orders that Vodafone had complained about.

Interestingly in the covering statement, Ofcom also said that BT must observe Ofcom’s determination in relation to any equivalent issues with other CPs and when applying Deemed Consent for future orders. Perhaps, to give impetus to this statement, Ofcom also opened an own initiative investigation into BT’s use of deemed consent on 6 November 2015 to consider whether BT was in compliance with its regulatory obligations.

Following the outcome of the dispute, BT is potentially facing action on three fronts in respect of deemed consent: the own initiative investigation; further disputes from third parties should it not reach agreement with them in respect of issues relating to deemed consent; and the likely tightening of the circumstances when it can use deemed consent through the Business Connectivity Market Review process.

Whilst BT is likely to challenge further disputes and investigations, and may well appeal Ofcom’s dispute resolution decision, the case of deemed consent illustrates that adopting a QoS regime that works both for the access provider and the access seeker, is a significantly difficult task.

We also expect to see Ofcom’s forthcoming Digital Strategic Review document address the issue of QoS in significant detail, given that this has formed a large part of competitor’s submissions to Ofcom.

Shepherd & Wedderburn has significant experience in dealing with Quality of Service issues around the world. If you would like to discuss any issues you have relating to Quality of Service please contact Gordon Moir.

¹ Business Connectivity Market Review May 2015 Consultation, pg 250

² Business Connectivity Market Review May 2015 Consultation, pg 261