

# Confirmation Decision issued under section 139A of the Communications Act 2003 to British Telecommunications plc relating to contravention of information requirements

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## Subject of this Confirmation Decision

- 1.1 This Confirmation Decision (the “Confirmation Decision”) is addressed to British Telecommunications plc (“BT”), whose registered company number is 1800000. BT’s registered office is 81 Newgate Street, London, EC1A 7AJ.<sup>1</sup>

## Summary

- 1.2 Ofcom has statutory powers, contained in section 135 of the Communications Act 2003 (the “Act”), to require the provision of information which it considers necessary for the purpose of carrying out its functions.
- 1.3 These statutory powers are fundamental to Ofcom’s ability to carry out its statutory functions in relation to communications matters, such as conducting market reviews, imposing regulatory obligations, resolving disputes and taking enforcement action, in line with its principal duty of furthering the interests of citizens and consumers. They enable Ofcom to gather the information which it considers necessary to carry out its functions in a timely and effective manner and are therefore key to the integrity of the regulation of the communications sector.
- 1.4 In February 2017, in the course of the Wholesale Local Access (“WLA”) market review, Ofcom sent BT an information request under section 135 of the Act. BT responded to this request, and Ofcom relied on the information provided in deciding whether to propose to apply charge controls (and if so, at what level) to certain BT products and services in its March 2017 WLA consultation.<sup>2</sup> However, subsequent information provided by BT in response to the March 2017 WLA consultation gave us reason to believe that the information we had relied on for our charge control proposals was not accurate and complete.

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<sup>1</sup> Although Openreach, the BT Group business responsible for the relevant services, responded to the relevant information requests, Openreach was not at the time a legally separate entity from BT so the relevant information requests were sent to the company secretary of BT (with Openreach employees in copy).

<sup>2</sup> See paragraphs 1.14 to 1.19 below for further information.

- 1.5 Moreover, in June 2017, also in the course of the WLA market review, Ofcom sent BT another information request under section 135 of the Act. BT responded to this request, but provided similarly inaccurate information to that which it had provided in response to the original information request discussed above. Additionally, this response further highlighted that BT failed to provide complete information in response to the earlier information request.
- 1.6 Given the importance and reliance we place on the accuracy of information requested under our statutory powers, we decided to open an investigation into BT's compliance with section 135 of the Act on 6 November 2017.
- 1.7 On 12 January 2018, Ofcom sent BT a Notification under section 138 of the Act (the s138 Notification) setting out its finding that there are reasonable grounds for believing that BT contravened the requirement to provide information under section 135 of the Act. On 19 January 2018, BT confirmed to Ofcom that it would not make any written or oral representations about the matters set out in the s138 Notification and agreed to enter into a voluntary settlement with Ofcom in relation to the matters set out in this Confirmation Decision.
- 1.8 This Confirmation Decision is issued under section 139A of the Act confirming that we are satisfied that BT contravened two information requests made by Ofcom under section 135 of the Act. The Confirmation Decision also sets out Ofcom's decision to impose a penalty of £70,000 which we consider would be appropriate and proportionate in this case. The calculation of this figure includes a 30% discount applied to the provisional penalty figure of £100,000 proposed in the s138 Notification, as a result of BT accepting liability and entering into a voluntary settlement with Ofcom at an early stage of our investigation.

## Relevant legislation

### Section 135 of the Act

- 1.9 Section 135 of the Act states that:
- "Ofcom may require a person falling within subsection (2) to provide them with all such information as they consider necessary for the purpose of carrying out their functions under this Chapter".*
- 1.10 Section 135(2) of the Act states that Communications Providers ("CPs") fall within the scope of this provision. The expression "communications provider" is defined at section 405(1) of the Act. It means:
- "a person who provides....an electronic communications network or an electronic communications service."*
- 1.11 Section 135(3) of the Act confirms that the information that may be required by Ofcom under section 135 of the Act includes information that they require for, amongst other things, any one or more of the following purposes:

*“(g) identifying markets and carrying out market analyses in accordance with, or for the purposes of, any provision of [Chapter 1 of the Act]”.*

- 1.12 Section 135(4) of the Act states that a person required to provide information under section 135 must provide it in such manner and within such reasonable period as may be specified by Ofcom.
- 1.13 Section 135(5) of the Act provides that the powers in section 135 are subject to the limitations in section 137. Section 137(3) provides that Ofcom are not to require the provision of information under section 135 except:
- i) by a demand for the information that describes the required information and sets out Ofcom's reasons for requiring it; and
  - ii) where the making of a demand for the information is proportionate to the use to which the information is to be put in the carrying out of Ofcom's functions.

### **Section 138, 139 and 139A of the Act**

- 1.14 Sections 138 to 144 of the Act specify the enforcement powers that Ofcom has in relation to contravention of information requirements. Section 138 of the Act (Notification of contravention of information requirements) states inter alia that:

*“(1) Where Ofcom determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a requirement imposed under section 135 or 136, they may give that person a notification under this section.*

*(2) A notification under this section is one which—*

*(a) sets out the determination made by OFCOM;*

*(b) specifies the requirement and contravention in respect of which that determination has been made;*

*(c) specifies the period during which the person notified has an opportunity to make representations;*

*(d) specifies the information to be provided by the person to OFCOM in order to comply with a requirement under section 135 or 136;*

*(e) specifies any penalty that OFCOM are minded to impose in accordance with section 139; and*

*(f) where the contravention is serious, specifies any direction which OFCOM are minded to give under section 140. [...]”.*

- 1.15 Section 139 of the Act specifies the penalties that may apply for contravention of the information requirements where a person is given a notification under section 138.

- 1.16 Section 139A of the Act applies where a person has been given a notification under section 138, Ofcom has allowed the opportunity for representations about the matter to be made, and the period allowed for the making of representations has expired.
- 1.17 Section 139A(2) allows Ofcom to:
- “(a) give the person a decision (a “confirmation decision”) confirming the imposition of requirements on the person, or the giving of a direction to the person, or both, in accordance with the notification under section 138; or*
- (b) inform the person that they are satisfied with the person’s representations and that no further action will be taken.”*
- 1.18 Under section 139A(3), Ofcom may not give a confirmation decision to a person unless, after considering any representations, they are satisfied that the person has, in one or more of the respects notified, been in contravention of a requirement notified under section 138.
- 1.19 Section 139A(4) states that a confirmation decision must be given without delay, include the reasons for the decision, may require immediate action by the relevant person, and may require the person to pay the penalty specified in the section 138 notification or such lesser penalty that Ofcom considers to be appropriate in light of representations made or steps taken by the CP. The confirmation decision may also specify the period within which the penalty is to be paid.

## Background

### The first information request – 25<sup>th</sup> Notice

- 1.20 In order to enable Ofcom to carry out its 2018 WLA market review, Ofcom issued BT with a number of information requests under section 135 of the Act. These included the 25<sup>th</sup> Notice issued to BT on 23 February 2017 that required the provision of specified information by 5pm on 6 March 2017 (the “25<sup>th</sup> Notice”). A copy of the 25<sup>th</sup> Notice is provided at Annex 1.
- 1.21 The specified information required by the 25<sup>th</sup> Notice was set out in the Annex to that notice.
- 1.22 The Annex to the notice included two questions, which asked for BT to ‘provide the following in relation to all optimisation and repair services, and where applicable any separately-priced components of such services, provided by BT’ for GEA FTTC lines (question 1) and for GEA FTTP lines (question 2):
- “a) The name of each service and, if applicable, each separately-priced component of a service;*
- b) In relation to each service and, if applicable, each separately-priced component of a service named in (a), whether it is sold by subscription (e.g. by way of a monthly charge) or as a one-off purchase;*

c) The current charge (£) for each and every service or separately-priced component of a service in relation to each basis in (b) on which the service or separately-priced component of a service is available. If the charge for a service or a separately-priced component of a service is variable, please explain the basis on which the charge would be calculated”.

## Openreach’s response to the 25<sup>th</sup> Notice

1.23 Openreach, the BT Group business responsible for the relevant services, responded to the 25<sup>th</sup> Notice on 6 March 2017. A copy of the relevant parts of Openreach’s response is set out in Annex 2.

1.24 Among the services mentioned by Openreach were Fibre Broadband Boost and Superfast Recharge. The relevant prices were listed in spreadsheets attached to the response and were as follows:

Optimisation Repair Products	Prices
Fibre Broadband Boost	£159
Superfast Recharge	Openreach Engineer Attendance: [X] Superfast Recharge External: [X] Superfast Recharge Internal: [X] Total: [X]

1.25 Relying on the accuracy of this information, in Volume 2 of the March 2017 WLA Consultation,<sup>3</sup> Ofcom proposed that:

- a charge control should apply to Fibre Broadband Boost, with a flat nominal cap set at £159;<sup>4</sup> and
- no charge control should apply to Superfast Recharge at this early stage in the life of this service but the usual Significant Market Power (“SMP”) remedies would still apply (e.g. fair and reasonable terms etc.).<sup>5</sup>

## BT’s consultation response

1.26 In its response to the March 2017 WLA Consultation, dated 22 June 2017, Openreach stated the following:

*“The price of [Fibre] Broadband Boost is contracted at £180, the figure of £159 quoted by Ofcom is net of rebates which are applied in circumstances where a*

<sup>3</sup> Ofcom, *Wholesale Local Access Market Review – Volume 2: Consultation on proposed charge control designs and implementation*, 31 March 2017, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0034/99637/Vol2-Charge-control.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0034/99637/Vol2-Charge-control.pdf).

<sup>4</sup> Ibid, paragraph 3.148.

<sup>5</sup> Ibid, paragraph 3.145.

*Broadband Boost has been ordered and it is subsequently discovered that the problem was on the Openreach network (a hard fault) and not chargeable.”<sup>6</sup>*

A copy of the relevant parts of Openreach’s response is set out in Annex 3.

- 1.27 On 10 October 2017, we raised our concern with BT that its failure to mention the unrebated charge for Fibre Broadband Boost in its response to the 25<sup>th</sup> Notice might have been a contravention of that notice. BT explained that ‘although there is an unrebated “price” for Monday to Friday, the reality is that, as a result of rebates, which are consistently applied (in order to reflect the fact that a proportion of Fibre [Broadband Boost] provisions will actually be hard faults which BT does not charge for), Fibre [Broadband Boost] purchasers actually pay a net charge of c.£159 per order. The unrebated “price” is not charged to purchasers and indeed is not referred to in our billing systems.’<sup>7</sup>

### **The subsequent information request – 27<sup>th</sup> Notice**

- 1.28 On 15 June 2017 Ofcom issued BT with another statutory information request, which required the provision of specified information by 5pm on 6 July 2017 and on 13 July 2017 (the “27<sup>th</sup> Notice”). A copy of the 27<sup>th</sup> Notice is provided at Annex 4.

- 1.29 Question 6 of the 27<sup>th</sup> Notice read as follows:

*“These questions seek information on revenues and costs for the services listed in Annex B spreadsheet “Q6 Costs and revenues”. For each of the products and services listed in “Q6 Costs and revenues”, please provide:*

*a) ...*

*b) ...*

*c) The historical prices for each of the services listed in “Q6 Costs and revenues”. Please provide their prices over time since they were launched up to the date of the response to this information request.”*

- 1.30 The Annex B spreadsheet, included at Annex 4, listed the following four services:

- Fibre Broadband Boost (both FTTC and FTTP);
- Superfast Recharge - Openreach Engineer Attendance;
- Superfast Recharge External; and
- Superfast Recharge Internal.

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<sup>6</sup> Openreach, *Wholesale Local Access Market Review: Response to Ofcom’s Consultation on proposed charge control designs and implementation – Volume 2, Non-confidential version*, 22 June 2017, [https://www.ofcom.org.uk/data/assets/pdf\\_file/0011/105023/Openreach-vol-2.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0011/105023/Openreach-vol-2.pdf), paragraph 147.

<sup>7</sup> Letter from Alan Lazarus (Director of Regulatory Affairs, Openreach) to Menachem Grunewald (Competition Policy Manager, Ofcom), dated 18 October 2017.

## Openreach's response to the 27<sup>th</sup> Notice

1.31 Openreach responded to the 27<sup>th</sup> Notice on 13 July 2017 and part of the information supplied is included in the table below:

Service/Product	1 <sup>st</sup> July 2011	1 <sup>st</sup> April 2013	1 <sup>st</sup> September 2015
Fibre Broadband Boost: Monday - Friday	[X]	[X]	[X]
Fibre Broadband Boost: Saturday	[X]	[X]	[X]

Service/Product	1 <sup>st</sup> April 2015
Superfast Recharge External: Monday to Friday	[X]
Superfast Recharge External: Saturday	[X]
Superfast Recharge Internal: Monday - Friday	[X]
Superfast Recharge Internal: Saturday	[X]

1.32 A copy of the relevant parts of Openreach's response is set out in Annex 5.

1.33 On 10 October 2017, we raised our concern with BT that its failure to specify the different tariff structure (and in particular, the existence of separate tariffs on Saturdays) for Fibre Broadband Boost or Superfast Recharge in its response to the 25<sup>th</sup> Notice might have been a contravention of that notice. BT explained that these two products are 'seldom consumed on a Saturday and therefore this charge is only rarely levied.'<sup>8</sup>

## Section 138 Notification

1.34 Ofcom issued the s138 Notification to BT on 12 January 2018, setting out its finding that there are reasonable grounds for believing that BT has contravened the requirement to provide information under section 135. These findings are set out below.

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<sup>8</sup> Ibid.

## The validity of the 25<sup>th</sup> and 27<sup>th</sup> Notices

1.35 BT is a communications provider within the meaning set out in Section 405(1) of the Act, namely, a “person who.... provides an electronic communications network or an electronic communications service”.

1.36 In accordance with section 137(3) of the Act, Ofcom set out its reasons for requiring the information in both Notices and described the required information.

1.37 In the 25<sup>th</sup> Notice the reasons were explained as follows:

*“This Notice requires you to provide the information set out below, in the manner and form specified therein, for the purpose of enabling Ofcom to review and carry out analysis of the markets for Wholesale Local Access Lines, including if appropriate the imposition of regulatory remedies. [...]*

*We are requiring the information we would need were any charge controls to be imposed, without having adopted a view either on the need for charge controls or their form. In order to help inform our views on appropriate regulatory remedies, we require further information relating to the current prices of GEA Optimisation and Repair Services.”*

1.38 A similar explanation was given in the 27<sup>th</sup> Notice:

*“This notice requires you to provide the information set out below, in the manner and form specified, for the purpose of enabling Ofcom to review and carry out analysis of the wholesale broadband access and wholesale local access markets, including if appropriate the imposition of regulatory remedies. [...]*

*We are requiring the information we would need were any charge controls to be imposed (on a variety of different bases), without having adopted a view either on the need for charge controls or their form. In order to help inform our views on appropriate regulatory remedies, we require further information to:*

- *[...] improve our understanding of GEA optimisation and repair services [...].”*

1.39 The specified information required by both notices was set out in annexes to the notices. The information was necessary to help inform our views on appropriate regulatory remedies. As such, the information requested by notice was necessary and proportionate for the purposes of the market review.

1.40 The 25<sup>th</sup> Notice allowed a reasonable period of 7 working days for BT to provide the information. This reflected the fact that the 25<sup>th</sup> Notice was straightforward and succinct, as it focused on BT’s wholesale fibre optimisation and repair services.

1.41 The 27<sup>th</sup> Notice allowed a reasonable period of 20 working days for BT to provide the information in relation to optimisation and repair services. This reflected the fact that the information request covered a range of products and services.



- 1.42 Given the above, we considered, in the s138 Notification, that the 25<sup>th</sup> and 27<sup>th</sup> Notices complied with the requirements as set out in the Act.

### **BT's compliance with the 25<sup>th</sup> and 27<sup>th</sup> Notices**

- 1.43 As noted above, we had two concerns in relation to BT's compliance with the 25<sup>th</sup> Notice: that BT's failure to provide the unrebated price for Fibre Broadband Boost, and its failure to reveal the complete tariff structure and in particular provide the Saturday tariffs for both Fibre Broadband Boost and Superfast Recharge, contravened the notice. BT offered explanations for both of these failures (noted at paragraphs 1.27 and 1.33). BT also acknowledged that it 'could have provided more clarity and context in relation to these matters and to the assumptions underlying the answers given in response to the 25<sup>th</sup> Notice'.<sup>9</sup> BT also added that its 'intention was to provide an accurate and helpful response to the 25<sup>th</sup> Notice'.<sup>10</sup>
- 1.44 Nonetheless, we set out in the s138 Notification that we considered that there were reasonable grounds for believing that BT contravened the 25<sup>th</sup> Notice by:
- i) not providing the correct tariff structure (and in particular, information on the Saturday tariffs) for both Fibre Broadband Boost and Superfast Recharge – the 25<sup>th</sup> Notice specifically noted: "If the charge for a service or a separately-priced component of a service is variable, please explain the basis on which the charge would be calculated". In our view, this clearly required BT to provide the variable prices of the products depending on whether it was a weekday or a Saturday.
  - ii) not providing the unrebated charge for Fibre Broadband Boost – the 25<sup>th</sup> Notice asked for 'the current charge (£) for each and every service'. In our view, this clearly required BT to provide the unrebated price of £180, and not the charge net of rebates. We note that if BT was not in a position to provide unrebated prices (for example because these were not referred to in its billing systems, as BT mentioned in its letter of 18 October 2017), BT should have provided an explanation to this effect and highlighted in its response that the prices provided instead were net of rebates.
- 1.45 Moreover, we set out in the s138 Notification that we considered there to be reasonable grounds for believing that BT contravened the 27<sup>th</sup> Notice by again not providing the unrebated charge for Fibre Broadband Boost. The 27<sup>th</sup> Notice asked for 'the historical prices for each of the services listed in "Q6 Costs and revenues", which included Fibre Broadband Boost. In our view, this clearly required BT to provide the unrebated price of £180, and not the charge net of rebates. Again, we considered that if BT was not in a position to provide unrebated prices (for example because these were not referred to in its billing systems), BT should have provided an explanation to this effect and highlighted in its response that the prices provided instead were net of rebates.

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

## Proposed penalty

### Introduction

- 1.46 In the s138 Notification, we provisionally found that BT contravened the requirements to provide information in response to two statutory information requests sent by Ofcom in the course of the WLA market review.
- 1.47 The WLA market review focusses on the fixed connections between homes and business premises, and local telephone exchanges. Our regulation of this market is vital to ensuring that the retail telephony and broadband markets remain competitive and deliver all the benefits of competition to citizens and consumers.
- 1.48 Ofcom's power under section 135 of the Act to require the provision of information, which it considers necessary for the purpose of carrying out market reviews such as this, is fundamental to its ability to carry out its statutory functions in line with its principal duty of furthering the interests of citizens and consumers.
- 1.49 This power enables Ofcom to gather the information which it considers necessary to carry out its functions in a timely and effective manner and therefore is key to the integrity of the regulation of electronic communications networks and services under the Act.
- 1.50 Accordingly, Ofcom considers that a contravention of a requirement to provide information under section 135 is a serious matter.
- 1.51 As such, we set out in the s138 Notification that we were minded to impose a penalty for the contraventions by BT of the information requirements specified in the s138 Notification. The penalty has to be proportionate in its amount and our assessment of the appropriate penalty amount as set out in the s138 Notification is detailed below. In setting the penalty, we had regard to the Penalty Guidelines.<sup>11</sup>

### Provisional penalty amount

- 1.52 Ofcom considered all the circumstances of the case in the round in order to determine the appropriate and proportionate amount for the penalty that we provisionally found in the s138 Notification. In the following paragraphs, we set out our assessment of the factors which appeared to us to be the most relevant to determining an appropriate penalty that is proportionate to the contraventions we provisionally found in the s138 Notification.

### Seriousness of the contraventions and degree of harm

- 1.53 A contravention of a requirement to provide information is inherently serious. As noted above, Ofcom's powers under section 135 of the Act are fundamental to its ability to carry out its statutory functions.

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<sup>11</sup> Ofcom, *Penalty Guidelines: s.392 Communications Act 2003*, 3 December 2015, [https://www.ofcom.org.uk/data/assets/pdf\\_file/0017/96101/Penalty-guidelines-2015-Section-392-of-the-Communications-Act-2003.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0017/96101/Penalty-guidelines-2015-Section-392-of-the-Communications-Act-2003.pdf).

- 1.54 Where companies contravene these requirements, Ofcom is at risk of being prevented from exercising its functions in the interests of citizens and consumers because of the asymmetry of information that exists: much of the information which it requires is held by CPs that it regulates.
- 1.55 We considered this asymmetry was particularly pronounced in this case, because the information requested in the course of the WLA market review, in relation to which we provisionally found that BT continues to hold SMP.<sup>12</sup> Ofcom was therefore reliant on BT responding accurately and completely to information requests in order for Ofcom to determine the regulatory obligations which would be appropriate to offset the effect of BT's SMP and promote competition.
- 1.56 Additionally, we considered that there were specific features of the contraventions that Ofcom identified in the s138 Notification which contributed to their seriousness.
- 1.57 Firstly, Ofcom considered that BT did not have effective systems in place to respond accurately and comprehensively to information requests in accordance with its statutory obligations under section 135 of the Act. This is, in our view, clearly illustrated by the simplicity of these contraventions – not accurately providing all the relevant prices for services.
- 1.58 BT is a CP which is subject to SMP obligations in respect of markets which are subject to a regular review cycle. Further, its SMP obligations include the obligation to give network access to other CPs, a requirement which is susceptible to disputes under the Act. Accordingly, BT must be aware that it will receive statutory information requests from Ofcom on a regular basis. Ofcom would expect a prudent CP mindful of its regulatory obligations in this situation to have effective systems for identifying and retrieving the information requested in order to provide comprehensive and accurate responses in accordance with its statutory duties. BT's apparent failure to do so suggests a degree of carelessness in respect of its regulatory responsibilities.
- 1.59 Moreover, in respect of the 27<sup>th</sup> Notice, BT repeated the mistake that it had made regarding Fibre Broadband Boost in response to the 25<sup>th</sup> Notice, despite having set out the rebates issue in the Openreach response to the March 2017 WLA Consultation. While BT correctly identified that the information overlapped with that requested in the 25<sup>th</sup> Notice (BT explained that it had aligned the two responses<sup>13</sup>), its processes fell short in that they seemingly did not question the accuracy of the earlier response before they were aligned (including in light of the inconsistent response to the March 2017 WLA Consultation).
- 1.60 We noted that the finding that BT did not have effective systems in place mimics a finding made in a previous investigation that found BT to have contravened three information requests, the latter of which were issued in September and November 2015.<sup>14</sup>

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<sup>12</sup> We expect to publish Ofcom's final statement on the WLA market review in early 2018.

<sup>13</sup> This explanation was in the covering letter of the response to the 27<sup>th</sup> Notice, dated 13 July 2017.

<sup>14</sup> Ofcom, *Confirmation decision under section 139A of the Communications Act 2003 relating to contravention of information requirements: Confirmation Decision issued to British Telecommunications plc by the Office of Communications*,

- 1.61 Secondly, having contravened the 25<sup>th</sup> Notice, Openreach did not take any steps to end the contravention which we considered added to the seriousness. We say this because:
- the contravention in relation to Fibre Broadband Boost should have been obvious to it when it read the March 2017 WLA Consultation. At paragraph 3.143 Ofcom notes that it knew the price of Fibre Broadband Boost from BT's response to the 25<sup>th</sup> Notice. On the same page Ofcom explains that it was proposing 'to apply flat nominal caps at the current charges' [emphasis added].<sup>15</sup> This should have alerted Openreach to the contravention and it should have then advised Ofcom of it – rather than simply responding to the consultation that 'any control applied should be on the published price and not a figure of £159 which is derived from the net amount billed'.<sup>16</sup>
  - having been asked for the same information about Fibre Broadband Boost in the 27<sup>th</sup> Notice, Openreach should have identified the previous error when preparing an accurate response to the 27<sup>th</sup> Notice and alerted Ofcom of the contravention – instead of making the same mistake again.
- 1.62 We understand that Openreach has a project team dedicated to the WLA market review that would have responded to both the information requests and the consultation. We considered that this added further to the seriousness of the contraventions.
- 1.63 Thirdly, the incorrect and incomplete information provided by Openreach in response to the 25<sup>th</sup> Notice underpinned a proposal in our March 2017 WLA Consultation. This limited the robustness of Ofcom's review as part of the WLA market review of BT's fibre ancillary services and the SMP obligations to which it may be subject in this regard.
- 1.64 Lastly, there was a moderate risk that BT's contraventions could have resulted in harm to citizens and consumers, given that the contraventions all related to information required for the exercise of Ofcom's regulatory functions in respect of superfast and ultrafast broadband services. The contraventions therefore had the potential to cause material harm to CPs, businesses and consumers. That said, this is somewhat limited by the nature of the information request, which was focused on fibre optimisation repair services, which cover WLA fibre ancillary services that CPs use to improve the speed and reliability of a customer's broadband.

### History of contraventions and steps taken to prevent future contraventions

- 1.65 BT was found to have contravened three information requests in April 2017 and was fined £300,000 for these contraventions (the 'deemed consent contraventions'). BT has advised us that since that case was concluded, it has taken the following steps to improve its processes to prevent future contraventions:

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5 April 2017, [https://www.ofcom.org.uk/data/assets/pdf\\_file/0014/102173/cw-01192-03-17-bt-confirmation-decision.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0014/102173/cw-01192-03-17-bt-confirmation-decision.pdf), paragraphs 5.14-15.

<sup>15</sup> *Wholesale Local Access Market Review – Volume 2: Consultation on proposed charge control designs and implementation*, paragraph 3.148.

<sup>16</sup> *Wholesale Local Access Market Review: Response to Ofcom's Consultation on proposed charge control designs and implementation – Volume 2, Non-confidential version*, paragraph 147.

- reviewed and enhanced its processes for gathering information from the relevant business units, improving the quality of information provided and driving greater accountability;
- ensured senior peer review within the providing business unit of any information provided, to avoid single points of failure and to further bolster assurance of the accuracy and completeness of information provided;
- started the roll-out of regular refresher training and best practice to relevant stakeholders in the business to ensure it maintains the right attitudes and skills throughout the organisation;
- continued to report to the monthly Executive all requests for information from Ofcom, their completion dates and status, as well as introducing weekly update reports to enable each business unit to prioritise appropriately the resourcing necessary to support timely responses; and
- reviewed its controls and governance framework to take account of the steadily increasing volume and complexity of statutory information requests.<sup>17</sup>

1.66 We noted, however, that these steps were not sufficient to prevent the contravention of the 27<sup>th</sup> Notice. This contravention took place over three months after the deemed consent contraventions were confirmed, during which time some or all of these measures would and should have been implemented.

### Other factors

1.67 In addition to the above, in the s138 Notification we also took into account that:

- we do not have any evidence that the contraventions we provisionally found occurred deliberately. As noted above, these contraventions are likely to be due to BT's apparent failure to have effective systems in place for fully and accurately identifying and retrieving the information requested by Ofcom; and
- BT cooperated with us during our investigation and indicated a willingness to further improve its processes.

1.68 In addition, we had regard to relevant precedents.<sup>18</sup>

### Deterrence

1.69 Ofcom's Penalty Guidelines explain that the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient to deter the business from contravening regulatory requirements, and to deter the wider industry from doing so, having regard to the seriousness of the infringement.

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<sup>17</sup> Letter from Alan Lazarus (Director of Regulatory Affairs, Openreach) to Menachem Grunewald (Competition Policy Manager, Ofcom), dated 18 October 2017.

<sup>18</sup> Under the current Penalty Guidelines there have been three relevant cases, two of the cases were against GW Telecom Limited (see: [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw\\_01201](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01201)) and the third was against BT as noted in paragraph 1.58.

- 1.70 As a general matter, we are of the view that the need for deterrence in any penalty set for a contravention of information requirements is important as information requests are fundamental to Ofcom's ability to regulate electronic communications networks and services under the Act effectively and in a timely manner, and Ofcom needs to be able to rely on responses to them.
- 1.71 We considered that the penalty which we were minded to impose was sufficiently large to ensure that it is a deterrent, having regard to BT's size and turnover and to the seriousness of the proposed contraventions in this case, and is at such a level which can change any potential non-compliant behaviour by BT, and by other providers.
- 1.72 The penalty we proposed also took account of the fact that the contraventions in this case occurred before the confirmation of the deemed consent contraventions, for which we imposed on BT a penalty of £300,000 that reduces the need for a penalty as a deterrence in this case.

### **Ofcom's provisional findings on the penalty amount**

- 1.73 Under section 139(5) of the Act, there is a statutory maximum penalty which Ofcom may impose on BT in relation to contraventions of information requirements. This statutory maximum is £2,000,000, although the level of the penalty imposed should be appropriate and proportionate to the contravention(s) in respect of which it is imposed.
- 1.74 Taking all the factors set out at paragraphs 1.46-1.72 above in the round, the penalty we were minded to impose on BT was £100,000. We considered that this was appropriate and proportionate, given the:
- seriousness of these contraventions;
  - the potential harm to consumers and citizens;
  - the fact that BT has already been fined for breaches over the same period and has already taken actions to prevent future contraventions;
  - BT's size and turnover; and
  - Ofcom's central objective of deterring further contraventions.

### **Confirmation Decision**

- 1.75 As set out above, we issued the s138 Notification to BT on 12 January 2018, and invited BT to make representations by 9 February 2018. In a letter dated 19 January 2018, BT informed us that it would not make any written or oral representations about the matters set out in the s138 Notification and has accepted liability for the contraventions.
- 1.76 As BT has not provided any representations in response to Ofcom's s138 Notification, our findings in this Confirmation Decision remain as set out in the s138 Notification and described above.
- 1.77 Ofcom has decided to impose a financial penalty on BT of £70,000. The calculation of this figure includes a 30% discount applied to the provisional penalty figure of £100,000 proposed in the s138 notification, as a result of BT's accepting liability and entering into a

voluntary settlement with Ofcom at an early stage of our investigation. BT has until 25 February 2018 to pay the penalty.

## **Interpretation**

- 1.78 Words or expressions used in this Notification have the same meaning as in the Act except as otherwise stated in this Notification.

**Gauche Rasmussen**

A handwritten signature in black ink, consisting of a stylized 'G' followed by a horizontal line.

**Director of Enforcement**

**25 January 2018**

## Annex 1 – The 25<sup>th</sup> Notice

[✂]



## Annex 2 – Openreach’s response to the 25<sup>th</sup> Notice (relevant extracts)

[REDACTED]

## Annex 3 – Openreach’s response to the March 2017 WLA Consultation (relevant extracts)

[Available at: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0011/105023/Openreach-vol-2.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0011/105023/Openreach-vol-2.pdf), pages 35 and 36]

## Annex 4 - The 27<sup>th</sup> Notice

[✂]

## Annex 5 – Openreach’s response to the 27<sup>th</sup> Notice (relevant extracts)

[REDACTED]