
Confirmation Decision under section 139A of the Communications Act 2003

Confirmation Decision served on Virgin Media Ltd (VM)
by the Office of Communications (Ofcom) for
contraventions of section 135 of the Communications
Act 2003

**Non-confidential version - redactions are
indicated with [✂]**

Confirmation Decision issued under section 139A of the Communications Act 2003 to Virgin Media Limited relating to a contravention of information requirements

Subject of this Confirmation Decision

- 1.1 This Confirmation Decision is addressed to Virgin Media Limited (“VM”), whose registered company number is 02591237. VM’s registered office is Media House, Bartley Wood Business Park, Hook, Hampshire, RG27 9UP.

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. A person required to provide information under that provision has a statutory duty to provide it to Ofcom in the manner and within such reasonable period as Ofcom may specify.¹
- 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 therefore are key to the integrity of the regulation of the communications sector.
- 1.4 Ofcom has found that VM has breached requirements imposed on it under section 135 of the Act, by failing to provide complete information to Ofcom. Ofcom required VM to provide the information for the purposes of its investigation into whether Early Termination Charges (“ETCs”) set and charged by VM complied with General Condition (“GC”) 9.3.
- 1.5 Given the importance and reliance we place on the completeness of information requested under our statutory powers, we consider that VM’s incomplete response is a serious matter. We have found that VM’s breaches resulted from a high degree of carelessness and the absence of effective systems in place to respond comprehensively to information requests in accordance with its statutory obligations under section 135 of the Act. As one

¹ Section 135(4) of the Act.

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of Ofcom's largest stakeholders, with annual revenues in 2017 of almost £5 billion, this is a serious matter.

- 1.6 We have decided to impose a penalty of £25,000 in respect of the contravention we have identified. We consider that this is appropriate and proportionate, given the seriousness of the breach, VM's size and turnover, and Ofcom's central objective of deterring further contraventions.

Relevant legislation

- 1.7 Section 135(1) 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".

- 1.8 Section 135(2) of the Act states that communications providers ("CPs") fall within the scope of this provision. VM 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."*

- 1.9 Section 135(3) of the Act confirms that the information that may be required by Ofcom under section 135 of the Act includes information required for, amongst other things:

"(a) ascertaining whether a contravention of a condition or other requirement set or imposed by or under this Chapter has occurred or is occurring"

- 1.10 Section 135(4) of the Act requires CPs to provide information to Ofcom in the manner and within such reasonable period as Ofcom may specify.

- 1.11 Section 137(3) of the Act provides that Ofcom is not to require the provision of information under section 135 except:

a) by a demand for the information that describes the required information and sets out Ofcom's reasons for requiring it; and

b) 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.

- 1.12 Sections 138 to 144 of the Act specify the enforcement powers that Ofcom has in relation to a contravention of section 135 of the Act.

- 1.13 Section 138 of the Act provides that Ofcom can issue a CP a notification *"[w]here Ofcom determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a requirement imposed under section 135"*. Section 138(2) of the Act provides that the notification can specify a penalty Ofcom is minded to impose and requires Ofcom to allow a CP the opportunity to provide representations in response.

- 1.14 Following the expiry of the period allowed for making representations, section 139A of the Act provides that Ofcom can issue a "confirmation decision" if it is satisfied that the CP has, in one or more of the respects notified, been in contravention of a requirement notified

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under section 138, and may require the person to pay the penalty specified in the notification issued under section 138 or such lesser penalty that Ofcom considers to be appropriate in light of representations made or steps taken by the CP.

- 1.15 Section 139(5) of the Act provides that the amount of any penalty Ofcom may impose has to be appropriate and proportionate and cannot exceed £2,000,000.

Relevant facts

The Investigation

- 1.16 On 27 June 2017, Ofcom opened an investigation into VM's compliance with GC 9.3. The investigation was to ascertain whether the ETCs that VM required its customers to pay in the event of the early termination of a fixed term contract between September 2016 and August 2017 acted as a disincentive for its customers against changing provider.
- 1.17 In the course of the investigation, Ofcom sent VM six information requests under section 135 of the Act. This Notification concerns VM's response to the third information request (the "Third Notice"). VM's response to the first information request (the "First Notice") provides the context for the Third Notice.

The First Notice

- 1.18 The First Notice under section 135 of the Act was issued to VM on 21 August 2017 and required the provision of specified information by 5pm on 2 October 2017.
- 1.19 Question 8 of the First Notice read as follows:

"Please provide any documents or analysis produced during the Relevant Period which:

...

(d) Review or propose changes to Virgin's ETC procedures and policies and/or the way in which it calculates ETCs (including the maximum amount of the ETC it charges)."

In your response please explain what organisational structures there are within Virgin to keep its ETC policy (including the level of ETCs) under review. If there are any documents that these organisational structures have considered during the Relevant Period for the purpose of reviewing Virgin's ETC policy and/or the level of ETCs, please provide these (to the extent you have not done so already in response to Question 8 (a) – (d))."

VM's response to the First Notice

- 1.20 VM responded to the First Notice on 2 October 2017 although, as agreed with Ofcom, it provided documents in response to Question 8(d) on 9 October 2017. These documents included three email chains about a project, referred to by VM as "Matterhorn":

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- a) Document VM0009: an email chain dated 10 February 2017 between [Senior Commercial Manager] and [Commercial Manager] with the subject heading “EDFs”.² The chain discusses whether ETCs exceed VM bundle prices and suggests VM needs to “keep an eye” on the level of ETCs as the Matterhorn project progresses.
- b) Documents VM00023 and VM00024: VM00023 is an email chain between 14 May 2017 and 22 May 2017 between various correspondents, with the subject heading “Matterhorn Requirements”. Emails in the chain attached a version of an excel spreadsheet (VM00024) which included a separate tab called “EDF Charge Changes” showing the then current ETC rates, new ETC rates scheduled for 1 November 2017 and the difference between the two. Two emails in the chain (VM00023) make reference to the rate change document being “signed off by [Member of VM’s Executive Committee A]”.³
- c) Document VM00035: an email chain dated between 26 May 2017 and 16 June 2017 between various correspondents, with the subject heading “Matterhorn – Info required”. One of the emails in the chain included under the words “EDF is here as well”, a table with the following columns: “Current Rate”; “Rate Change”; and “New Rate”.⁴

1.21 In response to the request in Question 8 of the First Notice for information about VM’s organisational structures for reviewing its ETCs, VM responded as follows:

“[§<]

- *Proposed changes are then reviewed and approved by [Member of VM’s Executive Committee A and Member of VM’s Executive Committee B].”*

[§<].”⁵

The Third Notice

1.22 On 17 January 2018, Ofcom issued VM with the Third Notice that required the provision of specified information by 5pm on 14 February 2018.

1.23 Question 19 of the Third Notice read as follows:

“Please explain the nature of the following VM projects and, where relevant, detail any changes proposed to the calculation of ETCs as a result of the project, specifying any such changes which were implemented and the date of implementation:

i) Matterhorn (referenced for example in documents VM0009 and VM00035);

² VM refers internally to ETCs as early disconnection fees or EDFs.

³ Email from [Senior Commercial Manager], 14 May 2018, 08:11 and email from [Senior Commercial Manager], 15 May 2018, 16:46.

⁴ VM00035, email from [Senior Commercial Manager] to [VM Employee], 16 June 2017, 14:53.

⁵ VM’s response to the First Notice, 2 October 2017, p8.

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ii) [redacted] (referenced for example in documents VM0009 and VM00045);

iii) [redacted] (referenced for example in document VM0017); and

iv) [redacted] (referenced in documents VM0007 and VM0009);

Your response to this Question should include details of the individual or individuals within VM (name, job title and team, division or business unit in which they worked at the relevant time) responsible for:

i) overseeing these projects; and

ii) for sign-off.”

VM’s response to the Third Notice

1.24 VM responded to the Third Notice on 14 February 2018. In its response to Question 19i) relating to the Matterhorn project, VM stated:

“Matterhorn was a project to change existing customer prices effective 1 November 2017. ETCs were not review [sic] in this project as this came after the introduction of the new ETC calculation process implemented on 22 August 2017

Responsible for overseeing: [Two senior members of the Commercial Team]

Responsible for sign off: [Member of VM’s Executive Committee C].”

Contravention of section 135 of the Act

1.25 For the following reasons, we have found that VM contravened requirements imposed under section 135 of the Act by providing incomplete information in response to the Third Notice:

- the statement that ETCs were not reviewed as part of the Matterhorn project was incomplete (“Statement 1”);
- the identification of [Member of VM’s Executive Committee C], as the individual responsible for sign off of the Matterhorn project was incomplete (“Statement 2”).

1.26 We explain the basis for these findings below.

Statement 1

1.27 As explained in paragraph 1.20 above, documents VM00023 and VM00035 are email chains which, as shown by their subject headings, discuss the Matterhorn project. Both chains include references to the ETC rate changes being proposed as part of the package of price changes put forward by the project. For example, VM00023 includes an email from [Senior Commercial Manager], which says:

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“...I’ve had to update the EDF changes (I have not gone through the list of individual codes to check this is comprehensive but the table to the right shows the changes we’d like to make by tier)”⁶

- 1.28 Emails in the chain (VM00023) also attach a version of a spreadsheet (VM00024) which includes a separate tab called “EDF Charge Changes”, showing the then current ETC rates and the new ETC rates scheduled for 1 November 2017.
- 1.29 Document VM00035 includes an email with a table showing similar information under the words “EDF is here as well”.
- 1.30 We inferred from the substance of VM00023 and VM00035 that the Matterhorn project did entail the review of VM’s ETC rates and therefore found Statement 1 to be inaccurate and incomplete.
- 1.31 In its representations provided in response to the notification issued under section 138 of the Act (“VM Reps” or “Representations”), VM has accepted that ETCs were reviewed as part of the Matterhorn project.⁷ However, VM contends that it “used the term ‘reviewed’ in its answer synonymously to ‘changed’ as it commonly would internally” and because ETCs were not changed as a result of the Matterhorn project, VM’s response that ETCs were not reviewed as part of the project is not inaccurate.⁸
- 1.32 Ofcom’s question expressly asked VM to provide information about changes that were proposed to its ETCs, asking VM to detail these and then go on to identify any that were implemented. Therefore, regardless of what VM meant by the use of the word “review”, its response was incomplete. VM failed to identify the changes to the calculation of ETCs that were proposed in the course of the Matterhorn project.
- 1.33 VM has also contended that:
- its response to Question 19i) “was intended by Ofcom to provide further context to documents disclosed in response to Q8d, in particular documents VM00023, VM00024 and VM00035”, and therefore should have been read in conjunction with its response to Question 8(d) of the First Notice;⁹ and
 - it is “simply inconceivable ... that Ofcom could at any point have been confused about the meaning of VM’s response to Q19i, or could have considered it as ‘not correct’ in any meaningful way.”¹⁰
- 1.34 The purpose of Question 19i) of the Third Notice was to enable Ofcom to understand the nature of “Matterhorn” and the extent to which it had entailed a review of VM’s ETCs. The extent to which VM examined its ETCs during the period under investigation was a key area of enquiry in our investigation.

⁶ VM00023, email from [Senior Commercial Manager] to [VM Employee] and others, 18 May 2017, 12:54.

⁷ VM Reps, paragraph 3.15.

⁸ VM Reps, paragraph 3.15.

⁹ VM Reps, paragraph 3.16.

¹⁰ VM Reps, paragraph 3.16.

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- 1.35 Ofcom did consider VM's response to Question 19i) of the Third Notice in conjunction with its response to the First Notice and the documents it had provided (identified in paragraph 1.20 above) and identified that Statement 1 appeared inconsistent with the contemporaneous evidence the documents provided. Our assessment of the documents was that VM had reviewed its ETC rates as part of the Matterhorn price review project (as VM has admitted). The fact that we were able, in the light of all the information we gathered, to make an accurate assessment of the documentary evidence does not release VM from its statutory obligation to provide the information requested in the Third Notice.
- 1.36 Accordingly, we are satisfied that Statement 1 was incomplete in breach of VM's obligations under section 135 of the Act.

Statement 2

- 1.37 The email chain VM00023 contains the following emails from [Senior Commercial Manager]:
- "Please find attached updated versions of the Pro-forma and the Rate Change Document. As you know, these are yet to be signed off by [Member of VM's Executive Committee A] and we are getting time with him next week to do so."*¹¹
- "Attached is a revised version of the rate change documents....I will repeat that this has not been signed off by [Member of VM's Executive Committee A] yet and due to the leadership conference this week looks like this won't be until Friday."*¹²
- 1.38 In light of the information provided by VM in its response to the First Notice about its governance process for reviewing ETCs, we inferred that the references to "[Member of VM's Executive Committee A]" in the emails in VM00023 were references to VM's [Member of VM's Executive Committee A]. We therefore considered that Statement 2 was incomplete by failing to identify the [Member of VM's Executive Committee A] as responsible for sign off.
- 1.39 VM confirmed in its Representations that the references to "[Member of VM's Executive Committee A]" in the emails in VM00023 were references to [Member of VM's Executive Committee A].¹³ It also accepted that all increases to existing customers subscription prices require sign-off, ultimately, by [Member of VM's Executive Committee A].¹⁴
- 1.40 In its Representations, VM disputed Ofcom's provisional finding, saying that it "*understood the question to ask for responsibility at divisional level*".¹⁵
- 1.41 Question 19i) asked VM to identify the individual or individuals responsible for overseeing the Matterhorn project and those responsible for sign-off. The request for additional details to enable Ofcom to understand the roles in VM's organisation of the individuals

¹¹ Email from [Senior Commercial Manager], 14 May 2017, 08:11.

¹² Email from [Senior Commercial Manager], 15 May 2017, 16:46.

¹³ VM Reps, paragraph 3.24.

¹⁴ VM Reps, paragraph 3.25.

¹⁵ VM Reps, paragraph 3.25.

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identified did not limit the target of the request, namely the identity of the individuals within VM responsible for the governance of the Matterhorn project. Accordingly, by failing to identify [Member of VM's Executive Committee A] as responsible for sign-off, VM provided an incomplete response.

- 1.42 VM also contends that Ofcom already *“had complete information about the sign-off process for any proposed ETC change”* and that *“it is unclear how the omission of a [Member of VM's Executive Committee A] sign-off requirement would have rendered VM's answer false in any material way.”*¹⁶ Ofcom had general information about VM's sign-off process. It also had the documentary evidence that the rate changes were to be signed off by [Member of VM's Executive Committee A]. It therefore required the provision of specific information about the sign-off arrangements for the Matterhorn project in order to confirm that the references in the documents were to [Member of VM's Executive Committee A].
- 1.43 VM's response was not consistent with the general information it had provided about sign-off in its response to the First Notice. It also failed to explain the identity of [Member of VM's Executive Committee A]. The fact that Ofcom was able to make an accurate assessment of the true position based on other information provided by VM does not release VM from its statutory obligation to provide the information requested in the Third Notice.
- 1.44 In relation to VM's suggestion that the omission was immaterial, we regard as serious its failure to identify the most senior member of the organisation as having responsibility for a matter which was under investigation.
- 1.45 Accordingly, we are satisfied that Statement 2 was incomplete in breach of VM's obligations under section 135 of the Act.

Penalty

- 1.46 Ofcom has decided to impose a penalty of £25,000 on VM for its contravention of section 135 of the Act.

Grounds for imposing a penalty

- 1.47 The Third Notice was issued to VM in the course of an investigation into VM's compliance with GC 9.3. This condition is a provision providing a high level of protection for consumers, enabling them to switch between services and providers without undue effort, disruption and anxiety.¹⁷ It is therefore important that Ofcom is able to obtain information as it considers necessary in order to monitor and enforce compliance with the obligations it imposes.

¹⁶ VM Repts, paragraph 3.29.

¹⁷ Ofcom, *Changes to the General Conditions and Universal Service Conditions*, Statement dated 25 May 2011, footnote 41.

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- 1.48 Accordingly, Ofcom considers that VM’s contravention of the requirements in the Third Notice to provide information under section 135 of the Act is a serious matter.
- 1.49 In its Representations, VM argued that it would not be appropriate or proportionate for Ofcom to impose a penalty for all contraventions of section 135 of the Act, no matter how trivial.¹⁸ It also contended that Ofcom should only impose a penalty where a breach “*has impeded “Ofcom’s ability to take enforcement action in a timely and effective manner” or its “ability to carry out its statutory functions more generally”*”.¹⁹
- 1.50 It is correct that VM’s contravention did not adversely affect the progress of Ofcom’s investigation. However, the contravention was not trivial. VM failed to provide information that was directly relevant to key issues in our investigation – the extent to which it reviewed its ETCs and the senior managers who exercised oversight of any changes to its ETC rates proposed during the period under investigation. These were serious omissions.
- 1.51 Ofcom’s central objective of imposing a penalty is deterrence, both in respect of the business required to pay the penalty and the wider industry.²⁰ VM has argued that “*[i]t is absurd to argue that the facts of this case require deterrence or incentive for organisational change*”²¹ and further, that a penalty is not required in this case because the finding of contravention and the negative publicity it will attract, will have a significant reputational impact and therefore act as a sufficient deterrent.²² VM also contends that a penalty would not be appropriate or proportionate because none of the factors in the Penalty Guidelines that Ofcom can take into account when deciding the amount of a penalty apply to this case.²³
- 1.52 For the reasons we have set out, we consider VM’s failure to comply with its statutory obligations as serious. While we recognise that the contravention we have found reflects poorly on VM and the way in which it discharges its regulatory obligations, we do not accept that the findings alone are a sufficient deterrent. This was a serious breach that in our view demonstrates an absence of appropriate systems within VM to ensure it responds comprehensively to statutory information requests. It is important that VM recognises this and is incentivised to ensure that these failings are not repeated. VM is one of the largest communications providers in the UK, with millions of customers and turnover for the year ending 31 December 2017 of almost £5 billion.²⁴ We are therefore satisfied that a penalty is appropriate and proportionate to act as an effective deterrent to prevent further wrongdoing by VM and the wider industry.

¹⁸ VM Reps, paragraphs 4.4 and 4.8.

¹⁹ VM Reps, paragraph 4.9.

²⁰ *Penalty Guidelines*, 14 September 2017, paragraph 1.4.

https://www.ofcom.org.uk/data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf

²¹ VM Reps, paragraph 4.11.

²² VM Reps, paragraph 4.12.

²³ VM Reps, paragraphs 4.13 - 4.14.

²⁴ VM’s annual revenues for the year ending 31 December 2017 were £4,963 million. See:

<https://www.libertyglobal.com/wp-content/uploads/2018/06/VMED-12-31-2017-Q4.pdf> (page 39).

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1.53 We also disagree that none of the factors in the Penalty Guidelines apply in this case. As set out in paragraphs 1.54 – 1.68 below, we have assessed the appropriate level of the penalty by reference to the factors in the Penalty Guidelines that we have identified as relevant.

Penalty amount

1.54 In setting the penalty, we have considered all the circumstances of the case and have had regard to the Penalty Guidelines.²⁵

Deterrence

1.55 As set out above, 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.

1.56 As a general matter, we are of the view that the need for deterrence in any penalty imposed 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.

1.57 Deterrence is particularly important in this case given that VM is one of UK’s largest communications providers with a large customer base. Breaches by VM of information requests relating to its compliance with regulatory obligations have the potential to undermine the effectiveness of those obligations to which it is subject and can have a harmful impact on a significant number of customers and cause harm to citizens, consumers and competition more generally. We therefore consider it important to ensure that the size of the penalty we set in relation to the breach we have identified is large enough to incentivise compliance by VM with all of Ofcom’s information requests.

1.58 In its Representations, VM contends that the financial penalty set out in the section 138 notification was high when compared to the maximum penalty of £50,000 Ofcom could impose under the previous statutory regime and “*obviously not one of those cases the Secretary of State had in mind when raising the fining limit in 2011*”.²⁶ We disagree. The maximum penalty for a contravention of section 135 of the Act was increased to ensure it is high enough “*to act as a sufficient deterrent for the larger communications companies*” against failing to comply with statutory information requests.²⁷ As one of the UK’s largest CPs, this would include VM.

²⁵ Section 392(6) of the Act requires us to have regard to those guidelines when determining such penalties. The 2017 Penalty Guidelines updated the 2015 Penalty Guidelines by reflecting our approach to applying a discount to the amount of a penalty following a successful settlement process.

²⁶ VM reps, paragraph 4.26.

²⁷ Paragraph 3.1 of the Explanatory memorandum to the Communications Order 2003 (Maximum Penalty for Contravention of Information Requirements) Order 2011.

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Seriousness of the contravention

- 1.59 Ofcom's powers under section 135 of the Act are fundamental to its ability to carry out its statutory functions. As a result, we consider that a contravention of a requirement to provide information is inherently serious.
- 1.60 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. In an enforcement case, this asymmetry is likely to be pronounced because much of the information that Ofcom requires to establish a contravention will be held by the subject of the investigation. This was the case in Ofcom's investigation of VM's ETCs under GC 9.3.
- 1.61 VM's contravention of section 135 of the Act was serious because both failures were relevant to key areas of the investigation: the extent to which VM reviewed its ETCs during the period that was the subject of our investigation (Statement 1) and who within VM was responsible for signing off proposed changes (Statement 2). Further, VM's failure to provide complete information about the individuals responsible for the sign-off for proposals made in the Matterhorn project could have had a material impact on Ofcom's findings in the investigation and the degree of culpability it was able to attribute to VM.
- 1.62 On this occasion, these risks did not materialise because VM had provided other information that enabled Ofcom to identify correctly the errors so that its ability to reach a decision confirming that VM was in breach of GC 9.3 was not compromised. Nonetheless, for the reasons set out below, we consider that the failings by VM that gave rise to this contravention contribute to its seriousness and create an ongoing risk to the exercise of Ofcom's functions, unless Ofcom takes action to deter this.
- 1.63 First, we consider that the contravention has resulted from a high degree of carelessness on VM's part. As set out in paragraphs 1.27 – 1.45 above, VM's response to Question 19i) of the Third Notice was inconsistent with information contained in documents that VM had provided to Ofcom in the First Response. One of these documents (VM00035) was explicitly referenced in Question 19i) of the Third Notice. In our view, a basic due diligence check would have identified the errors. Accordingly, in our view there is no reasonable excuse for VM's failure to provide complete information in response to the Third Notice.
- 1.64 In its Representations, VM argues that it is not clear what further steps it could have taken to prevent the alleged contravention.²⁸ VM's Representations fail to provide any information on any of the systems it may have in place for responding to statutory information requests and VM has not made any representations to explain what steps it intends to take to ensure similar issues do not arise in the future. We do not therefore know what checks VM carried out. However, it would have required minimal action on the part of VM to review its response against the information it had already provided and to verify the response with VM staff with relevant knowledge. It would also have required

²⁸ VM Reprs, paragraph 4.14.

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minimal action on the part of VM to check its answer against the wording of the question before submitting its response.

- 1.65 We would expect a prudent CP in an equivalent position to implement systems to carry out all necessary due diligence checks to ensure responses to a statutory information requests are complete. These checks should ensure responses are discussed with and reviewed by individuals with knowledge of the relevant information and are reviewed and approved by the appropriate director/head of department. These checks should also ensure that responses to statutory information requests are clear and complete; responses may cross-refer to other documents or information held by Ofcom, but they should not require Ofcom to interpret a response by reference to other documents a CP has provided in order to understand the CP's intended meaning.
- 1.66 Second, VM is a well-resourced CP with one of the largest customer bases in the UK. It has a dedicated Regulatory Affairs team, responsible for regulatory compliance and handling correspondence with Ofcom, such as notices requiring the provision of information under section 135 of the Act. It also has an in-house legal team. It has extensive experience of responding to statutory information requests and, in principle, has the capability to do so properly in accordance with its statutory obligations.
- 1.67 In our view, the contraventions we have identified demonstrates a lack of due attention and diligence to VM's regulatory responsibilities and an absence of appropriate systems within VM to ensure it responds comprehensively to statutory information requests such as the Third Notice.

Other factors

- 1.68 In addition to the above, we have also taken into account the following factors:
- we do not have any evidence that the contravention we have found occurred deliberately;
the contravention did not ultimately hinder the progress of the investigation and therefore the risk that this particular contravention could have resulted in harm to citizens and consumers is low; and
 - VM has no history of contraventions of section 135 of the Act.

Precedents

- 1.69 Ofcom has taken four decisions under section 139A of the Act since revising its Penalty Guidelines in 2015.²⁹ Each of these confirmed Ofcom's decision to impose a penalty in respect of the contraventions of information requirements identified.

²⁹ Two of the cases were against BT plc (see: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01208 and https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01192) and 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).

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- 1.70 Two of the decisions were taken against BT, a CP with comparable resources to VM. In the first decision, CW/01192/03/17, Ofcom imposed a penalty of £300,000. We consider from the facts that the contraventions were significantly more serious than in this case, in terms of the extent of the contraventions and the degree of harm that may have resulted. BT was found to have contravened three separate information requests, by failing to provide a substantial amount of information and, in respect of one of the contraventions, providing misleading responses.³⁰ Ofcom found that the failings may have compromised the effectiveness of a market review and delayed and then hindered the investigation into breaches of BT's regulatory obligations imposed as a result of its significant market power.³¹ We note, however, that as in this case, we considered that BT did not have effective systems in place to respond comprehensively to information requests and that it was careless towards its regulatory responsibilities.³²
- 1.71 In the second decision against BT, CW/01208/09/17, we imposed a penalty of £100,000 (reduced by 30% to £70,000 by virtue of a voluntary settlement by BT). We note that this penalty was imposed in respect of two contraventions, each in respect of a separate information request. We also note that (i) there was a degree of recidivism, in that the second contravention occurred after the confirmation decision in the previous case, CW/01192/03/17;³³ (ii) BT did not take any steps to end the first contravention despite the fact it should have been alerted to it;³⁴ and (iii) the incorrect and incomplete information provided by BT was relied on by Ofcom and underpinned a consultation proposal.³⁵ However, there were also features which are similar to the facts of this case. We made a finding again that BT had been careless in preparing its responses and did not have effective systems in place to provide accurate and complete responses.³⁶ We also said that the contraventions were straightforward errors that BT should have identified.³⁷ Further, we observed that the information requests were sent in the course of a market review, which meant that the asymmetry of information between Ofcom and BT was particularly pronounced.³⁸
- 1.72 The two other decisions under section 139A of the Act were taken against GW Telecom Limited, as a result of a persistent failure to respond to notices under section 135. The information we had indicated that GW Telecom Limited was a very small CP, with the most recent financial information available showing that its accounts were in the red.³⁹ In these cases, we imposed penalties of £10,200 and a maximum of £4,950 respectively. In both cases, these amounts included accrued daily penalties.

³⁰ See paragraphs 2.13 – 2.20, 3.22, 3.24 and 4.13 – 4.15.

³¹ See paragraphs 5.16 – 5.20.

³² See paragraphs 5.14 – 5.15.

³³ See paragraph 1.66.

³⁴ See paragraph 1.61.

³⁵ See paragraph 1.63.

³⁶ See paragraphs 1.57 – 1.59.

³⁷ See paragraphs 1.61.

³⁸ See paragraph 1.55.

³⁹ See paragraph 48 of case CW/01201/07/17.

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- 1.73 VM has argued that a comparison with the BT cases *“simply is not tenable on the basis of the facts of this case which rests solely on the interpretation of phrases used in responses and which had no bearing on Ofcom’s understanding of the facts in the case.”*⁴⁰ As set out in paragraphs 1.27 – 1.45 above, we disagree that VM’s contravention is dependent on matters of interpretation. There were material omissions in the information that VM provided. As stated above, the contravention we have identified demonstrates a lack of due attention and diligence to VM’s regulatory responsibilities and an absence of appropriate systems within VM to ensure it responds comprehensively to statutory information requests. The size of the penalty we have decided to impose on VM reflects the fact we consider VM’s contravention to be less serious than BT’s contraventions.
- 1.74 Regarding the Gateway cases, VM commented that *“[l]ittle information can be gleaned from the amount of penalty imposed”* and contends that because VM cooperated with Ofcom at all times, they provide no support for Ofcom imposing a penalty on VM in this case.⁴¹
- 1.75 We acknowledge that there are material differences between Gateway breaches (in terms of the facts giving rise to the contraventions and the financial position of Gateway compared to VM). We have taken these differences into account in determining the relevance of the precedents and have made our assessment by reference to the specific facts of this case to decide the appropriate and proportionate level of penalty.

Conclusion on penalty amount

- 1.76 Considering all of the above factors in the round, we have decided to impose on VM a penalty of £25,000 in respect of the contravention of section 135 of the Act.
- 1.77 Ofcom’s judgment is that this is an appropriate and proportionate penalty, given the importance of responding comprehensively to statutory information requests and the seriousness of this contravention, in particular the failure of VM’s internal systems to identify the contravention. The level of the penalty takes into account VM’s size and turnover and in our judgement, is at such a level which can change any potential non-compliant behaviour by VM, and by other providers.
- 1.78 Accordingly, Ofcom now requires VM to pay a penalty of £25,000 in respect of its contravention of requirements imposed under 135 of the Act within one calendar month of the date of this Confirmation Decision.

Interpretation

- 1.79 Words or expressions used in this Confirmation Decision have the same meaning as in the Act except as otherwise stated in this Confirmation Decision.

⁴⁰ VM Reqs, paragraph 4.20.

⁴¹ VM Reqs, paragraphs 4.21 - 4.22.

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Gaicho Rasmussen

A handwritten signature in black ink on a light-colored background. The signature is stylized, starting with a large, looped 'G' followed by a horizontal line that tapers to the right.

Director of Competition and Consumer Enforcement

16 November 2018