

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

1.1 This notification relates to British Telecommunications plc (BT), whose registered company number is 1800000. BT's registered office is 81 Newgate Street, London, EC1A 7AJ.

## 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 functions in relation to communications matters. 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 For further information on the relevant legislation, please see Annex 1.

1.5 In June 2011, in accordance with section 137(6) of the Act, Ofcom published on its website a General Demand for Information (the '2011 GDI') required by Ofcom under section 135 of the Act. The 2011 GDI was addressed to each and every person who was liable to pay administrative charges under section 38 of the Act.

1.6 Ofcom is funded by (among other things) administrative charges payable by each person ('Relevant Persons') who is liable to charges under Ofcom's Notice of Designation pursuant to section 38 of the Act, as made by Ofcom from time to time. Paragraph 6 of the designation during the time in which the 2011 GDI was in force provided that the following persons are liable to pay such charges:

*"During each Charging Year, the Electronic Communications Network, Electronic Communications Service or Associated Facility which is designated for the purposes of section 28 of the Act is any Electronic Communications Network, Electronic Communications Service or Associated Facility where the person providing that Network or Service, or making available that Associated Facility had a Relevant Turnover from Relevant Activities of £5 million or more in the last but one calendar year prior to the charging year in question. (For example, if the relevant Charging Year commences on 1 April 2007, the relevant turnover will be for the calendar year of 2005)."*<sup>1</sup>

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<sup>1</sup> Notice of Designation under Section 38 and 34 of the Communications Act 2003, paragraph 6. Available at: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0017/46052/designation.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0017/46052/designation.pdf)

- 1.7 The Notice of Designation gives the following meanings to the expressions used therein:
- ‘Charging year’ means a twelve month period ending 31 March;
  - ‘Relevant Activity’ means any of the following:
    - a) The provision of Electronic Communications Services to third parties;
    - b) The provision of Electronic Communications Networks, Electronic Communications Services and Network Access to Communications Providers; or
    - c) The making available of Associated Facilities to Communications Providers;
  - ‘Relevant Calendar Year’ means, in respect of a Charging Year, the twelve month period commencing on 1 January in the last but one calendar year prior to the Charging Year in question so that if, for example, the Charging Year Commences on 1 April 2007, the Relevant Calendar Year will be the calendar year of 2005; and
  - ‘Relevant Turnover’ means turnover made from carrying on any Relevant Activity after the deduction of sales rebates, value added tax and other taxes directly related to turnover.
- 1.8 The 2011 GDI required each Relevant Person to submit, for each Charging Year, an annual certificate of turnover return (the ‘Annual Turnover Return’) providing, among other things<sup>2</sup> the Relevant Turnover generated by the Relevant Person in the Relevant Calendar Year.
- 1.9 Ofcom uses the information provided by Relevant Persons to set tariffs for calculating administrative charges. It is important that Relevant Persons provide accurate and complete information in this context, as it ensures that Ofcom is able to set the correct level of tariffs.
- 1.10 Using the information provided by BT and other Relevant Persons, Ofcom set the tariffs for administrative charges to be payable by all Relevant Persons in the Charging Years 2013/14 to 2017/18 (the ‘Relevant Charging Years’) in line with its Statement of Charging Principles. The amount of Relevant Turnover provided by BT for each of the Relevant Charging Years, (the ‘Relevant Original Responses’) is set out in Table 1.

Table 1: Relevant turnover reported in the Relevant Original Responses

	2011	2012	2013	2014	2015
Originally reported relevant turnover (£m)	[<del>]	[<del>]	[<del>]	[<del>]	[<del>]

Source: BT’s Annual Turnover Return for each of the Relevant Calendar Years.

- 1.11 On 9 May 2018, BT resubmitted its responses to the 2011 GDI for each of the Relevant Original Responses (the ‘First Resubmission’), having already informed Ofcom in November

<sup>2</sup> General Demand for information required by Ofcom under Section 135 of the Communications Act and published in accordance with Section 137(6) of that act for the purposes of calculating the administrative charge for each Charging Year, August 2011.

2017 that it had identified an error. This resubmission identified that the level of Relevant Turnover reported in each of the Relevant Original Responses was incorrect. On 15 March 2019, BT provided a further resubmission (the ‘Second Resubmission’) of its responses to the 2011 GDI, which revised the Relevant Turnover figures provided in the First Resubmission, following extensive additional work by BT to verify the correct amounts. We set out below BT’s revised Relevant Turnover for each Relevant Calendar Year as set out in the Second Resubmission, as well as the increase on the Relevant Original Responses.

Table 2: Revised Relevant Turnover for each Relevant Calendar Year

	2011	2012	2013	2014	2015
Revised reported Relevant Turnover, Second Resubmission (£m)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Increase on originally reported Relevant Turnover (£m)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: Letter from BT to Ofcom, 15 March 2019, & Ofcom analysis.

- 1.12 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 14 May 2018.
- 1.13 On 12 July 2019, Ofcom issued BT with a section 138 notification, which set out our reasonable grounds for believing that BT had contravened section 135 of the Act.
- 1.14 On 19 July 2019, BT confirmed that it would not contest the findings set out in Ofcom’s section 138 notification and on 29 July 2019 paid to Ofcom the amount owed plus interest.
- 1.15 This confirmation decision sets out Ofcom’s decision that BT has contravened section 135 of the Act, and sets out the action that has and will be taken in relation to this matter.

## Grounds for finding that BT contravened the 2011 GDI

- 1.16 The 2011 GDI was issued in accordance with sections 135 and 137 of the Act, and BT provided the Relevant Original Responses in response to it.
- 1.17 On 16 May 2018, BT wrote to Ofcom providing revised information to that submitted in the Relevant Original Responses. On 15 March 2019, BT wrote to Ofcom providing a further revision to the information that it submitted in the Relevant Original Responses.
- 1.18 Based on the information submitted by BT on 15 March 2019, Ofcom has determined that that BT provided inaccurate information in response to the 2011 GDI, and has therefore breached section 135 of the Act.

## Consequences of the error

- 1.19 Ofcom is required by statute to ensure that we collect administrative fees in such a way as to secure that the revenues we collect are at least sufficient to enable Ofcom to meet the costs of carrying out the functions to which the revenues relate.<sup>3</sup> Each year, Ofcom determines its budget for regulating the Networks and Services sector.
- 1.20 In each of the Relevant Charging Years, Ofcom set its charges in accordance with the Statement of Charging Principles, based on the known Relevant Turnover of each Relevant Person. We use the known Relevant Turnover information to set tariffs, which are published in tariff tables. The tariff applicable to each Relevant Person is a percentage of their Relevant Turnover in the Charging Year.
- 1.21 It is now clear that BT did not state its Relevant Turnover correctly, and accordingly had not paid the full administrative charge due under the applicable tariffs in respect of each of the Relevant Charging Years.

## Source of BT's error

- 1.22 BT prepared its first draft of its Relevant Turnover return for 2016 using the same approach that it had used to prepare the Relevant Turnover submissions in the Relevant Original Responses. This draft return was submitted to the recently appointed BT Group CFO, for review in September 2017. As part of the new governance arrangements that were put in place, BT Group CFO raised a number of questions in relation to the return, and asked for additional assurance processes ahead of submission of the Annual Turnover Return.<sup>4</sup>
- 1.23 As a result of obtaining this additional verification, it was identified that for each of the Relevant Turnover Years, the team responsible for preparing the Annual Turnover Return had incorrectly classified a number of sources of turnover.
- 1.24 BT has explained that in preparing the 2011 return, it adopted new principles that led to a reduction in the amount of turnover classified as relevant. BT believes that these principles were consistent with Ofcom's 2005 guidelines for calculating Relevant Turnover and notes that it continues to use the same principles to date.<sup>5</sup>
- 1.25 However, BT has said that the practical application of the principles was flawed. BT has said that *"we believe our staff preparing the return misunderstood the data sources used, and as a result used the data incorrectly."*<sup>6</sup>
- 1.26 BT has undertaken several rounds of verification in preparing its resubmitted Relevant Turnover information, including:
- a) having the BT's Compliance Committee undertake an assurance review of the work done within BT to investigate the source of this error, following a request from Ofcom;

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<sup>3</sup> Office of Communications Act 2002, Sch. Para. 8

<sup>4</sup> Item 6, Annex 1, Briefing paper for BTCC 24, 23 July 2018, paragraph 11

<sup>5</sup> Item 6, Annex 1, Briefing paper for BTCC 24, 23 July 2018, paragraph 17

<sup>6</sup> Item 6, Annex 1, Briefing paper for BTCC 24, 23 July 2018, paragraph 19

- b) commissioning a review from PwC of the appropriateness of BT's classification on non-relevant turnover for the Relevant Turnover Years;
  - c) undertaking a detailed review by BT's Group Internal Audit (GIA) team of all sources of turnover classified as non-relevant or of mixed-relevance, to consider whether the classification of turnover was correct.<sup>7</sup>
- 1.27 BT has put in place additional assurances intended to prevent a repeat of the classification errors. These steps are:<sup>8</sup>
- a) obtaining input from experts in relevant customer facing parts of BT providing advice on whether revenues are correctly classified.
  - b) requiring the Financial Controller and CFO of each customer facing area of the business to endorse the classification of sources of turnover as relevant or non-relevant.
- 1.28 BT has also said that its GIA team identified a series of improvements to the processes and controls applied to BT's preparation of the Relevant Turnover submission. BT has said that these improvements are all being implemented and will be applied to future submissions. BT has said that the GIA team will also undertake a review of the new process as part of its planned audit work for 2019/20.<sup>9</sup>

## Payment made by BT

- 1.29 On 19 July 2019, BT confirmed that it accepted its liability to pay to Ofcom the principal amount of [§<] plus simple interest to the date of payment at the Bank of England base rate +1%. In this case, Ofcom has calculated interest up to (but not including) 1 April 2019. Ofcom's interest calculation is available at Annex 2. The total amount that BT was required to pay Ofcom is £3,727,330.
- 1.30 This amount represents the application of the tariff for each Relevant Charging Year to BT's restated Relevant Turnover information. The outstanding amount is derived by comparing this result with the original amount paid.
- 1.31 BT paid the required amount to Ofcom on 29 July 2019.

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<sup>7</sup> Report from BT GIA to BARC, April 2019.

<sup>8</sup> Letter from BT to Gaucho Rasmussen (Ofcom), 4 June 2018.

<sup>9</sup> Report from BT GIA to BARC, April 2019.

Table 3: Payment required

Relevant charging year	Relevant calendar year	Original reported relevant turnover (£)	% tariff	Original fee paid (£)	Revised reported relevant turnover (£)	Revised fee (£)	Fee Payment due (£)	Interest (£)
2013/14	2011	[X]	0.000833	[X]	[X]	[X]	[X]	[X]
2014/15	2012	[X]	0.000855	[X]	[X]	[X]	[X]	[X]
2015/16	2013	[X]	0.000861	[X]	[X]	[X]	[X]	[X]
2016/17	2014	[X]	0.000989	[X]	[X]	[X]	[X]	[X]
2017/18	2015	[X]	0.001127	[X]	[X]	[X]	[X]	[X]
<b>Total</b>		[X]		[X]	[X]	[X]	[X]	[X]

1.32 Collecting the sums owed by BT now gives rise to an excess in Ofcom’s revenues. This is because, consistently with our Statement of Charging Principles, Ofcom set its tariffs at the time so as to cover all its costs in each of the Relevant Charging Years, based only on the (then) known turnover of each Relevant Person. Consistently with our Statement of Charging Principles<sup>10</sup>, the excess in Ofcom’s balance in the current charging year will be reflected in Ofcom’s budget and tariff calculations for the next charging year (i.e. the charging year commencing on 1 April 2020). BT will, like other Relevant Persons, have paid in full at the higher tariff, and so is not excluded from this.

## Ofcom’s provisional view on penalty

1.33 Ofcom has carefully considered whether to impose a penalty in this case.

1.34 As set out in Ofcom’s Penalty Guidelines,<sup>11</sup> the central objective of imposing penalty is deterrence. In the event Ofcom decides to impose a penalty, the level of that penalty must be sufficient to deter the business from contravening regulatory requirements, and to deter the wider industry from doing so.

1.35 Notwithstanding the seriousness with which Ofcom generally regards a failure to provide complete and accurate information in response to information requests, on balance we have decided that it is not appropriate to impose a penalty, based on the specific facts of this case.

<sup>10</sup> See paragraph 3.11

<sup>11</sup>Penalty Guidelines, paragraph 1.4, see: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0022/106267/Penalty-Guidelines-September-2017.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf)

- 1.36 We consider that the evidence indicates that BT takes compliance with GDIs seriously and will seek to ensure that future submissions are complete and accurate. In particular, we note that:
- a) this breach was a result of human error in dealing with a complex task and significant volumes of information, rather than an intentional effort to mislead Ofcom;
  - b) the errors found in the Relevant Original Responses were identified as a result of BT undertaking additional assurance at the request of BT's then new CFO, which indicates that senior management within BT already take compliance with the requirement to report Relevant Turnover seriously;
  - c) BT has put in place additional assurance intended to prevent a repeat of the classification errors which resulted in this breach, including increased input from product experts;
  - d) BT has further improved its future processes and controls used in preparing its returns, and BT's internal audit team will also undertake a review of the new process as part of its planned audit work for 2019/20.
- 1.37 On this basis of these specific circumstances, Ofcom considers that the imposition of a penalty would not have a material deterrent effect on BT.
- 1.38 In addition to the above, we also consider that the following factors are relevant to our consideration of whether to impose a penalty:
- a) BT's actions have not resulted in any direct harm to UK citizens or consumers.
  - b) BT's cooperation with Ofcom in relation to this investigation has been extensive and productive. Upon discovery of its error, BT informed Ofcom and committed to remedying the consequences of its error. BT has also undertaken extensive work to ensure that its final resubmitted turnover is complete and accurate; had Ofcom had to carry out this work itself, it is likely to have required significant resource and time to complete.
- 1.39 Where other providers identify errors in reporting Relevant Turnover to Ofcom, we would encourage them to engage openly and cooperatively with Ofcom both in reporting the error and in ensuring that the consequences of the error are fully remedied. This will be a factor that we will consider, alongside other case-specific factors, when deciding whether to impose a penalty.

Gaicho Rasmussen



9 August 2019

# A1. Relevant legislation

## Section 135 of the Act

A1.1 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”.*

A1.2 Section 135(2) sets out the persons falling within that subsection are:

*“(a) a communications provider;*

*“(b) a person who has been a communications provider;*

*“(c) a person who makes, or has made, any associated facilities available to others;*

*“(d) a person, other than a communications provider, to whom a universal service condition applies or has applied;*

*“(e) a person who supplies electronic communications apparatus;*

*“(f) a person not falling within the preceding paragraphs who appears to OFCOM to have information required by them for the purpose of carrying out their functions under this Chapter.”*

A1.3 Section 135(3) of the Act states, inter alia, that the information that may be required by Ofcom under section 135 of the Act includes information that they require for the purpose of *“ascertaining or verifying the charges payable by a person under section 38”*.

A1.4 Section 135(5) of the Act provides that the powers in section 135 are subject to the limitations in section 137.

## Section 137 of the Act

A1.5 Section 137(6) sets out that:

*“In the case of information required by OFCOM for the purpose of ascertaining who is liable to charges under section 38, the demand may—*

*“(a) be made by being published in such manner as OFCOM consider appropriate for bringing it to the attention of the persons who are described in the demand as the persons from whom the information is required; and*

*“(b) take the form of a general demand for a person so described to provide information when specified conditions relevant to his liability to such charges are satisfied in his case.”*

## Section 138 to 139A of the Act

A1.6 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.”*

A1.7 Section 138(2) sets out that 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 what the person must do in order to comply with the requirement;*

*“(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. [...]”*

A1.8 Section 139 sets out Ofcom’s powers to impose a penalty for contravention of information requirements. Section 139(5) sets out that the amount of any penalty imposed not relating to an ongoing contravention is to be such amount not exceeding £2,000,000 as Ofcom determine to be both appropriate and proportionate to the contravention in respect of which it is imposed.

A1.9 Section 139A(1) to 139A(3) set out that

*“(1) This section applies where—*

*“(a) a person has been given a notification under section 138;*

*“(b) OFCOM have allowed the person an opportunity to make representations about the matters notified; and*

*“(c) the period allowed for the making of representations has expired.*

*“(2) OFCOM may—*

*“(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.*

*“(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.”*

A1.10 Section 139A(4) sets out, inter alia, that a confirmation decision—

*“[...]”*

*“(c) may require immediate action by the person to comply with a requirement notified under section 138(2)(d), or may specify a period within which the person must comply with the requirement; and*

*“(d) may require the person to pay—*

*(i) the penalty specified in the notification under section 138, or*

*(ii) such lesser penalty as OFCOM consider appropriate in the light of the person's representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention,*

*“and may specify the period within which the penalty is to be paid[...].”*

## **Section 38 of the Act: fixing of charges**

A1.11 Section 38(1) sets out, inter alia, that a person who, at any time in a Charging Year, is a person to whom section 38 applies shall in respect of the network, service or facility provided or made available by him pay to OFCOM the administrative charge (if any) that is fixed by them for the case that is applicable to him.

A1.12 Section 38(2) sets out, inter alia, that section 38 applies to a person at a time if, at that time, he is:

*“(a) providing an electronic communications network of a description which is, at that time, designated for the purposes of this section;*

*“(b) providing an electronic communications service of a description which is, at that time, so designated;*

*“(c) making available an associated facility of a description which is, at that time, so Designated[...].”*

A1.13 Section 38(3) explains that Ofcom is not to fix the administrative charge for a charging year unless

*“(a) at the time the charge is fixed there is in force a statement by OFCOM of the principles that OFCOM are proposing to apply in fixing charges under this section for that year; and*

*“(b) the charge is fixed in accordance with those charging principles.”*

1.40 Ofcom fixed the charge for each of the Relevant Charging Years in accordance with the principles set out in the Notice of Designation (the ‘Notice of Designation’) under Section 38 and 34 of the Communications Act 2003.

## **Notice of Designation under Section 38 and 34 of the Communications Act 2003**

A1.14 The Notice of Designation set out that during each Charging Year, the Electronic Communications Network, Electronic Communications Service or Associated Facility which is designated for the purposes of section 38 of the Act is any Electronic Communications Network, Electronic Communications Service or Associated Facility where the person providing that Network or Service, or making available that Associated Facility had a Relevant Turnover from Relevant Activities of £5 million or more in the last but one calendar year prior to the charging year in question. For example, if the Relevant Charging

Year commences on 1 April 2007, the Relevant Turnover will be for the calendar year of 2005.<sup>12</sup>

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<sup>12</sup> Notice of Designation under Section 38 and 34 of the Communications Act 2003, paragraph 6