
Confirmation Decision under section 139A of the Communications Act 2003

Confirmation Decision served on giffgaff Limited by the Office of Communications (Ofcom) for contraventions of information requirements under section 135 of the Communications Act 2003

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

ISSUE DATE: 30 July 2019

Confirmation Decision issued under section 139A of the Communications Act 2003 to giffgaff Limited relating to contraventions of information requirements

Subject of this Confirmation Decision

- 1.1 This Confirmation Decision (the “Decision”) is issued in accordance with section 138 of the Communications Act 2003 (the “Act”) and is addressed to giffgaff Limited (“giffgaff”), whose registered company number is 04196996. giffgaff’s registered office is 260 Bath Road, Slough, Berkshire, SL1 4DX.

Summary

- 1.2 Ofcom has statutory powers contained in section 135 of 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 by a request issued 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 are therefore key to the integrity of the regulation of the communications sector.
- 1.4 In June 2018, giffgaff self-reported a billing error which it claimed arose on 8 June 2016 as a result of a change to its billing and charging system, and affected its data services. As a result, in September 2018, Ofcom opened an investigation into whether giffgaff had complied with its obligations under General Condition 11.1 (“GC 11.1”) which requires Communications Providers (“CPs”) to accurately bill consumers for their use of communication services (the “Investigation”).
- 1.5 During the course of the Investigation, Ofcom sent giffgaff four notices under section 135 of the Act. We have found that giffgaff provided inaccurate information relating to the cause and duration of the billing error in response to two of these notices, in contravention of its obligations under section 135 of the Act. Information provided by giffgaff during the course of the Investigation revealed that (i) the billing error relating to its data services

¹ See section 135(4) of the Act.

actually arose on 4 April 2011 and not 8 June 2016; and (ii) the billing error was not caused by a change to giffgaff's billing and charging system but was the result of how giffgaff's billing and charging system operated.

- 1.6 As a result of inaccurately identifying the cause of the billing error, giffgaff provided additional inaccurate information in response to statutory information requests including (i) failing to identify that the error also affected its voice services for over 9 years; and (ii) significantly underestimating the number of customers affected and the amount they were overcharged.
- 1.7 Following its inaccurate responses to statutory information requests, giffgaff subsequently identified and proactively made Ofcom aware of the inaccuracies in its responses.
- 1.8 Given the importance and reliance we place on the accuracy of information requested under our statutory powers, we take the provision of inaccurate responses seriously. giffgaff's initial failure to provide accurate information indicates a degree of carelessness with regard to its regulatory responsibilities and could have significantly limited the robustness and comprehensive nature of Ofcom's Investigation. Moreover, it is not clear to us whether, in the absence of Ofcom thoroughly questioning giffgaff in relation to the cause and duration of the billing error as well as the services affected, giffgaff would have realised it had provided inaccurate information in response to statutory information requests.
- 1.9 Taking these factors into account, Ofcom has decided to impose a penalty of £50,000 on giffgaff for the contraventions we have identified. We consider that this is appropriate and proportionate in the circumstances given the importance of providing accurate responses to statutory information requests, giffgaff's size and turnover and Ofcom's central objective of deterring further contraventions.
- 1.10 The penalty would have been significantly higher if giffgaff had not identified and proactively made Ofcom aware of the inaccuracies in its responses. It is important that CPs inform Ofcom as soon as possible when they become aware that the information they have provided in response to a statutory information request was inaccurate or incomplete.

Relevant legislation

- 1.11 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".

- 1.12 Section 135(2) of the Act states that communications providers fall within the scope of this provision. giffgaff 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".

- 1.13 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:
- “(a) ascertaining whether a contravention of a condition or other requirement set or imposed by or under this Chapter has occurred or is occurring”*
- 1.14 Section 135(4) of the Act states that a person required to provide information under section 135 must provide it in the manner and within such reasonable period as Ofcom may specify.
- 1.15 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.
- 1.16 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.
- 1.17 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.
- 1.18 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 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.
- 1.19 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.

Background

The Investigation

- 1.20 In June 2018, giffgaff self-reported a billing error which it initially stated arose on 8 June 2016 as a result of the implementation of a new charging protocol (referred to as [X]) and affected its data services. Ofcom wrote to giffgaff on 18 July 2018 seeking further information and giffgaff responded on a voluntary basis on 9 August 2018 (the “August Letter”). Following from this, in September 2018, Ofcom opened an investigation into

whether giffgaff had complied with its obligations under GC 11.1 requiring CPs to accurately bill consumers for their use of communication services.

- 1.21 During the course of the Investigation, Ofcom sent giffgaff four notices requiring the provision of information under section 135 of the Act. This Decision concerns giffgaff's response to the first and second of those notices.
- 1.22 Ofcom issued giffgaff a decision under section 96C of the Act on 30 July 2019, confirming its decision that giffgaff had contravened GC 11.1 and imposing a penalty of £1.4 million in relation to that contravention.²

The August Letter

- 1.23 In response to Ofcom's letter dated 18 July 2018, the August Letter provided additional information to Ofcom in relation to the billing error giffgaff had identified.

- 1.24 In relation to the cause and duration of the billing error, the August Letter stated the following:

*"The billing error arose on 8 June 2016 and continued until the date of giffgaff's fix on 15 June 2018."*³

*"On 25 May 2018 a team (including giffgaff's senior management) was set up to investigate the complaint in greater detail and establish whether there was, in fact, a system wide billing error. The conclusion of this investigation was reached on 6 June 2018. This established that there was an error with giffgaff's billing system which arose on 8 June 2016 as a result of a change to the signalling protocol used between giffgaff's charging node and the O2 network that giffgaff uses"*⁴

*"Our investigation revealed that the cause of the billing error which arose on 8 June 2016 had led to the same billing error throughout and up until the date of giffgaff's fix on 15 June 2018."*⁵

*"Once the billing issue was established as originating on 8 June 2016 ..."*⁶

*"Over the two-year period of the billing system error, our investigation revealed there was a total billing error of £2.13 million that affected 1.2 million members."*⁷

The First Notice and Response

- 1.25 On 1 October 2018, Ofcom issued the first notice to giffgaff under section 135 of the Act (the "First Notice"). giffgaff responded to the First Notice on 29 October 2018 (the "First Response").

² The penalty also included a 30% discount from the penalty that Ofcom would otherwise have imposed, on account of giffgaff's admissions of liability and its agreement to enter into a settlement.

³ August Letter, page 1.

⁴ August Letter, page 2.

⁵ August Letter, page 2.

⁶ August Letter, page 6.

⁷ August Letter, page 7.

- 1.26 The First Notice sought to confirm the information provided in the August Letter and obtain additional information necessary for the purposes of the Investigation.
- 1.27 Question 1 of the First Notice required giffgaff to “confirm the accuracy and completeness of the information contained in [the August Letter]”.
- 1.28 In response, giffgaff stated:
“This is confirmed ...”.
- 1.29 Question 2(i)(a) of the First Notice required giffgaff to provide any documents it held which recorded the date(s) when the billing error first occurred.
- 1.30 In response, giffgaff provided a diagram showing that the total monthly top-up amount by its customers significantly increased from June 2016. The earliest date shown in the diagram was June 2016.
- 1.31 Question 14 of the First Notice read as follows:
“giffgaff’s [August Letter] states that on 8 June 2018, the full duration of the impact dating to 6 June 2016 was agreed. Please provide a copy of any documents you hold agreeing the duration of the impact”.
- 1.32 In response, giffgaff stated:
“There is a typing error on page 5 of our response dated 9 August 2018 here. The full duration of impact dated to 8 June 2016 (as described on page 1 and 2 of the same response) and not 6 June 2016.
Ongoing analysis was undertaken to show that the issue started in June 2016 ...
The graph illustrates how the issue arose in June 2016 ...”

The Second Notice and Response

- 1.33 On 26 November 2018, Ofcom issued a second notice to giffgaff under section 135 of the Act (the “Second Notice”). giffgaff responded to the Second Notice on 20 December 2018 (the “Second Response”).
- 1.34 The Second Notice sought additional information for the purposes of the Investigation and required giffgaff to explain and clarify comments and documents that it provided in its August Letter and First Response (including its supporting documents).
- 1.35 Question 5 of the Second Notice read as follows:
“Please confirm how giffgaff has satisfied itself that the Billing Error only affected data services and not voice or text services.”
- 1.36 In response, giffgaff stated as follows:
“The error in giffgaff’s charging logic which lead to the Billing Error arose as a result of the introduction of the [X] protocol. This [X] protocol [X] supports data services. Voice and

SMS services use different infrastructure to the [X], and therefore could not relate to this issue.”

1.37 Question 22 of the Second Notice read as follows:

“Document ORANGE_00000054 provided by giffgaff in response to Question 2(ii) of the First Notice includes an email from [X] at giffgaff dated 24 May 2018 at 13:26 which summarises the Billing Error and states:

“Note: this has always been the way, nothing has changed”.

Similarly, page 4 of document ORANGE_00000060 provided in giffgaff’s response to Question 2(ii) of the First Notice states:

“The issue has been ongoing since the inception of [X]. The [X] interface was introduced in the summer of 2016, it is the interface between the Online Charging System (OCS) and the Packet Gateway (PGW). The [X] interface allows online credit control for service data flow based charging. The introduction of [X] has enabled larger data sessions with a time limit of [X] and [X] data consumption.

[X] That doesn’t mean that the issue did not exist prior to [X], it just means that the issue was a lot smaller. In 2016 it costs 2p/Mb from your main balance if you had purchased a Goodybag, therefore, the maximum overcharge per person would be no more than 64p, but most likely a lot less. If you had no previous Goodybag and were making a fresh purchase, the cost would have been 5p/Mb, this would have been no more than a £1.50 overcharge.”

Page 9 of document ORANGE_00000060 goes on to state:

“When the original service was created, approximately 9 years ago, it is not thought to have been highlighted to giffgaff. If it had, terms and conditions would have been laid out accordingly.”

- i. Please confirm how giffgaff has satisfied itself that the billing error “arose on 8 June 2016” as referenced on page 1 of giffgaff’s [August Letter].
- ii. Please provide any documents recording the decision not to refund members before June 2016.”

...

1.38 In response to Question 22i., giffgaff stated:

“Documents referenced

With respect to Document ORANGE_00000054, [X] comment (and in fact, all of the email after her name beginning with the title “Issue”) was drafted following correspondence with [X] who were working through solutions. The view expressed in this email is that of [X], and was indicative of their view throughout. [X].

With respect to Document ORANGE_00000060, [X]⁸. As an operations manager, [X] would not have had the knowledge or evidence to substantiate his comments referenced above which were based on his discussions with [X]. [X] comments referenced above were therefore unqualified and speculative.

The date the billing error arose

As set out in our response to question 5, the error in giffgaff's charging logic which lead to the Billing Error arose as a result of the introduction of the [X] protocol. We know that this was introduced on 8 June 2016, and was therefore the date the Billing Error first arose.

giffgaff has also only seen 6 tickets being raised on [X] which all relate to post June 2016. Based on this, our thorough investigation, and evidence to date, we do not believe it possible for the billing error to have arisen prior to June 2016."

1.39 In response to Question 22ii., giffgaff stated:

"No such documents exist as the Billing Error arose on 8 June 2016 and it has therefore not been necessary to consider this issue."

The February Meeting

1.40 On 30 January 2019, giffgaff telephoned Ofcom and requested a meeting to discuss its response to Question 5 of the Second Notice, in which Ofcom asked giffgaff to "confirm how giffgaff has satisfied itself that the Billing Error only affected data services and not voice or text services". giffgaff explained that following further investigation, an issue had arisen that it would like to discuss face-to-face.

1.41 As a result, on 6 February 2019, Ofcom met with giffgaff (the "February Meeting"). giffgaff explained that, despite what it had previously said in its August Letter, First Response and Second Response, further investigations had revealed that:

(i) The cause of the billing error was not the implementation of the new [X] signalling protocol in June 2016 (although this did exacerbate its effect). giffgaff characterised the error as a misalignment between customer expectation (due to the fact its terms and conditions said a goodybag⁹ would start following a successful purchase) and the way in which its billing and charging system worked (which meant a goodybag would not actually start until a customer started a new data session or ended the voice call they were on). It also confirmed that the cause of the billing error was the result of how its billing and charging system operated.

(ii) The billing error arose prior to June 2016. giffgaff explained its preliminary view that the billing error affected its data services from 4 April 2011.

⁸ For Ofcom's assurance, we checked whether [X] may be affected by the billing issue as part of our investigation and can confirm that they were not.

⁹ giffgaff offers pre-paid bundles of voice minutes, SMS (texts) and data known as "goodybags".

(iii) Voice services were affected in addition to data services. giffgaff explained its preliminary view that its voice services were affected from 14 April 2010 (although later updated that view to confirm some calls were affected from 25 February 2010).

1.42 giffgaff also explained that it was working out the best way to estimate the impact in terms of the number of customers affected and the amount they had potentially been overcharged based on the actual duration of the billing error and the fact it also affected voice services.

1.43 On 8 February 2019, giffgaff wrote to Ofcom to confirm what it had said at the February Meeting. On 15 March 2019, Ofcom issued a third notice to giffgaff under section 135 of the Act (the “Third Notice”). Amongst other questions, Question 1(i) of the Third Notice required giffgaff to “confirm the accuracy and completeness of the information contained in giffgaff’s submissions to Ofcom on [8 February 2019]”. giffgaff responded to the Third Notice on 10 April 2019 and provided such confirmation.

Contraventions of section 135 of the Act

1.44 For the reasons set out below, we have determined that giffgaff has contravened section 135 of the Act by providing inaccurate information in response to the First Notice and the Second Notice (the “First and Second Notices”).

The First Notice

1.45 We have determined that giffgaff’s response to the following questions in the First Notice was inaccurate in breach of the requirements imposed under section 135 of the Act:

- Question 1 – the First Response confirmed the accuracy and completeness of the August Letter. However, we have found that the August Letter was inaccurate by stating that the billing error arose on 8 June 2016 and was caused by the implementation of the new [§<] charging protocol in June 2016.¹⁰
- Question 2(i)(a) – the First Response indicated that the billing error arose in June 2016.
- Question 14 – the First Response stated that the billing error arose in June 2016.

1.46 As explained in paragraph 1.41 above, at the February Meeting, giffgaff explained to Ofcom that the cause of the billing error was not the implementation of the new [§<] charging protocol and that the issue did not arise in June 2016.

1.47 Accordingly, we have determined that giffgaff’s response to the First Notice was inaccurate in breach of its obligations under section 135 of the Act.

¹⁰ August Letter, pages 1, 2, 6 and 7.

The Second Notice

- 1.48 We have determined that giffgaff's response to the following questions in the Second Notice was inaccurate in breach of the requirements imposed under section 135 of the Act:
- Question 5 – the Second Response explained that the billing error was caused by the implementation of the new [X] charging protocol and as a result did not affect voice services.
 - Question 22i. and 22ii. – the Second Response stated that the billing error was caused by the implementation of the new [X] charging protocol and arose in June 2016.
 - Question 14 – the Second Response stated that the billing error arose in June 2016.
- 1.49 As explained in paragraph 1.41 above, at the February Meeting, giffgaff explained to Ofcom that the cause of the billing error was not the implementation of the new [X] charging protocol, the issue did not arise in June 2016 and it also affected giffgaff's voice services.
- 1.50 Accordingly, we have determined that giffgaff's response to the Second Notice was inaccurate in breach of its obligations under section 135 of the Act.

Penalty

- 1.51 Under section 138(2)(e) of the Act, Ofcom may impose a financial penalty on a CP that has, in one or more of the respects notified by Ofcom, been in contravention of requirements imposed under section 135 of the Act. Section 139(5) of the Act provides that the amount of any penalty Ofcom may impose for a contravention of information requirements has to be appropriate and proportionate and cannot exceed £2,000,000.

Grounds for imposing a penalty

- 1.52 This Decision concerns a contravention of two notices issued under section 135 of the Act which were sent in the course of an investigation into giffgaff's compliance with GC 11.1. This condition requires CPs to accurately bill customers for their use of communication services.
- 1.53 Accordingly, a failure to comply may result in (i) customers continuing to receive inaccurate bills and being overcharged; and (ii) customers that have received inaccurate bills not being compensated for any amount they have been overcharged.
- 1.54 In order to ensure that GC 11.1 and other obligations that Ofcom imposes in carrying out its functions under Part 2 of the Act are effective at securing their policy objectives, Ofcom must be able to monitor and enforce compliance with the obligations it imposes. Ofcom's power to require the provision of information for the purpose of carrying out investigations such as this is fundamental to Ofcom's ability to take enforcement action in a timely and effective manner and key to its ability to carry out its statutory functions more

generally, in line with its principal duty of furthering the interests of citizens and consumers.

- 1.55 Accordingly, Ofcom considers that the contraventions of the First and Second Notices we have found, are serious matters.
- 1.56 We do not consider that a finding alone, including any reputational impact flowing from such a finding, would act as a sufficient deterrent for giffgaff (or the wider industry) against failing to provide accurate and complete responses to statutory information requests. giffgaff's failure to provide accurate information indicates a degree of carelessness with regard to its regulatory responsibilities and could have significantly limited the robustness and comprehensive nature of Ofcom's Investigation. It is important that giffgaff recognises this and is incentivised to ensure that these failings are not repeated.
- 1.57 Taking account of these factors, we have decided that it would be appropriate to impose a financial penalty on giffgaff.

Penalty amount

- 1.58 In setting the penalty, we have considered all the circumstances of the case and have had regard to our Penalty Guidelines.¹¹ In the following paragraphs, we set out our assessment of the factors which appear to us to be the most relevant to determining an appropriate penalty that is proportionate to the contraventions we have found.

Seriousness of the contraventions and degree of harm

- 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 into the accuracy of giffgaff's billing under GC 11.1.
- 1.61 Additionally, there are specific features of the contraventions that Ofcom has identified in this Decision which contribute to its seriousness.
- 1.62 First, the contraventions were relevant to key areas of the Investigation. giffgaff's failure to provide accurate information relating to the cause and duration of the billing error resulted in giffgaff also providing inaccurate information relating to the services affected by the billing error, the number of customers affected and the amount by which affected customers had been overcharged.

¹¹ Ofcom, [Penalty Guidelines](#), 14 September 2017.

- 1.63 As a result, giffgaff's failure to provide accurate information in response to the First and Second Notices could have significantly limited the robustness and comprehensive nature of Ofcom's Investigation and caused Ofcom to reach inaccurate and misleading conclusions. The First Response and the Second Response confirmed that the billing error arose in June 2016, lasted for approximately two years and only affected giffgaff's data services. As a result, giffgaff's August Letter stated that "*there was a total billing error of £2.13 million that affected 1.2 million members*".¹² At the February Meeting, giffgaff confirmed that its voice services were also affected, that the billing error relating to data arose nearly 5 years earlier on 4 April 2011 and that the billing error relating to voice arose over 9 years ago on 25 February 2010. As a result, giffgaff has estimated that:
- around 1.46 million additional customers were overcharged an additional £718,000 as a result of the billing error relating to its data services; and
 - around 27,000 customers were overcharged around £43,000 as a result of the billing error relating to its voice services – giffgaff's inaccurate responses to the First and Second Notices could also have resulted in giffgaff continuing to overcharge some of these customers.
- 1.64 On this occasion, these risks did not materialise because giffgaff subsequently identified the inaccuracies in the First Response and the Second Response relating to the cause, duration and scope of services affected by the billing error.
- 1.65 However, it is not clear to us whether, in the absence of Ofcom thoroughly questioning giffgaff in relation to the cause and duration of the billing error as well as the services affected, giffgaff would have properly investigated these matters and realised it had provided inaccurate information in response to statutory information requests. Indeed, giffgaff's response to Question 22i. of the Second Notice dismissed Ofcom's suggestion that the evidence that giffgaff had provided in response to the First Notice, indicated that the billing error relating to its data services had lasted much longer than two years, and suggested that Ofcom had interpreted the documents out of context.
- 1.66 Second, giffgaff's inaccurate responses to the First and Second Notices created additional work for Ofcom (for example, in terms of requesting further information from giffgaff in order to thoroughly interrogate the evidence, reviewing additional evidence and revising internal documents) and hindered the efficient progress of the Investigation.
- 1.67 Third, giffgaff's initial failure to provide accurate information indicates an absence of effective systems to enable it to provide complete and accurate responses to statutory information requests and a degree of carelessness with regard to its regulatory responsibilities. The August Letter presented the cause and duration of the billing error as conclusive and final using language which referred to the "*conclusion*" of giffgaff's investigation which "*established*" that the billing error was caused by the implementation

¹² August Letter, page 7. We note that giffgaff has said that the financial impact has been provided on a worst-case scenario basis.

of the new [redacted] charging protocol in June 2016.¹³ Similarly, in the Second Response, giffgaff referred to its “*thorough investigation*” and stated that “*the error in giffgaff’s charging logic which lead to the Billing Error arose as a result of the introduction of the [redacted] protocol. We know that this was introduced on 8 June 2016, and was therefore the date the Billing Error first arose.*”¹⁴

- 1.68 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 statutory information requests are accurate and complete. It is important that individuals have the appropriate expertise (or know who else may have the appropriate expertise) to enable CPs to identify the information within the scope of a statutory information request and provide accurate and complete responses to Ofcom. All information within the scope of a statutory information request should be properly interrogated, cross-checked and reviewed through appropriate governance channels (including by the appropriate director/head of department) and responses to statutory information requests should only be sent to Ofcom when they are complete and accurate, failing which any issues should be clearly explained to Ofcom and information should be provided with appropriate qualification.
- 1.69 Fourth, giffgaff has been providing electronic communications services for over 10 years and therefore has a number of years’ experience in responding to statutory information requests. giffgaff also had an annual turnover of approximately £[redacted] million for the year ended 31 March 2017 and is wholly owned subsidiary of Telefonica UK Limited, a mobile network operator trading under the O2 brand. giffgaff should therefore have the capability and resources to provide accurate and complete responses to statutory information requests in accordance with its statutory obligations.

Other factors

- 1.70 We have also taken into account the following mitigating factors:
- Following its inaccurate responses to the First and Second Notices, giffgaff subsequently identified and proactively made Ofcom aware of the inaccuracies in its responses and has been very cooperative. It is important that CPs inform Ofcom as soon as possible when they become aware that the information they have provided in response to a statutory information request was inaccurate or incomplete.
 - We do not have any evidence that the contraventions we have found occurred deliberately.
 - giffgaff does not appear to have ultimately benefitted from the contraventions.
 - We have not previously issued a decision finding giffgaff in contravention of its obligations under section 135 of the Act.
- 1.71 In addition, we have had regard to relevant precedents.

¹³ See, for example, August Letter, pages 2 and 6.

¹⁴ Second Response, Question 22i.

Precedents

- 1.72 Ofcom has issued a number of decisions under section 139A of the Act since revising its Penalty Guidelines in 2015. We have had regard to each of these decisions, in particular the cases discussed below.
- 1.73 On 5 April 2017, Ofcom issued BT with a penalty of £300,000 for providing incomplete information in response to two information requests and misleading information in response to another during Ofcom’s investigation into BT’s use of deemed consent in Ethernet provisioning (the “Deemed Consent Decision”).¹⁵ This case concerned three separate contraventions and we found that BT’s responses adversely affected Ofcom’s ability to progress a regulatory process efficiently¹⁶ and resulted in a high risk of harm to consumers and citizens.¹⁷
- 1.74 On 25 January 2018, Ofcom issued BT with a penalty of £100,000 (reduced to £70,000 as a result of Ofcom applying a 30% settlement discount) for providing inaccurate and incomplete information about its pricing as part of the Wholesale Local Access market review (the “WLA Decision”).¹⁸ This was the second time we had issued a decision finding BT in breach of its statutory obligations. In this case, we found that BT’s error should have been obvious to it and the fact it took no steps to end the contravention and in fact repeated the contravention in response to a subsequent statutory information request added to the seriousness.¹⁹ We also found the risk of harm to consumers and citizens to be moderate because of the narrow scope of the information request.²⁰
- 1.75 On 22 March 2019, Ofcom imposed a penalty of £75,000 on O2 for contravening the requirements of a statutory information request issued under the Open Internet Access Regulations 2016.²¹ We found that O2 failed to provide accurate and complete answers to our questions about its traffic management practices which delayed Ofcom’s assessment.
- 1.76 On 16 November 2018, Ofcom imposed a penalty of £25,000 on Virgin Media for providing an incomplete response to an information request issued under section 135 of the Act in the context of Ofcom’s investigation into Virgin Media’s early termination charges.²² In this case, we found that the risk to citizens and consumers was low as the information did not have a substantive impact on Ofcom’s investigation.

¹⁵ CW/01192/03/17: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01192.

¹⁶ [Deemed Consent Decision](#), paragraphs 5.19 – 5.20.

¹⁷ [Deemed Consent Decision](#), paragraph 5.21.

¹⁸ CW/01208/09/17: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01208.

¹⁹ [WLA Decision](#), paragraph 1.61.

²⁰ [WLA Decision](#), paragraph 1.64.

²¹ CW/01236/02/19: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01236.

²² CW/01198/06/17: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01198.

- 1.77 Additionally, on 30 November 2018, Ofcom found Cloud M in breach of requirements imposed under section 135 of the Act in relation to three information requests by (i) not providing information that fell within the scope of the request; and (ii) not providing information by the deadline set by Ofcom.²³ Ofcom imposed a penalty of £5,000 on Cloud M, as well as an additional penalty of £100 per day (capped at £3,000) until the breach of the third request was remedied.
- 1.78 In all these cases, and similar to this case, we found an absence of effective systems for responding to statutory information requests which was indicative of a careless attitude towards responsibilities. However, the facts and context of this case are different. In this case, we have had to balance a number of factors: for example, on the one hand, giffgaff's inaccurate responses could have significantly limited the robustness and comprehensive nature of Ofcom's Investigation, and are indicative of an absence of effective systems to enable giffgaff to provide complete and accurate responses to statutory information requests. On the other hand, giffgaff identified and proactively made Ofcom aware of its inaccurate responses, we have not previously found giffgaff in breach of section 135 and giffgaff has more limited resources than some of the larger CPs.

Deterrence

- 1.79 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.
- 1.80 As a general matter, we are of the view that the need for deterrence in any penalty set for a contravention of the requirements in section 135 of the Act is important as statutory 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.
- 1.81 In view of our findings in relation to giffgaff's attitude towards information requests and the material risk to the robustness and comprehensive nature of Ofcom's Investigation, we consider deterrence to be important in this case. giffgaff's failure to comply with regulatory obligations imposed under section 135 of the Act has 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. We consider that giffgaff should have systems in place to ensure it is able to respond to information requests in accordance with its statutory obligations. It is important that giffgaff recognises this and is incentivised to ensure that it complies with all statutory information requests.
- 1.82 We consider that the penalty which we have decided to impose is sufficiently large to ensure that it is a deterrent, having regard to giffgaff's size and turnover, and the

²³ CW/01211/01/18: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01211.

seriousness of the contraventions we have found, and is at such a level which can change any potential non-compliant behaviour by giffgaff, and by other regulated entities.

- 1.83 We note that giffgaff is a wholly owned subsidiary of Telefonica UK Limited, a mobile network operator trading under the O2 brand, and that giffgaff and O2 share certain resources. We would expect a finding of contravention against O2 or giffgaff to have a particularly significant deterrent effect on the other.

Conclusion on penalty amount

- 1.84 Considering all of the above facts in the round, we have decided to impose a penalty on giffgaff of £50,000 for contravening the requirements imposed under section 135 of the Act.
- 1.85 Ofcom's judgment is that this is an appropriate and proportionate penalty, given the importance of providing accurate responses to statutory information requests and the seriousness of the contraventions, in particular giffgaff's failure to implement effective systems for responding to statutory information requests and the material risk to the robustness and comprehensive nature of Ofcom's Investigation. The penalty would have been significantly higher had giffgaff not subsequently identified and proactively made Ofcom aware of the inaccuracies in its responses.
- 1.86 The level of the penalty takes into account giffgaff's size and turnover and in our judgment, is at such a level which can change any potential non-compliant behaviour by giffgaff, and by other providers.
- 1.87 Accordingly, Ofcom now requires giffgaff to pay a penalty of £50,000 in respect of its contraventions of requirements imposed under section 135 of the Act by 5pm on Wednesday, 28 August 2019.

Interpretation

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

Gaicho Rasmussen

Director of Enforcement

30 July 2019