

Confirmation Decision issued under section 139A of the Communications Act 2003 to GW Telecom Limited relating to contravention of information requirements

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Subject of this Confirmation Decision

1. This Confirmation Decision (the “Confirmation Decision”) is addressed to GW Telecom Limited trading as Gateway Telecom (“Gateway”), whose registered company number is 07414362. Gateway’s registered office is 253 Alcester Road South, Birmingham, West Midlands, B14 6DT.

Summary

2. Ofcom has statutory powers to require the provision of information which it considers necessary for the purpose of carrying out its functions. In relation to the contravention set out in this document, the relevant powers are contained in section 135 of the Communications Act 2003 (the “Act”).
3. This is a Confirmation Decision issued under section 139A of the Act confirming that we are satisfied that Gateway has contravened the requirement to provide information in response to a statutory information request made by Ofcom under section 135 of the Act. This Confirmation Decision also sets out Ofcom’s decision that it is appropriate and proportionate in this case to impose a penalty on Gateway in respect of the contravention.

Section 135 of the Act

4. Section 135 of the Act states that:

“Ofcom may require a person falling within subsection (2) to provide them with all such information as they consider necessary for the purpose of carrying out their functions under this Chapter”.

5. Section 135(2) of the Act states that communications providers fall within the scope of this provision. The expression “communications provider” is defined at section 405(1) of the Act. It means:

“a person who....provides an electronic communications network or an electronic communications service.”

6. Section 135(3) of the Act sets out that the information that may be required by Ofcom under section 135 of the Act includes information that they require for, amongst other things, any one or more of the following purposes:

“(a) ascertaining whether a contravention of a condition or other requirement set or imposed by or under [Chapter 1 of the Act] has occurred or is occurring”

7. Section 135(4) of the Act states that a person required to provide information under section 135 must provide it in such manner and within such reasonable period as may be specified by Ofcom.
8. Section 135(5) of the Act provides that the powers in section 135 are subject to the limitations in section 137. Section 137(3) provides that Ofcom are not to require the provision of information under section 135 except:
 - i. by a demand for the information that describes the required information and sets out Ofcom's reasons for requiring it; and
 - ii. where the making of a demand for the information is proportionate to the use to which the information is to be put in the carrying out of Ofcom's functions.
9. These statutory powers are fundamental to Ofcom's ability to carry out its statutory functions in relation to communications matters, and its principal duty of furthering the interests of citizens and consumers. In particular, they enable Ofcom to gather the information which it considers necessary to investigate compliance matters and take enforcement action where appropriate. Ofcom's powers under section 135 of the Act are therefore key to the integrity of the regulation of the communications sector.

Section 135 Notice

10. On 25 May 2017, Ofcom opened an investigation into Gateway's compliance with its obligations under General Conditions 18.1, 18.3 and 18.5 of the General Conditions of Entitlement relating to number portability (“the GC18 Investigation”)¹. The GC18 Investigation follows an allegation that Gateway has failed to respond to a porting request in relation to a customer who wished to switch providers away from Gateway and retain their number.
11. Ofcom sent Gateway an information request under Section 135 of the Act on 30 May 2017 (the “s135 Notice”) requiring it to provide information to Ofcom for the purposes of the GC18 Investigation. A copy of the s135 Notice is provided at Annex 1.
12. The s135 Notice set a deadline for the information to be provided by 5pm on 13 June 2017. On 12 June 2017, Gateway asked for this deadline to be extended until 16 June 2017². Ofcom agreed to this request and extended the deadline to 5pm on 16 June 2017³.

¹ See: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01195. Based on information received, the scope of the GC18 Investigation was subsequently amended on 13 July 2017 to considering whether Gateway has complied with its obligations under General Conditions 18.1, 18.5, 18.9 and 18.10.

² Email from [§<], Gateway, to Joe Woolmer, Ofcom, dated 12 June 2017. A copy of this email can be found at Annex 3.

³ Email from Sheryl Willson, Ofcom, to [§<], Gateway, dated 12 June 2017. A copy of this email can be found at Annex 4.

13. Ofcom did not receive a response to the s135 Notice by the extended deadline of 16 June 2017. Therefore, Ofcom wrote to Gateway on 21 June 2017 to explain that:

“Given that the extended deadline has now passed and we have still received no response from you, we are entitled to take enforcement action against you under sections 138 and 139 of the Communications Act.

Our next step will be to prepare a notification setting out our view that Gateway has contravened our information request, and setting out a proposed financial penalty that we are minded to impose on Gateway in respect of this contravention.”⁴

14. On 22 June 2017, Gateway responded to Ofcom to explain that a reply had been sent in the post the previous week⁵. In response to this, Ofcom asked Gateway to
- a. confirm who the post was addressed to and what day it was sent; and
 - b. provide an electronic version of Gateway’s response via e-mail that day⁶.
15. Ofcom did not receive a response from Gateway to this e-mail and has not received any of the information requested in the s135 Notice.

Sections 138 and 139 of the Act

16. Sections 138 to 144 of the Act specify the enforcement powers that Ofcom has in relation to contravention of information requirements. In particular, section 138 of the Act (Notification of contravention of information requirements) states that:

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

(2) A notification under this section is one which–

- (a) sets out the determination made by OFCOM;*
- (b) specifies the requirement and contravention in respect of which that determination has been made;*
- (c) specifies the period during which the person notified has an opportunity to make representations;*
- (d) specifies the information to be provided by the person to OFCOM in order to comply with a requirement under section 135 or 136;*

⁴ Email from Sheryl Willson, Ofcom to [redacted], Gateway dated 21 June 2017. A copy of this email can be found at Annex 5.

⁵ Email from [redacted], Gateway, to Sheryl Willson, Ofcom, dated 22 June 2017. A copy of this email can be found at Annex 6.

⁶ Email from Sheryl Willson, Ofcom, to [redacted], Gateway, dated 23 June 2017. A copy of this email can be found at Annex 7.

(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.”

17. Section 139 of the Act specifies the penalties that may apply for contravention of the information requirements where a person is given a notification under section 138. Section 139(5) provides that a penalty for a contravention of the information requirements (other than in respect of a continuing contravention) is to be an amount not exceeding £2,000,000 as Ofcom determine to be both (a) appropriate and (b) proportionate to the contravention in respect of which it is imposed.
18. Where there is a continuing contravention, section 139(4) provides that no more than one penalty may be specified in respect of the period of contravention specified in the notification. However, under section 139(4A), a penalty may be specified in respect of each day on which the contravention continues after the giving of a confirmation decision that requires immediate action, or after the expiry of a period specified in the confirmation decision for complying with a requirement set out in it. The amount of any daily penalty specified for a contravention that continues beyond this point is, under section 139(4B) to be such amount not exceeding £500 per day as Ofcom determine to be (a) appropriate; and (b) proportionate to the contravention in respect of which it is imposed.

Section 138 Notification

19. Ofcom issued a notification to Gateway on 4 July 2018 under section 138 of the Act (“the s138 Notification”), setting out its finding that there are reasonable grounds for believing that Gateway has contravened, and is contravening, the requirement to provide information under section 135. A copy of the s138 Notification is provided at Annex 2. The findings are set out below.
20. In accordance with section 135(3) of the Act, the s135 Notice described the requested information and set out Ofcom’s reasons for requiring it. In particular, the s135 Notice stated:

“This notice requires you to provide the information set out below, in the manner and form specified, for the purpose of ascertaining whether Gateway has contravened or is contravening conditions 18.1, 18.3 and/or 18.5 of the General Conditions of Entitlement.”
21. The specified information required by the s135 Notice was set out in the Annex to that notice. The information requested for the purpose of assessing Gateway’s compliance with GC18 included copies of relevant correspondence and documentation relating to the customer’s porting request. Ofcom also requested information about Gateway’s relevant turnover for the purposes of assessing the level of any penalty which should be paid by Gateway in the event that Ofcom should find that Gateway had contravened GC18 and that it was appropriate to impose a penalty in respect of that contravention. We therefore considered, in the s138 Notification, that the information requested in the s.135 Notice was necessary and proportionate for the purposes of the GC18 Investigation.
22. The s135 Notice allowed a reasonable period of 10 working days for Gateway to provide the information. As noted above, Ofcom extended the deadline set out in the s135 Notice in response to a request from Gateway, allowing a total of 13 working

days for Gateway to respond. Accordingly, and as set out in the s138 Notification, we consider that the s135 Notice complied with the requirements as set out in the Act.

23. As noted above, Ofcom is yet to receive a response to the s135 Notice from Gateway, despite the expiry of the extended deadline. We are satisfied, therefore, that Gateway has contravened, and is contravening, the information requirements imposed by section 135 of the Act.

Steps that should be taken by Gateway

24. The s138 Notification set out the steps that Ofcom believed that Gateway should take to comply with the requirements of Section 135 of the Act, which was to provide the information as set out in Annex 1 to the s135 Notice⁷.

Penalty

25. In the s138 Notification, Ofcom determined it appropriate to impose a penalty of £1,100 (£100 per working day from 16 June 2017 to 4 July 2017, the date of the s138 Notification) in relation to Gateway's contravention of the information requirements under section 135 of the Act.
26. Ofcom also required that Gateway pay a daily penalty of £100 for each day that the contravention continues after the date of this Confirmation Decision. In considering this proposed penalty, we had regard to Ofcom's Penalty Guidelines⁸. We considered that this figure, and the daily rate for continued contravention, to be appropriate and proportionate for the following reasons.
27. Number portability is an important mechanism that enables customers to retain their telephone number(s) when they switch communications providers. GC18 sets out the requirements that communications providers must meet when dealing with number porting requests, including providing number portability within the shortest time possible. These regulations are designed to help promote healthy competition in the market by ensuring that customers can move freely between providers and take their number with them when they do so.
28. Ofcom's ability to regulate number portability effectively, including by imposing and monitoring regulatory obligations and taking enforcement action, is therefore of critical importance to the communications market and to citizens and consumers.
29. In addition, Ofcom's powers under section 135 of the Act are crucial to Ofcom's ability to regulate the communications sector. They enable Ofcom to obtain the information it requires to carry out its functions and to fulfil its principal duty of furthering the interests of citizens and consumers.
30. 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 communications providers that it regulates. Accordingly, Ofcom considers that a contravention of a requirement to provide information under section 135 of the Act is a serious matter as it hinders Ofcom's ability to carry out its

⁷ See Annex 1 for the s135 Notice.

⁸ Revised Penalty Guidelines, Statement, Revising the Penalty Guidelines, 2 December 2015, https://www.ofcom.org.uk/data/assets/pdf_file/0029/79823/penalty_guidelines_-_statement.pdf

functions and more generally has the potential to undermine the integrity of the regulatory regime, thereby harming citizens and consumers.

31. Ofcom's Penalty Guidelines explain that the central objective of imposing a penalty is deterrence. As a general matter, we are of the view that the need for deterrence in any penalty set for a contravention of information requirements is important as information requests are fundamental to Ofcom's ability to regulate electronic communications networks and services under the Act effectively and in a timely manner, and Ofcom needs to be able to rely on responses to them.
32. In addition, we noted that the most recent set of statutory accounts filed by Gateway at Companies House (on 25 July 2016) shows that in the period to 31 October 2015 its total assets less current liabilities were minus £57,687. This is the most accurate information we have on Gateway's financial position. We do not have details of Gateway's turnover in the most recent financial year, as this question was included in the s135 Notice to which Gateway has failed to respond.
33. Taking all of these factors into account, we considered a penalty of £1,100, together with £100 per day for each day of continued contravention after the date of this Confirmation Decision to be appropriate and proportionate, given the seriousness of the contravention, the potential harm to consumers and citizens, Gateway's financial information in its most recently filed statutory accounts and Ofcom's central objective of deterring further contraventions.

Section 139A of the Act

34. Section 139A of the Act applies where a person has been given a notification under section 138, Ofcom has allowed the opportunity for representations about the matter to be made, and the period allowed for the making of representations has expired.
35. Section 139A(2) allows Ofcom to:

“(a) give the person a decision (a “confirmation decision”) confirming the imposition of requirements on the person, or the giving of a direction to the person, or both, in accordance with the notification under section 138; or

(b) inform the person that they are satisfied with the person's representations and that no further action will be taken.”
36. Under section 139A(3), Ofcom may not give a confirmation decision to a person unless, after considering any representations, they are satisfied that the person has, in one or more of the respects notified, been in contravention of a requirement notified under section 138. Section 139A(4) states that a confirmation decision must be given without delay, include the reasons for the decision, may require immediate action by the relevant person, and may require the person to pay the penalty specified in the section 138 notification or such lesser penalty that Ofcom considers to be appropriate in light of representations made or steps taken by the CP. The confirmation decision must also specify the period within which the penalty is to be paid.

Confirmation Decision

37. As set out above, we issued the s138 Notification to Gateway on 4 July 2017, and invited Gateway to make representations by 5pm on 18 July 2017. This period has now expired. As Gateway has not provided any representations in response to Ofcom's s138 Notification, our findings in this Confirmation Decision remain as set out in the s138 Notification and described above, that Gateway has contravened, and is continuing to contravene the information requirements under section 135 of the Act.
38. In summary, despite allowing Gateway an extended deadline to respond to our s.135 Notice, it failed to provide any of the requested information. In addition, we have found that the information we requested was necessary and proportionate for the purposes of the GC18 Investigation. We therefore conclude that Gateway breached its information requirements by failing to respond to our s.135 Notice.
39. Therefore, we have decided that it is appropriate to issue Gateway with this Confirmation Decision confirming the imposition of requirements on Gateway that we set out in our s138 Notification. These requirements are for Gateway to immediately provide the information requested in Annex 1 of the s135 Notice (see Annex 1 to this Notification).
40. In addition, the s138 Notification proposed a fixed penalty of £1,100 in respect of the contravention. Given that Gateway has not made any representations or taken any steps to comply with its information requirements since we issued the s138 Notification, we have not found reason to amend the level of penalty.
41. The s138 Notification also proposed an additional daily penalty of £100 for each day that the contravention continues after the date of this Confirmation Decision. We have decided to impose this daily rate until the sooner of the date Gateway complies with our s135 Notice and provides the requested information or 20 October 2017. We will therefore impose a maximum additional penalty of £9,100.
42. In considering whether the fixed penalty and the daily penalty (including the maximum cap of £9,100) are appropriate and proportionate, we have taken account of the resource Ofcom has had to utilise to address this contravention, the seriousness of the ongoing breach and its impact on our ability to carry out our functions. As noted above, given that Gateway has failed to provide us with details of its turnover, the latest financial information we have on Gateway is that in the period to 31 October 2015 its total assets less current liabilities were minus £57,687. From the limited information we have about Gateway, we have concluded that Gateway is likely to be a relatively small provider.
43. Taking these factors in the round, we conclude a fixed penalty of £1,100 together with a daily penalty of £100 (with a cap of £9,100) is appropriate and proportionate, particularly given that Gateway can mitigate its total penalty by promptly responding to the s135 Notice.
44. We therefore require Gateway to pay a penalty of £1,100, together with a daily penalty of £100 for each day that the contravention continues after the date of this Confirmation Decision until the sooner of the date Gateway complies with our s135 Notice and provides the requested information or 20 October 2017.
45. Gateway has until 5pm on 21 August 2017 to pay Ofcom the fixed penalty of £1,100. Any daily penalties that accrue will be payable by Gateway one calendar month after

daily penalties cease to be payable, which will be the sooner of the date Gateway comes into compliance with the s.135 Notice or 20 October 2017.

Interpretation

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

A handwritten signature in black ink, appearing to be 'Gaucho Rasmussen', is written over a faint horizontal line.

Gaucho Rasmussen

Director of Enforcement

21 July 2017

Annexes

Not included in non-confidential version.