

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

This version is non-confidential. Confidential redactions are indicated by [X].

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.

Information Requirements

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 to require the provision of information 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, for a second time.
4. This Confirmation Decision also sets out Ofcom’s decision that it is appropriate and proportionate in this case to impose a daily penalty of £150 on Gateway in respect of the contravention.

Section 135 of the Act

5. 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”.

6. 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.”

7. 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 [Chapter 1 of the Act] has occurred or is occurring;”.

8. 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.
9. 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.
10. 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.

Background

11. Ofcom opened an investigation on 25 May 2017 into Gateway’s compliance with its obligations under General Condition 18 of the General Conditions of Entitlement relating to number portability (“the GC18 Investigation”)¹.

First information request

12. Ofcom sent Gateway an information request under section 135 of the Act on 30 May 2017 (“the First s135 Notice”) requiring it to provide information to Ofcom for the purposes of the GC18 Investigation by 5pm on 13 June 2017. Despite Ofcom granting Gateway’s request for

¹ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01195

an extended deadline, to 16 June 2017, Gateway failed to respond with the requested information by that date or at all. Despite making representations that it had posted its response to Ofcom during the week of the 16 June 2017, Ofcom has received no response from Gateway and none of the information requested in the First s135 Notice.

13. On 4 July 2017, Ofcom issued a notification under section 138 of the Act, setting out our provisional conclusion that Gateway had breached its information requirements and setting out again what information it required. Gateway had until 18 July 2017 to make its written representations in response to this notification. We did not receive any representations from Gateway by that date or at all.
14. Ofcom then issued a confirmation decision to Gateway under section 139A of the Act on 21 July 2017, confirming that we were satisfied that Gateway had contravened the requirement to provide information in response to a statutory information request made by Ofcom under section 135 of the Act.
15. We required Gateway to pay Ofcom a fixed penalty of £1,100, together with a daily penalty of £100 for each day that the contravention continued after the date of the confirmation decision until the sooner of the date Gateway complied with the First s135 Notice and provide the requested information or 20 October 2017. As Gateway has not come into compliance with the First s.135 Notice, the daily penalty accrued until today's date and amounts to £9,100.

Second information request

16. During the GC18 Investigation, we found it necessary to request additional information from Gateway.
17. We therefore sent Gateway a second information request under section 135 of the Act on 9 August 2017 ("the Second s135 Notice") requiring it to provide further information for the purposes of the GC18 Investigation. A copy of the Second s135 Notice is provided at Annex 1.
18. The Second s135 Notice was sent by email² and by Special Delivery post to Gateway's registered address. It was also forwarded to Gateway's general enquiries email address on 10 August 2017³.
19. The Second s135 Notice set a deadline for the information to be provided by 5pm on 23 August 2017. On 13 August 2017, we received a 'read receipt' from Gateway, confirming Ofcom's email attaching the Second s135 Notice had been read⁴.
20. On 22 August 2017, Gateway's [redacted] telephoned Ofcom's Sheryl Willson, to request a second copy of the Second s135 Notice. This was sent by email the same day, with a reminder about the penalties previously issued under the Confirmation Decision⁵ issued in relation to the

² Annex 2, Email from Ofcom's Sheryl Willson to Gateway's [redacted] dated 9 August 2017

³ Annex 3, Email from Ofcom's Sheryl Willson to [redacted] dated 10 August 2017

⁴ Annex 4, Email from Gateway's [redacted] to Ofcom's Sheryl Willson dated 13 August 2017

⁵ Annex 5, Email from Ofcom's Sheryl Willson to Gateway's [redacted] dated 22 August 2017

First s135 Notice. We asked Gateway to respond immediately if it needed further time to supply the requested information.

21. The s138 Notification was sent by Special Delivery and was returned to Ofcom undelivered as there was no one at Gateway's registered office to sign for the it (and it was not subsequently collected from the Post Office). We therefore sent the s138 Notification by First Class post on 25 September 2017. We allowed Gateway a further two weeks to make representations by 9 October 2017. Gateway made no representations, and did not respond with the requested information, and this period has now expired.

Sections 138 and 139 of the Act

22. 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 that:

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

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

(a) sets out the determination made by OFCOM;

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

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

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

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

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

23. 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 138 Notification

24. Ofcom issued a notification to Gateway on 31 August 2017 under section 138 of the Act, and reissued it on 25 September 2017 after the 31 August 2017 letters had been returned

unopened (“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 6. The findings are set out below.

25. Gateway is a communications provider within the meaning set out in Section 405(1) of the Act, namely a *“a person who... provides an electronic communications network or an electronic communications service”*.
26. In accordance with section 135(3) of the Act, Ofcom described the required information and set out its reasons for requiring it in the Second s135 Notice. In particular, the Second 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, 18.5, 18.9 and/or 18.10 of the General Conditions of Entitlement.”
27. The information that was required by the Second s135 Notice was set out in the Annex to that notice. This included information about the number in question, [X], and why it was taken out of service during August 2016. We also asked Gateway to confirm how much the customer had paid for its services, and whether Gateway had awarded the customer any compensation in relation to its porting request. Finally, we asked Gateway for all correspondence it had with Ombudsman Services regarding an investigation Ombudsman Services had carried out as a result of a complaint submitted by the customer.
28. Ofcom considers that this information is necessary as it provides evidence to assess Gateway’s compliance with GC18, and the level of harm suffered by the customer, and is therefore proportionate for the purposes of the GC18 Investigation. The Second s135 Notice allowed a reasonable period of 10 working days for Gateway to provide the information. For these reasons, we considered that the Second s135 Notice complied with the requirements as set out in the Act.
29. As set out above, Ofcom is yet to receive a response to the Second s135 Notice from Gateway. Given this, Ofcom has determined that there are reasonable grounds for believing that Gateway has contravened and is contravening the information requirements imposed by section 135 of the Act for a second time.

Steps that should be taken by Gateway

30. The s138 Notification set out the steps that Ofcom believed 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 Second s135 Notice (see Annex 1 to this Notification).

Penalty

31. Section 139 of the Act specifies the penalties that may apply for contravention of the information requirements. 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.

32. 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 the expiry of a period specified in the confirmation decision for complying with a requirement set out in it.
33. 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.
34. In the s138 Notification, Ofcom was minded to require Gateway to pay a daily penalty of £150 for each day that the contravention continues after the date of this Confirmation Decision requiring immediate action. In considering this proposed penalty, we had regard to Ofcom's Penalty Guidelines⁶. Our provisional view was that the daily rate of £150 for continued contravention was appropriate and proportionate for the following reasons:
 - a. Ofcom's ability to regulate number portability effectively, including by imposing and monitoring regulatory obligations and taking enforcement action, is of critical importance to the communications market and to citizens and consumers;
 - b. Ofcom's powers under section 135 of the Act are crucial to Ofcom's ability to regulate the communications sector, as 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;
 - c. such a fine would have the necessary deterrent effect on Gateway and the wider industry to prevent future contraventions, as the daily penalty of £100 in respect of the previous Confirmation Decision has not prompted Gateway to come into compliance;
 - d. we considered this second breach to be particularly serious given it is a repeated contravention of Ofcom's information requirements and demonstrates Gateway's severe lack of co-operation with our GC18 Investigation; and
 - e. finally, we noted that the most recent set of statutory accounts filed by Gateway at Companies House (on 25 July 2016) show that in the period to 31 October 2015 its total assets less current liabilities was -£57,687. We do not have details of Gateway's turnover in the most recent financial year, as this question was included in the First s135 Notice to which Gateway has failed to respond.

⁶ 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

35. Given the above, we considered a daily penalty of £150 per day for each day of continued contravention after the date of this Confirmation Decision to be appropriate and proportionate.

Section 139A of the Act

36. 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.

37. 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.”

38. 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

39. As set out above, we issued the s138 Notification to Gateway on 31 August 2017, and invited Gateway to make representations by 5pm on 14 September 2017.
40. The s138 Notification was returned to Ofcom undelivered. It had been sent by Special Delivery, however no one was at Gateway’s registered office to sign for the letter (and it was not subsequently collected from the Post Office). We therefore sent the s138 Notification by First Class post on 25 September 2017. We also sent a further copy by email on 25 September 2017 to [redacted]⁷. We allowed Gateway a further two weeks to make representations by 9 October 2017. This period has now expired.
41. Gateway has not responded or provided any representation in response to Ofcom’s s138 Notification. Our findings therefore remain broadly the same in this Confirmation Decision as was set out in the s138 Notification. As we described above, we consider that Gateway

⁷ Annex 7, Email from Ofcom’s Sheryl Willson to Gateway’s [redacted] dated 25 September 2017

has contravened, and is continuing to contravene, the information requirements under section 135 of the Act.

42. We sent Gateway our Second s135 Notice on 9 August 2017 and allowed 10 working days for its response. Despite Gateway suggesting to Ofcom that it would respond in a telephone conversation on 22 August 2017, it failed to provide any of the requested information by the initial deadline of 23 August 2017 or by the later deadline we provided of 9 October 2017.
43. We have found that the information we requested in the Second s135 Notice 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 Second s135 Notice.
44. Therefore, we have decided that it is appropriate to issue Gateway with this second 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 Second s135 Notice (see Annex 1 to this Notification).
45. In the s138 Notification, we proposed a daily penalty of £150 for each day that the contravention continues after the date that Ofcom issues a confirmation decision requiring immediate action.
46. Given that Gateway has not made any representations or taken any steps to comply with its information requirements since we issued the Second s138 Notification, we have not found reason to amend the level of penalty. However, we want to be in a position to be able to enforce the penalty by means of civil proceedings without undue further delay and resource cost. Accordingly, we have decided to impose this daily rate until the sooner of the date Gateway complies with the Second s135 Notice and provides the requested information or 22 November 2017. We will therefore impose a maximum penalty of £4,950 in relation to the contravention.
47. In considering whether this penalty is appropriate and proportionate, we have taken account of the resource Ofcom has had to utilise to address this contravention, the seriousness and repeated nature of the ongoing breach, its impact on our ability to carry out our functions and the central objective of deterring future contraventions.
48. As noted previously, 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.
49. Having considered these factors in the round, we conclude that a penalty of £150 for each day the contravention continues after the date of this Confirmation Decision until the sooner of the date Gateway complies with the Second s135 Notice or 22 November 2017 is appropriate and proportionate, particularly given that Gateway can mitigate its total penalty by promptly responding to the s135 Notice. Gateway has until one calendar month after

daily penalties cease to be payable, which will be the sooner of the date Gateway comes into compliance with the s135 Notice or 22 November 2017 to pay this penalty.

Interpretation

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



Simon Leathley

Legal Director

20 October 2017

Annexes

Not included in non-confidential version.